THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Mikell Scarborough
Master in Equity

Appellate Case No. 2019-000575
Circuit Court Case No. 2010-CP-10-7838

Ditech Financial, LLC,

Respondent,

v.

Kevin G. Snyder, Individually and as Personal Representative of the Estate of Mary Snyder,

Appellant.

BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

1. Whether the Appellant's counterclaim for civil compensatory contempt, premised on violation of Justice Toal's 2011 Administrative Order, was properly dismissed at the summary judgment stage where violation of the 2011 Administrative Order does not provide for a private cause of action, and where Ditech (and its predecessors) fully completed the foreclosure intervention process and certified their compliance with the 2011 Administrative Order.

2. Whether the Appellant satisfied his burden of establishing that the trial court abused its discretion in denying a motion to compel the production of documents where the document requests sought overly broad materials relative to an unrelated FTC enforcement action in Minnesota as well as Ditech's attorney-fee agreements with its legal counsel.

3. Whether the trial court abused its broad discretion in granting a motion to amend the case caption where the Appellant consented to a subsequent change to the case caption (making the issue moot), where Ditech possesses the Note and is clearly the proper plaintiff with standing, and where any error would be harmless.

4. Whether the trial court properly struck the Appellant's affirmative defense for violation of South Carolina's Attorney Preference Statute with regard to Mary Snyder where the statute protects "borrowers' and Mary Snyder borrowed nothing.

5. Whether the trial court abused its discretion in proceeding with the foreclosure hearing despite the Appellant's notice of appeal from the interlocutory summary judgment order where the summary judgment order was not immediately appealable, where the initial notice of appeal (even if proper) did not prevent the trial court from proceeding with separate matters not affected by the appeal, and where the Appellant has suffered no prejudice because he is presently seeking to unwind the foreclosure judgment based on alleged errors made at the summary judgment stage.

STATEMENT OF THE CASE

A. The Promissory Note and the Mortgage.

On or about April 21, 2005, Kevin G. Snyder ("Snyder") executed and delivered a promissory note ("Note") in the principal sum of $135,000.00 in favor of Gateway Funding Diversified Mortgage Services L.P. (R. p. 45, ¶ 4; R. p. 308, ¶ 6). Snyder's wife at the time, Mary Snyder, was not a signatory to the Note. (R. p. 308, ¶ 6; R. pp. 312–315). To secure payment of the Note, Snyder, together with his then-wife Mary Snyder, made, executed, and delivered a real estate mortgage ("Mortgage") encumbering real property located at 1752 Orange Grove Shores Drive, Charleston, South Carolina 29407 (the "Property"). (R. pp. 45–46, ¶ 5; R. p. 308, ¶ 7).

In connection with the loan, Snyder executed an Attorney/Insurance Preference Form and an Attorney/Insurance Preference Check List, forms in which Snyder selected – and handwrote in the name – Roy Reynolds as his preferred attorney to handle the closing of the loan. (R. p. 308, ¶ 8; R. pp. 330–332). Snyder also executed two Servicing Disclosure Statements providing notice that the right to collect mortgage loan payments could be transferred. (R. p. 308, ¶ 8; R. pp. 333–335).

B. Notice of Default, Foreclosure Action, and Initial Efforts at Loan Modification and Loss Mitigation.

The Note came into default for failure to make payments on September 1, 2008 and all subsequent payments. (R. p. 47, ¶ 15; R. p. 309, ¶ 12).[1] On April 27, 2010, Ditech Financial LLC's ("Ditech") predecessor in interest, BAC Home Loans Servicing, LP,[2] gave notice to Snyder

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[1] Ditech's predecessor in interest, Bank of America, N.A., filed an initial foreclosure action in 2009, in which the trial court granted a foreclosure judgment. The judgment was subsequently vacated owing to the first South Carolina Supreme Court Administrative Order regarding foreclosure intervention.

[2] Through various assignments, the mortgage was assigned to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing LP. (R. p. 46, ¶¶ 7–9).

that the Note was in default and that he had an opportunity to cure the default. (R. pp. 309–310, ¶ 14; R. pp. 376–378). On September 23, 2010,[3] with the Note remaining in default, BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing LP ("BAC") initiated this foreclosure action against Snyder and filed an appropriate Lis Pendens covering the Property. (R. pp. 35–42). On October 27, 2010, BAC filed an amended complaint ("Complaint") to add Mary Snyder as a defendant along with Snyder, together with an Amended Lis Pendens. (R. pp. 45–57). On December 16, 2010, the matter was referred to Mikell R. Scarborough, Master in Equity, by order of the trial court. (R. pp. 1–2).

Pursuant to the Administrative Order of the Supreme Court of South Carolina, Re: Mortgage Foreclosure Actions, No. 2011-05-02-01 (May 2, 2011) (hereinafter, the "2011 Order"), Ditech's predecessor in interest, on December 20, 2012, filed and served on Snyder and Mary Snyder a Notice of Foreclosure Intervention. (R. pp. 59–62). Several months later on April 8, 2013, Ditech's predecessor in interest filed and served a certificate of compliance with the 2011 Order, which certified that Snyder and Mary Snyder had been served with notice of their rights to foreclosure intervention but had failed to submit required documents to be reviewed for loss mitigation alternatives (resulting in being denied for loss mitigation), and which directed Snyder and Mary Snyder to answer the Complaint. (R. pp. 63–65).

C. Answer and Counterclaims.

On June 3, 2013, Snyder and Mary Snyder filed an answer ("Answer") to the Complaint. (R. pp. 70–77). The Answer included several affirmative defenses, including that Ditech's predecessor in interest (a) did not have standing, (b) violated South Carolina's Attorney Preference Statute, S.C. Code Ann. § 37-10-102(a) (hereinafter, the "Attorney Preference Statute"), with

[3] For the sake of clarification, dates of filed documents referenced herein refer to the date of the file-stamp on the document (not the date of the signature of the parties or the Court).

regard to Mary Snyder, and (c) did not comply with the 2011 Order. (R. p. 71, ¶¶ 11, 12, and 14(a)). The Answer also asserted four counterclaims: (1) Civil Compensatory Contempt (for the alleged violation of the 2011 Order); (2) Breach of Contract; (3) Violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*; and (4) Quiet Title. (R. pp. 73–76, ¶¶ 21–34). Ditech's predecessor in interest timely filed a reply to the Answer. (R. pp. 78–83).

D. Further Efforts Undertaken to Avoid Foreclosure.

Ditech, which was formerly known as Green Tree Servicing, LLC, began servicing the loan effective June 1, 2013. (R. p. 309, ¶ 9). On June 10, 2013 and June 11, 2013, Ditech sent letters to Snyder notifying him of the servicing transfer and providing him with information regarding the loan balance and the identity of the creditor. (R. p. 309, ¶ 9; R. p. 336–344). The Mortgage was assigned to Ditech on June 17, 2013, following assignments from the original beneficiary to Countrywide Home Loans Inc. on September 25, 2007 and Countrywide Home Loans Servicing, LP on January 26, 2009. (R. p. 309, ¶ 10). The Note is endorsed in blank, and it is in Ditech's possession. (R. p. 309, ¶ 11).

Like its predecessors in interest, Ditech reviewed the Note and Mortgage for alternatives to foreclosure and attempted to resolve the delinquency through loss mitigation.[4] On December 23, 2014, Ditech approved a trial plan for modification with trial payments in the amount of $1,131.37. (R. p. 310, ¶ 15; R. pp. 379–385). Snyder, via his counsel, rejected the trial plan, and Ditech, on March 10, 2015, notified Snyder, via his counsel, that a permanent modification would be denied due to failure to complete the trial period plan. (R. pp. 386–391). In a March 25, 2015

[4] As of March 18, 2019, the total amount due on the Note was $292,015.44, including the principal sum of $137,020.25, interest in the amount of $109,238.89, escrow advances in the amount of $39,793.89, and corporate advances, late fees, and other charges in the amount of $5,962.41. (R. p. 309, ¶ 13).

letter, Ditech also provided Snyder's counsel with answers to questions posed concerning its calculation of the trial plan payment amounts. (R. pp. 392–393).

Notwithstanding Snyder's rejection of the trial payment plan, Ditech reviewed Snyder again for a modification. On May 11, 2017, Ditech notified Snyder, via his counsel, that he was ineligible for a modification. (R. p. 310, ¶ 16; R. pp. 396–399). A month later on June 8, 2017, and following an appeal of the determination of ineligibility, Ditech confirmed Snyder's ineligibility. (R. pp. 400–401).

E. Relevant Procedural History

1. Amendment of Case Caption

On March 20, 2014, upon the motion of Ditech's predecessor in interest ("Motion to Amend"), "Green Tree Servicing, LLC" replaced BAC as the plaintiff in this lawsuit. (R. p. 7). On or about August 31, 2015, Green Tree Servicing, LLC merged with Ditech Mortgage Group. Shortly thereafter on November 23, 2015, Mary Snyder passed away. As a result, the case caption was further amended via a consent motion of the parties to list the Plaintiff as "Ditech Financial, LLC" and to list the Defendant as "Kevin G. Snyder, individually and as Personal Representative of the Estate of Mary Snyder." (R. pp. 15–16).[5]

2. Denial of Motion to Compel Discovery Responses

On November 29, 2018, Appellant filed a motion to compel responses to four separate document requests. (R. pp. 87–98). Generally speaking, the motion sought to compel Ditech to provide documents related to (a) a Consent Order entered in the United States District Court for the District of Minnesota in a suit brought by the Federal Trade Commission, (b) Ditech's policies and procedures related to loss mitigation evaluation, and (c) the fee agreements between Ditech

[5] "Kevin G. Snyder, individually and as Personal Representative of the Estate of Mary Snyder" is hereinafter referred to as "Appellant".

and the law firms engaged to handle this lawsuit. Ditech opposed the motion on relevancy grounds. (R. pp. 179–191). The parties discussed this motion at a March 18, 2019 hearing on the parties' cross-motions for summary judgment, with the trial court orally denying the motion to compel. (R. p. 578, lines 3–18). The trial court subsequently denied the motion to compel in a Form 4 Order, filed March 25, 2019 (R. p. 17), and it denied the motion to compel again in the context of its order on the parties' motions for summary judgment (hereinafter "Summary Judgment Order") (R. p. 22, ¶ E).

3. Cross-Motions for Summary Judgment

On March 11, 2019, the parties both filed motions for summary judgment.[6] The Appellant filed a motion for summary judgment as to the counterclaims for civil compensatory contempt and quiet title. (R. pp. 412–434). Ditech moved for summary judgment on its foreclosure action and on the Appellant's counterclaims for civil compensatory contempt and quiet title. (R. pp. 290–410). Ditech also moved for summary judgment on the Appellant's defense alleging violation of the Attorney Preference Statute with regard to Mary Snyder. The trial court held a hearing on March 18, 2019, which was attended by counsel for the parties. (R. pp. 561–601). On March 28, 2019, the trial court entered its Summary Judgment Order denying the Appellant's motion, granting Ditech's motion with regard to the civil compensatory contempt counterclaim and the

[6] Prior to the parties filing motions for summary judgment, Ditech notified the Court of its Chapter 11 bankruptcy filing in the United States District Court for the Southern District of New York, together with the bankruptcy court's modification order which limited the scope of the automatic stay. (R. pp. 203–289). The parties agree that as a result of the limited automatic stay, the Appellant's counterclaims for breach of contract, unfair trade practices, and (to the extent it seeks monetary relief) civil compensatory contempt are stayed. Ditech's foreclosure action and the Appellant's counterclaims for quiet title and for civil compensatory contempt (to the extent those counterclaims seek only to suspend or stop the foreclosure or seek determination of the validity of Ditech's lien) are not stayed and were permitted to proceed to judgment.

Attorney Preference Statute defense, and denying Ditech's motion with regard to the foreclosure claim and the quiet title counterclaim. (R. pp. 19–22).

4. Initial Notice of Appeal, Subsequent Trial, Foreclosure Order, and Amended Notice of Appeal

On March 29, 2019, the Appellant filed a notice of appeal, indicating his intent to appeal the following orders: (a) March 20, 2014 Order Amending Caption; (b) March 25, 2019 Form 4 Order Denying Motion to Compel; and (c) March 28, 2019 Order on Motions for Summary Judgment (hereinafter "Initial Notice of Appeal"). (R. pp. 531–533).[7]

On April 1, 2019, the trial proceeded. (R. pp. 602–662). At the inception of the trial, counsel for the Appellant objected to the trial going forward, arguing that the Initial Notice of Appeal deprived the trial court of jurisdiction. (R. p. 606, lines 12–p. 621, line 25). The trial court determined it had jurisdiction and proceeded. At the trial, Ditech produced the original Note for the trial court's inspection, and the trial court noted that it was endorsed in blank and was in Ditech's possession. (R. p. 24, ¶ 10). The trial court found that Ditech was entitled to foreclose and had complied with the 2011 Order, and it therefore entered judgment in Ditech's favor. (R. pp. 27–32). Consistently, the trial court concluded that the Appellant was not entitled to the remedy of quiet title. (R. p. 27, ¶ 3).

On May 2, 2019, the Appellant filed an amended notice of appeal (hereinafter "Amended Notice of Appeal"). (R. pp. 536–537). In addition to appealing the three orders referenced in the Initial Notice of Appeal, the Appellant indicated his intent to also appeal the April 26, 2019 Master

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[7] Referencing the date on which the trial court signed these orders, the Appellant refers to them as the orders "dated March 12, 2014, March 18, 2019, March 18, 2019, and March 27, 2019." (R. p. 531). The Appellant seems to have erroneously listed March 18, 2019 twice on the Initial Notice of Appeal. Although not expressly referenced in the Initial Notice of Appeal, the Initial Notice of Appeal also attaches a March 25, 2019 Form 4 Order (signed by the trial court on March 20, 2019) denying the Appellant's Motion for Partial Summary Judgment. (R. p. 18).

in Equity's Order and Judgment of Foreclosure and Sale (referred to by the Appellant as the "April 23, 2019" order). (R. p. 536).

SUMMARY OF THE ARGUMENT

The trial court properly dismissed the Appellant's counterclaim for civil compensatory contempt at the summary judgment stage. The civil compensatory contempt counterclaim was premised exclusively on an alleged violation of the 2011 Order. However, that 2011 Order does not provide for a private cause of action. In any event, Ditech (and its predecessors) fully complied with the 2011 Order. The Appellant was served with a notice of foreclosure intervention, and prior counsel also filed and served a certificate of compliance with the 2011 Order. Ditech subsequently reviewed the Appellant for a loan modification and offered a trial period plan. When the Appellant rejected the trial payment plan, Ditech still reviewed the Appellant again for modification but ultimately determined that the Appellant was no longer eligible. Thus, even if the 2011 Order provided a private cause of action, which it does not, Ditech fully complied with the 2011 Order.

The Appellant's other challenges to various orders in this proceedings below are without merit. The trial court did not abuse its discretion in denying a motion to compel the production of materials from an unrelated FTC enforcement action that proceeded in federal court in Minnesota back in 2015. This request – which sought all accounting records, home addresses and telephone numbers of Ditech employees, and information about Ditech's interactions with borrowers other than Snyder – was plainly overbroad. Similarly overbroad was the Appellant's request for Ditech's attorney-fee agreements with the various counsel it has used in these proceedings.

The trial court also did not abuse its broad discretion in granting a motion to amend the case caption, which replaced BAC with "Green Tree Servicing LLC" (now known as Ditech). Ditech possesses the Note endorsed in blank. Because a mortgage follows a note, Ditech is the real party in interest with standing to enforce the Mortgage. Furthermore, the Appellant subsequently agreed to an amendment of the case caption, rendering moot any dispute over the

prior amendment. In any event, any error is harmless because the Appellant never had a basis to oppose the amendment of the caption.

And finally, the trial court properly struck the Appellant's affirmative defense under the Attorney Preference Statute with regard to Mary Snyder. Mary Snyder was not a signatory to the Note. Therefore, she borrowed nothing and is not a "borrower." Because the Attorney Preference Statute required Ditech to ascertain the attorney preference of the borrower only (and not others), and because Ditech complied with the statute by ascertaining the attorney preference of Snyder (the only signatory to the Note and, therefore, the only "borrower"), the trial court did not err in giving the statutory text its plain and ordinary meaning and striking the Attorney Preference Statute defense.

The Appellant's only remaining argument is that the Initial Notice of Appeal from the Summary Judgment Order deprived the trial court of jurisdiction and should have precluded the trial court from proceeding with the foreclosure hearing. The Summary Judgment Order was not immediately appealable under S.C. Code Ann. § 14-3-330, which moots the Appellant's entire argument about the trial court's continued jurisdiction. Even if the Summary Judgment Order was immediately appealable, the South Carolina Rules of Appellate Procedure permitted the trial court to retain jurisdiction over matters not affected by the appeal – and proceed with the foreclosure hearing – during the pendency of the appeal from the Summary Judgment Order.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DISMISSING THE APPELLANT'S COUNTERCLAIM FOR CIVIL COMPENSATORY CONTEMPT.

A. Violation of the 2011 Order does not create a private cause of action.

The Appellant's counterclaim for civil compensatory contempt was premised exclusively on the alleged violation of the 2011 Order. (R. pp. 73–74, ¶¶ 21–23). However, "[t]he Toal Administrative Order, on its face, does not create a private cause of action." *Weber v. Bank of Am. NA*, 2013 WL 4820446, at *3 (D.S.C. Sept. 10, 2013). The Appellant has failed to direct this Court to any case identifying violation of the 2011 Order as an independent cause of action.[8] For this reason alone, the Appellant's counterclaim for civil compensatory contempt was appropriately dismissed at the summary judgment stage.

B. Even if the Appellant pleaded an actionable claim, it was properly dismissed at the summary judgment stage because Ditech (and its predecessors) fully complied with the 2011 Order.

Prior counsel for the original underlying plaintiff in this action served Snyder with a notice of foreclosure intervention on December 17, 2012. (R. pp. 59–62). When Snyder failed to complete a loss mitigation application in response to the notice of foreclosure intervention, prior counsel also served and filed a certificate of compliance with the 2011 Order on April 8, 2013. (R. pp. 63–65).

Subsequent to the appearance of counsel for the Appellant, Ditech also reviewed the Appellant for a loan modification. Ditech offered the Appellant a trial period plan for a permanent

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[8] During the summary judgment hearing, the Appellant directed the trial court to *Jarrell v. Petoseed Co., Inc.*, 331 S.C. 207, 500 S.E.2d 793 (Ct. App. 1998), to support his argument that this claim is actionable. (R. p. 577, lines 4–9). *Jarrell* involves the sale of contaminated watermelon seeds; it has nothing to do with residential foreclosures. The issue of whether civil compensatory contempt is a viable cause of action under South Carolina law is separate and apart from the issue of whether a violation of the 2011 Order provides for a private cause of action, regardless of how the action is captioned.

modification in 2014, but the Appellant rejected the trial period plan on the grounds that the modification terms of the plan were not sufficiently favorable, even though the plan contemplated a reduction in the Appellant's monthly payments. (R. p. 310, ¶ 15). Ditech again reviewed the Appellant for a modification in 2017 and determined that the Appellant was no longer eligible for a loan modification. (R. p. 310, ¶ 16).

The 2011 Order provides that "[n]o foreclosure hearing may be held in the foreclosure action until the Mortgagee's attorney certifies that the Mortgagee has complied with the requirements" set forth in the 2011 Order. Administrative Order of the Supreme Court of South Carolina, Re: Mortgage Foreclosure Actions, No. 2011-05-02-01 (May 2, 2011). Those requirements include that the mortgagor has been served with the notice of right to foreclosure intervention, that the lender has received and examined all documents submitted by the borrower, and that the borrower has been afforded a full and fair opportunity to submit documents and information, but that either the mortgagor does not qualify for loss mitigation and has been so informed, or the mortgagor has failed to participate in foreclosure intervention. As set forth above, both the prior servicer and Ditech complied with the requirements of the 2011 Order. Therefore, the Appellant's counterclaim for violation of the 2011 Order is without merit, and the trial court did not err in dismissing the counterclaim at the summary judgment stage.

C. The Appellant's myriad complaints about Ditech's compliance with the 2011 Order fail both individually and collectively.

Despite the Appellant's "kitchen sink" argumentation about the foreclosure intervention process (Brief at pp. 7–11), an assessment of each of the Appellant's individual complaints reveals them to be immaterial and without merit, both individually and collectively. In the very least, and even assuming the Appellant could assert a viable cause of action for violation of the 2011 Order (which Ditech denies), Ditech complied with its foreclosure intervention obligations in good faith.

Although the Appellant complains that correspondence was not always sent to the correct address (Brief at pp. 7–8), the Appellant's counsel acknowledges not only that he has changed offices twice since appearing in this case (making for three separate office addresses) (R. p. 585, lines 10–18), but also that his office moves "may have disrupted normal mail service." (R. p. 387). The important point is that the Appellant's counsel received the December 23, 2014 trial payment plan terms. (R. p. 310, ¶ 15; R. pp. 381–385). Indeed, he responded to the payment plan terms and rejected them. (R. pp. 386–387).

In an effort to ascribe bad faith to Ditech, the Appellant acknowledged in the proceedings below that the gist of his complaints relates to delays (as there is no real dispute that the foreclosure intervention process was completed by the parties). (R. p. 574, line 24–p. 575, line 24). As the trial court noted, however, the mere delay (and any associated frustrations) does not amount to bad faith. (R. p. 596, line 23–p. 597, line 3 ("I find that they did – they have acted in good faith in attempting to [comply with the 2011 Order]. It has been slow and arduous and I understand the Defendant's frustration with the process. I find that there's no lack of good faith in what they have done.")).[9]

The Appellant's second argument, titled "Failure to timely respond to foreclosure intervention request," similarly complains about delays, contending that it took Ditech's predecessor two months after a request to provide a foreclosure intervention application. (Brief at

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[9] If the Appellant were truly concerned about avoiding delays and moving the foreclosure process along, he could have filed an answer admitting the material allegations of foreclosure without giving up his counterclaims. Similarly, and as discussed *infra*, if the Appellant wanted to avoid delays, he could have waited for a final judgment before attempting to appeal the interim Summary Judgment Order (and making the associated argument that the foreclosure hearing was stayed).

p. 8). This does not amount to bad faith, and the Appellant has identified no basis to make that argument.

Although the Appellant's third argument notes "repeated[ ]" and "flagrant[ ]" contact directly with the borrowers (Brief at p. 8), a review of the purported evidence of this claim cited by the Appellant reveals only a single instance in which Ditech inadvertently sent correspondence to the borrower directly. This single instance was inadvertent – and therefore not in bad faith – and unquestionably did not prevent the foreclosure intervention process from proceeding to completion.

The Appellant's two remaining arguments can be addressed summarily. Though the Appellant complains about the filing of an affidavit of default, he also notes that the affidavit of default was stricken from the record by the trial court. (Brief at p. 10; *see* R. p. 17). As such, the affidavit of default had nothing to do with the underlying foreclosure judgment. The Appellant lastly accuses Ditech of alleged spoliation of evidence (Brief at pp. 10–11) based on Ditech's inability to confirm the existence of certain documents not contained within Ditech's business records. The fact that certain documents may be in the hands of a prior loan servicer does not amount to spoliation because nothing was destroyed or lost. *See* Black's Law Dictionary 1169 (8th ed. 2005) (defining "spoliation" as the "intentional destruction, mutilation, alteration, or concealment of evidence"). At bottom, as the Appellant's counsel admitted, this issue relates only to Ditech being "unable to admit or deny certain facts" due to lack of documentation. (R. p. 650, line 24). This does not amount to reversible error.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE APPELLANT'S MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS.

The Appellant additionally seeks to unwind the foreclosure by complaining about the denial of his motion to compel the production of the following documents:

- *"A copy of the records Green Tree is required to keep pursuant to Section XIX, paragraph A of Federal Trace Comm'n v. Green Tree Servicing, LLC, 0:15-cv-02064-SRN-JSM (D. Minn. Order dated April 23, 2015) (the 'FTC Order')";*

- *"A copy of the records Green Tree is required to keep pursuant to Section XIX, paragraph B of the FTC Order for the following:*
    - *a. Cassandra Turner*
    - *b. Michael Young*
    - *c. Swarn [last name unknown]*
    - *d. Xaiver A. (See Ex. A to Responses to 02/13/18 Interrogatories p. 22)*
    - *e. All persons who interacted with Kevin Snyder, Mary Snyder, or their representatives (e.g., their attorney) regarding this loan or its collection*
    - *d. All persons who reviewed the Snyders' loss mitigation applications";*

- *A copy of the records Green Tree is required to keep pursuant to Section XIX, paragraph E of the FTC Order that would have been used in the collection of the loan at issue in this action."; and*

- *"A copy of your fee agreement(s) with all attorneys who were retained to handle this mortgage foreclosure action."*

(R. pp. 95–97, Nos. 25, 26, 29, and 32).[10] The Appellant has not satisfied his burden of establishing that the trial court clearly abused its discretion in denying the Appellant's motion to compel with regard to these overly broad document requests seeking the production of irrelevant documents.

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[10] For the Court's reference, Paragraphs A, B, and E of Section XIX of the FTC Order refer to the following documents:

> "A. Accounting records maintained in accordance with generally accepted accounting principles in effect from time to time in the United States of America, including records showing the revenues from all goods or services sold, all costs incurred in generating those revenues, and the resulting net profit or loss;
>
> B. Personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name, address, and telephone numbers; job title or position; dates of service; and, if applicable, the reason for termination;
>
> . . .
>
> E. Copies of all scripts and other training materials related to the collection of debts."

Stipulated Order for Permanent Injunction and Monetary Judgment, *FTC v. Green Tree Servicing LLC*, No. 0:15-cv-02064 (D. Minn. April 23, 2015), ECF No. 5.

(R. p. 578, lines 3–18; R. p. 17; R. p. 22, ¶ E). *See Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001) ("The rulings of a trial judge in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion."); *see also Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 353, 559 S.E.2d 327, 334 (Ct. App. 2001) ("An abuse of discretion occurs when there is no evidence to support the trial judge's factual conclusion or when the ruling is based upon an error of law."); *Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989) ("The burden is upon the party appealing from the order to demonstrate the trial court abused its discretion.").

The FTC Order has nothing to do with this case, and all of the requests for documents in connection with that unrelated FTC action from the United States District Court of the District of Minnesota are overly broad and seek irrelevant information.[11] None of the Appellant's arguments about relevance pass muster. In the very least, the trial court did not abuse its discretion.

The Appellant claims relevance with regard to Request No. 25 (FTC Order Section XIX, ¶ A) by arguing that "[a]ccounting records . . . are needed to establish damages." (Brief at p. 16). However, Request No. 25 seeks *all* records of *all* revenues from *all* goods or services sold, including *all* associated costs, and *all* resulting profits and losses. It is plain that this request is overly broad for the purpose of establishing purported damages vis-à-vis Snyder.

Although Request No. 26 (FTC Order Section XIX, ¶ B) at least limits the scope of documents sought to certain individuals, it is also overly broad. With regard to Request No. 26, the Appellant argues that personnel records "will provide information on the persons who

[11] Whether Ditech has custody of the documents sought, and whether it would be burdensome for Ditech to produce them (Brief at pp. 16–17), is separate and apart from whether the documents are relevant to this case and whether Ditech has an obligation to produce them. Ditech did not object to the document requests at issue on the grounds of undue burden.

interacted with the Snyders and their counsel." (Brief at p. 16). However, Request No. 26 seeks documents well beyond this purported need, including home addresses and telephone numbers of employees and information about employee terminations.

Finally, via Request No. 29 (FTC Order, Section XIX, ¶ E), the Appellant seeks Ditech's training materials under the guise of "determin[ing] how systemic the alleged misconduct is." (Brief at p. 16). This is a textbook example of an improper fishing expedition. Whether any of the alleged misconduct set forth in the Appellant's counterclaims is "systemic" has no bearing on Ditech's dealings with the Appellant. Moreover, the Appellant's counterclaims – purportedly serving as a basis for these document requests – were filed approximately two years *prior* to the FTC Order. Therefore, the FTC Order (and the documents referenced therein) could not possibly be relevant to the alleged actions forming the basis of the Appellant's counterclaims. Indeed, the Appellant signaled his intent to "fish" for evidence in support of his counterclaims by alleging in his affirmative defenses and counterclaims that said defenses and claims would be supported by *future* acts or omissions of Ditech. (R. pp. 72–75, ¶¶ 14(c)–20, 22, 24(c), and 27(c)).[12]

Apart from documents referenced in the FTC Order, the Appellant also challenges the denial of his motion to compel the production of Ditech's "fee agreement(s) with all attorneys who were retained to handle this mortgage foreclosure action." (R. p. 97, No. 32). Ditech objected on the grounds of privilege, relevance, and confidentiality. On appeal, as he did below, the Appellant argues that Ditech's fee agreements are relevant because Ditech sought its attorneys' fees and

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[12] The Appellant's contention that personnel records and training materials are relevant for impeachment purposes in light of Ditech's denial of certain allegations (Brief at p. 16) similarly misses the point. The requests are overly broad. Whether Ditech complied with the 2011 Order vis-à-vis other borrowers has no bearing on whether Ditech complied with the 2011 Order with regard to the Appellant, which is the only relevant issue here. Neither training materials nor personnel records make that fact any more or less probable.

costs, and because attorney-fee agreements are not privileged. (Brief at p. 17). The terms of Ditech's fee agreements with its counsel go far beyond what might be needed to calculate an attorney fee award. If the trial court awarded attorneys' fees, Ditech would – as is customary – file an affidavit of the amount and reasonableness of its fees, which would provide the Appellant all the information he might need to evaluate the request.[13] Even if this Court disagrees with Ditech's arguments about the relevance of these documents, the trial court made no errors of law and denied the motion to compel based on evidence in the record, meaning the Appellant has not established an abuse of discretion. *See Hedgepath.*, 348 S.C. at 353, 559 S.E.2d at 334.

Lastly, although the Appellant challenges the sufficiency of Ditech's written objections to these document requests and argues that the objections are waived (Brief at p. 15–16), he cites only to Delaware law and federal law to support his argument. By failing to cite to any South Carolina authority, the Appellant fails to satisfy his burden of establishing that the trial court abused its discretion.

III. THE GRANTING OF THE MOTION TO AMEND THE CASE CAPTION DOES NOT CONSTITUTE AN ABUSE OF DISCRETION.

Although the Appellant is technically arguing that the trial court abused its discretion in granting the Motion to Amend, the Appellant is expressly contending that Ditech (and its predecessors in interest) did not have standing to foreclose and that "the action should have been

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[13] Even if the fee agreements were relevant (which they are not), they are still privileged. Although the Appellant cites to two federal cases to argue the contrary point (Brief at p. 17), he has failed to cite to any controlling South Carolina law and, therefore, falls far short of carrying his burden of establishing an abuse of discretion. In any event, the federal criminal cases on which the Appellant relies concern themselves primarily with disclosure of the identity of a client as opposed the fee agreement or retainer agreement more generally. *See In re Grand Jury Subpoena*, 204 F.3d 516, 518 (4th Cir. 2000) ("The United States served a grand jury subpoena on an attorney commanding him to testify and produce documents concerning the identity of a client."); *In re Grand Jury Investigation*, 631 F.2d 17, 19 (3d Cir. 1980) ("Therefore, disclosure of the names of any third parties would not disrupt any other attorney-client relationship.").

dismissed; the Master-in-Equity should be reversed and Ditech's action dismissed." (Brief at p. 19).

"It is well established that a motion to amend is addressed to the sound discretion of the trial judge, and that the party opposing the motion has the burden of establishing prejudice." *Brown v. James*, 389 S.C. 41, 59, 697 S.E.2d 604, 614 (2010) (internal quotation marks omitted). In light of the broad discretion afforded a trial judge in this area, an order on a motion to amend a pleading "will rarely be disturbed on appeal." *Id.* at 61, 697 S.E.2d at 614 (internal quotation marks omitted). The trial court did not abuse its discretion by granting the Motion to Amend. This issue is moot, Ditech's possession of the Note means it has standing to foreclose, and any error made by the trial court is harmless and cannot serve as a basis to reverse any trial court ruling.

On or around December 18, 2018, the Appellant ***consented*** to an amendment of the case caption to replace Green Tree Servicing LLC with Ditech. (R. pp. 15–16). The Appellant is complaining about a ***prior amendment*** of the case caption, which replaced BAC with Green Tree Servicing LLC. (R. p. 7). Because the Appellant consented to the subsequent amendment – which named the current, real party in interest as the Plaintiff – any ruling on the earlier Motion to Amend is now moot.

Although the Appellant is making a standing argument, Ditech possesses the original Note endorsed in blank, as the trial court acknowledged, which gives Ditech standing to foreclose. (R. p. 24, ¶ 10; R. p. 6, ¶ 5). "Standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right." *Bank of Am., NA v. Draper*, 405 S.C. 214, 219, 746 S.E.2d 478, 481 (Ct. App. 2013) (internal quotation marks omitted). A party in possession of a negotiable instrument payable to "bearer" is entitled to enforce the negotiable instrument. *See* S.C. Code Ann. §§ 36-1-201(b)(21)(A), 36-3-301. Because a mortgage follows a note, a party in possession

of a note with the right to enforce it may also enforce the mortgage. *See Draper*, 405 S.C. at 220, 746 S.E.2d at 481 ("[T]he assignment of a note secured by a mortgage carries with it an assignment of the mortgage . . . ."); *see also U.S. Bank Tr. Nat'l Ass'n v. Bell*, 385 S.C. 364, 374, 684 S.E.2d 199, 204 (Ct. App. 2009) ("A mortgage and a note are separate securities for the same debt, and a mortgagee who has a note and a mortgage to secure a debt has the option to either bring an action on the note or to pursue a foreclosure action."). Ditech unquestionably had standing to enforce the terms of the Note and Mortgage via the foreclosure process. The trial court's order granting the Motion to Amend is supported by record evidence and is not an error of law, meaning there is no abuse of discretion. *Cf. Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001) ("An abuse of discretion occurs when the trial judge's ruling is based upon an error of law or, when based on factual conclusions, is without evidentiary support.").[14]

IV. THE TRIAL COURT PROPERLY STRUCK THE ATTORNEY PREFERENCE DEFENSE BECAUSE MARY SNYDER WAS NOT A BORROWER ENTITLED TO THE PROTECTIONS OF THE STATUTE.

The Attorney Preference Statute required the originating lender to "ascertain prior to closing the preference of the *borrower* as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction." S.C. Code Ann. § 37-10-102(a) (emphasis added). The lender fully complied with this statute by ascertaining the preference of Snyder, the only borrower under the Note. (R. pp. 331–332). Because Mary Snyder

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[14] In any event, any abuse of discretion by the Master in Equity in granting the Motion to Amend is mere harmless error because Ditech – the undisputed real party in interest based on its possession of the Note endorsed in blank, which gave it the right to enforce the Mortgage – subsequently became the Plaintiff in this lawsuit. Although the Appellant seeks to unwind the foreclosure and completely dismiss Ditech's action on the basis of this alleged error, "[a] judgment will not be reversed for insubstantial errors not affecting the result." *Jensen v. Conrad*, 292 S.C. 169, 172, 355 S.E.2d 291, 293 (Ct. App. 1987); *see Stevenson v. Emerson Elec. Corp.*, 286 S.C. 331, 336, 333 S.E.2d 355, 358 (Ct. App. 1985) ("The Court will not reverse a judgment on the basis of harmless error.").

was not a signatory to the Note – a fact the Appellant does not dispute (Brief at p. 19) – she was not a "borrower" under the Note, and the Attorney Preference Statute, therefore, did not obligate Ditech to also ascertain her preference of a closing attorney. Even if Mary Snyder's signature had been required on the Attorney/Insurance Preference Form, the Appellant presented no facts to the trial court that would have supported the extraordinary remedy of denying enforcement of the Mortgage. Accordingly, the trial court did not err in reaching this conclusion and striking the Attorney Preference Statute argument with regard to Mary Snyder. (R. pp. 21–22, ¶ 12).

"The cardinal rule of statutory interpretation is to determine the intent of the legislature." *Jones v. State Farm Mut. Auto. Ins. Co.*, 364 S.C. 222, 230, 612 S.E.2d 719, 723 (Ct. App. 2005). "Words in [a] statute should be given their plain and ordinary meaning without resort to forced or subtle construction." *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 608, 670 S.E.2d 674, 678 (Ct. App. 2008). Here, the Attorney Preference Statute is unambiguously limited to ascertaining preferences of a "borrower" as to the lawyer who will represent the "debtor" at closing. S.C. Code Ann. § 37-10-102. Although the word "borrower" is not defined in S.C. Code Ann. § 37-1-301 – which is the statute that defines words for purposes of the Consumer Protection Code – the word "debtor" is defined, and the Attorney Preference Statute uses those words interchangeably. "Debtor" is defined as "any person who is an obligor in a credit transaction, including any cosigner, comaker, guarantor, endorsee or surety, and the assignee of any obligor, and also includes any person who agrees to assume the payment of a credit obligation." S.C. Code Ann. § 37-1-301(14). Mary Snyder is not a debtor under this definition (and is therefore not a borrower) because she is not an obligor, cosigner, comaker, guarantor, endorsee, surety, or assignee of the subject Note.

The plain and ordinary meaning of "borrower" is "[a] person or thing to whom money or something else is lent." Black's Law Dictionary 153 (8th ed. 2005). No money was lent to Mary Snyder under the Note. As a result, the Attorney Preference Statute did not require the lender to ascertain Ms. Snyder's attorney preference as a mere signatory to the Mortgage. This Court should not utilize the "forced or subtle construction" for which the Appellant is advocating. *Original Blue Ribbon Taxi Corp.*, 380 S.C. at 608, 670 S.E.2d at 678.

Although the Appellant asks this Court to apply the definition of "borrower" found in S.C. Code Ann. § 37-22-110(7) (Brief at p. 19), the Legislature made clear its intent for that definition to "apply in this chapter," i.e., Chapter 22 of the Consumer Protection Code. Because the Attorney Preference Statute is not contained within Chapter 22 of the Consumer Protection Code, the legislature did not intend for that definition to apply. The Appellant also argues that the Court should be guided by the remedial purposes of the Consumer Protection Code. (Brief at p. 20 (citing S.C. Code Ann. § 37-1-102)). However, the Court should not resort to this interpretive gloss because the plain and ordinary meaning of the word "borrower" is clear, and "[c]lear and unambiguous statutes require no statutory construction and must be applied according to the literal meaning of their terminology." *Original Blue Ribbon Taxi Corp.*, 380 S.C. at 607, 670 S.E.2d at 678.

Even if the lender had been required to obtain Mary Snyder's signature on the Attorney/Insurance Preference Form, this would not support an affirmative defense to the foreclosure. A court may deny enforcement of an agreement for violations of the Attorney Preference Statute only "[i]f the court finds as a matter of law that the agreement or transaction is unconscionable pursuant to Section 37-5-108 at the time it was made, or was induced by unconscionable conduct." S.C. Code Ann. § 37-10-105(C). No facts were either pleaded or

presented as evidence to show that the Mortgage was unconscionable or induced by unconscionable conduct. The trial court did not err in granting summary judgment in favor of Ditech and striking the Appellant's Attorney Preference Statute defense.

V. THE MASTER IN EQUITY HAD JURISDICTION TO PROCEED WITH THE FORECLOSURE HEARING.

The Appellant's last argument is that the trial court did not have jurisdiction to proceed with the foreclosure hearing in light of the Initial Notice of Appeal from the Summary Judgment Order. (Brief at p. 20–21). A trial court's decision to retain jurisdiction following a notice of appeal is reviewed for an abuse of discretion. *See Cousar v. New London Eng'g Co., Inc.*, 306 S.C. 37, 40, 410 S.E.2d 243, 245 (1991).

The Appellant sets forth this argument as three sub-arguments, as follows: (1) the Summary Judgment Order was immediately appealable, (2) upon the filing of the Initial Notice of Appeal, "the Master-in-Equity lost jurisdiction of this matter and did not have the authority to conduct the [foreclosure hearing]," and (3) the trial court did not even have jurisdiction to determine to scope of any applicable automatic stay resulting from the Initial Notice of Appeal. Because the Summary Judgment Order was not immediately appealable (sub-argument (1)), the Court need not consider the Appellant's remaining arguments (sub-arguments (2) & (3)). In any event, all of the Appellant's arguments are without merit. In the very least, the trial court did not abuse its discretion.

A. The Summary Judgment Order was not immediately appealable.

"The right of appeal arises from and is controlled by statutory law." *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006). Specifically, "[a]bsent a specialized statute, an order must fall into one of several categories set forth in Section 14-3-330 in order to

be immediately appealable." *Id.* at 7, 630 S.E.2d at 467.[15] S.C. Code Ann. § 14-3-340 enumerates four categories of claims that are immediately appealable, as follows:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
>
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
>
> (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
>
> (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. Code Ann. § 14-3-330. The Summary Judgment Order was neither a "final order" nor an order relating to an injunction or a receiver; therefore, subsections (3) and (4) are inapplicable. The Summary Judgment Order likewise does not satisfy subsections (1) or (2).

1. The Summary Judgment Order does not "involve the merits" under Subsection (1).

"The phrase 'involving the merits' is narrowly construed in modern precedent." *U-Drive-It, Inc.*, 369 S.C. at 7, 630 S.E.2d at 467. "An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights." *Watson v. Underwood*, 407 S.C. 443, 458, 756 S.E.2d 155, 163 (Ct. App. 2014). The policy behind limiting the scope of interlocutory appeals is to avoid

[15] The Appellant does not cite this statute in his brief, much less explain the subsection on which he relies to support his argument about the immediate appealability of the Summary Judgment Order. For this reason alone, the Appellant fails to establish an abuse of discretion.

piecemeal litigation. *See Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 94, 529 S.E.2d 11, 13 (2000). Here, following the Summary Judgment Order, the foreclosure hearing – where the parties' rights would ultimately be determined – had yet to be held. And nothing prevented the Appellant from opposing the foreclosure at the foreclosure hearing. In this respect, the Summary Judgment Order was not immediately appealable under subsection (1).

2. The Summary Judgment Order does not "affect a substantial right" under Subsection (2).

"Immediate appeals under subsection (2) have been allowed in situations where the substantial right could not be vindicated on appeal after the case." *Breland*, 339 S.C. at 93, 529 S.E. at 13. When an alleged "error in [an] order can be corrected on appeal following the trial," it has generally been held to not affect a substantial right. *See id.*; *see generally Watson v. Underwood*, 407 S.C. 443, 458, 756 S.E.2d 155, 163 (Ct. App. 2014) ("Piecemeal appeals should be avoided and most errors can be corrected by the remedy of a new trial." (internal quotation marks omitted)). Nothing prevents the Appellant from challenging the Summary Judgment Order on appeal after a final judgment, *just as he is doing in this proceeding*. Therefore, subsection (2) is not satisfied.

Although subsection (2)(c) refers to "strik[ing] out an answer or any part thereof or any pleading in any action," the question of "whether an order is immediately appealable is determined on a case-by-case basis." *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 538, 773 S.E.2d 144, 146 (2015). Stated differently, "[a]n appellate court should look to the effect of an interlocutory order to determine its appealability under section 14-3-330(2)(c)." *Dorn v. Cohen*, 418 S.C. 126, 138, 791 S.E.2d 313, 319 (Ct. App. 2016) (internal quotation marks omitted). "An order affects a substantial right by striking a pleading" only if the order "prevent[s] the [aggrieved] party from seeking to correct any errors in the order during or after trial." *Thornton*

v. S.C. Elec. & Gas Corp., 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011); *see Harbath v. Sanders*, No. 2017-UP-465, 2017 WL 6513257, at *1 (Ct. App. Dec. 20, 2017) (per curiam) (unpublished disposition) (same). The Appellant is, in fact, seeking to correct alleged errors made in the Summary Judgment Order in this very appeal, and nothing prevents him from doing so. Therefore, the interlocutory Summary Judgment Order does not affect a substantial right under S.C. Code Ann. § 14-3-330(2)(c).

3. The Appellant's general arguments about orders affecting property interests are not determinative.

In lieu of citing any statutory basis for his purported right to immediately appeal the Summary Judgment Order (prior to the foreclosure hearing), much less making any statutory argument, the Appellant argues that an immediate appeal was necessary because "there exists a risk that the underlying property could be lost." (Brief at p. 20). But that is plainly inaccurate, as Ditech made very clear to the trial court at the beginning of the foreclosure hearing, when the issue of the trial court's jurisdiction to proceed was raised:

> We're not asking the Court to schedule a foreclosure sale today. What we are asking the Court is to decide all of the factual and legal issues that were not determined at Summary Judgment so that the entire case can – should Defendants choose to appeal from anything else, all that can go up on appeal and be decided at the same time.

(R. p. 612, lines 15–22). It is not accurate for the Appellant to contend that absent an immediate appeal "and the consequential automatic stay, the property at issue in this residential foreclosure could be lost at judicial sale and an appeal would not reinstate ownership." (Brief at p. 20). Following a foreclosure judgment, the Appellant could appeal that order and file a motion for supersedeas, asking the trial court to stay the foreclosure sale pending appeal. Indeed, *this is exactly what the Appellant is doing*. (R. pp. 435–440).

B. Even if the Summary Judgment Order was immediately appealable, which Ditech denies, the Initial Notice of Appeal did not prevent the trial court from proceeding with the foreclosure hearing.

Assuming, *arguendo*, that the Summary Judgment Order was immediately appealable, the question before the Court is whether that Initial Notice of Appeal operated to stay the foreclosure hearing pending the outcome of that appeal. Under SCRAP 241, with certain exceptions, a notice of appeal "automatically stay[s] matters decided in the order, judgment, decree or decision on appeal," but "[t]he lower court . . . retains jurisdiction over matters *not affected by the appeal*." SCRAP 241(a) (emphasis added). SCRAP 205 similarly notes that this Court has exclusive jurisdiction over any appeal, but it expressly provides that "[n]othing in [the South Carolina Rules of Appellate Procedure] shall prohibit the lower court . . . from proceeding with matters *not affected by the appeal*." SCRAP 205.

The trial court's ability to decide all of the remaining facts and legal issues (not decided at the summary judgment stage) relative to Ditech's foreclosure action was "not affected" by the Initial Notice of Appeal. As the plaintiff in a foreclosure action, Ditech had the burden of establishing the existence of a debt secured by a mortgage and the mortgagor's default on that debt. *See Draper*, 405 S.C. at 221, 746 S.E.2d at 481. Ditech's ability to establish these elements was unaffected by peripheral challenges relating to compliance with the 2011 Order. Therefore, the trial court properly proceeded with the foreclosure hearing.

Although the Appellant makes a last ditch argument that the trial court could not determine the scope of any applicable automatic stay (Brief at p. 21), that principle would altogether swallow the rule. In other words, even though a lower court "retains jurisdiction" over matters not affected by the appeal under SCRAP 205 and 241(a), the rule advocated by the Appellant would have the trial court do nothing upon the filing of a notice of appeal unless and until this Court – the Court of Appeals – instructed the trial court regarding the scope of the trial court's continued jurisdiction.

And because the Court of Appeals does not, *sua sponte*, provide this instruction to every trial court in response to each notice of appeal of an interlocutory, non-final order, the Appellant's argument would completely envelope (and negate) the trial court's retained jurisdiction expressly carved out in Rules 205 and 241(a). Stately differently, although the rules provide that the trial court "retains jurisdiction" in certain circumstances, the Appellant's approach would write that provision out of the rules.

In *Metts v. Mims*, 384 S.C. 491, 682 S.E.2d 813 (2009), an intermediate order was followed by an initial notice of appeal. *Id.* at 496, 682 S.E.2d at 816. Despite the initial notice of appeal, the trial court proceeded to hear summary judgment motions, a party appealed from the subsequent summary judgment order, and the two appeals were consolidated. *See id.* Because the summary judgment motion in that case was "not affected" by the claims at issue in the initial notice of appeal, the Supreme Court concluded that "the trial court properly proceeded on the summary judgment motion, despite the pending appeal." *Id.* at 498, 682 S.E.2d at 817. And the trial court in *Metts* proceeded with summary judgment *without first getting the Court of Appeals' approval*. Here, the trial court was likewise entitled to proceed with the foreclosure hearing because it retained jurisdiction to address matters not affected by the Initial Notice of Appeal. The trial court's determination in that respect was not an abuse of discretion.

The Appellant's reliance on *State v. Cooper*, 342 S.C. 389, 536 S.E.2d 870 (2000), is misplaced. (Brief at p. 21). In that criminal case, the appellant first moved the trial court for a stay, just as the rules require. *See Cooper*, 342 S.C. at 396, 536 S.E.2d at 874; *see also* SCRAP 241(d) (issues relating to lifting or supersedeas of stay must first be made to trial court). *Cooper* was just clarifying that a party can petition the Court of Appeals (and not the Supreme Court) to review the trial court's initial stay decision. *See Gaddy v. Douglass, III*, No. 99 CP 20-76, 2001

WL 36215944 (S.C. Com. Pl. Sept. 22, 2001); *see also* SCRAP 241(d)(2).[16] *Cooper* does not stand for the proposition that "only this Court had the authority to determine the extent of the automatic stay." (Brief at p. 21).

CONCLUSION

For the foregoing reasons, Ditech respectfully requests that the underlying decisions be affirmed.

This 4th day of November 2019.

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[16] In this sense, if the Appellant were concerned about the trial court's ability to proceed with the foreclosure hearing in light of the Initial Notice of Appeal, he could have filed a motion for supersedeas under SCRAP 241 in the trial court in the first instance, with a ruling on that motion reviewable by this Court. The Appellant did not file any such motion at the time in the trial court.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Mikell Scarborough
Master in Equity

Appellate Case No. 2019-000575
Circuit Court Case No. 2010-CP-10-7838

Ditech Financial, LLC,

Respondent,

v.

Kevin G. Snyder, Individually and as Personal Representative of the Estate of Mary Snyder,

Appellant.

RULE 211(b) CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing **BRIEF OF RESPONDENT** complies with SCACR 211(b) because it is identical to Respondent's previously filed Initial Brief of Respondent except for references to the record and correction of typographical errors and misspellings.

This the 4th day of November, 2019.

Jonathan E. Schulz (SC Bar No. 79850)