

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM FLORENCE COUNTY  
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

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Court of Appeals No. 2019-000486

Florence Common Pleas No. 2018-CP-21-03238

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**RECEIVED**

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SC Court of Appeals

Nationstar Mortgage LLC..... Plaintiff,

v.

Barbara A. Gibbs, Melvin E. Gibbs, and  
Westbrook Phase IV Homeowners Association ..... Defendants,

Of whom Barbara A. Gibbs and Melvin E. Gibbs are the ..... Appellants,

v.

Nationstar Mortgage LLC..... Respondent.

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**RESPONDENT NATIONSTAR MORTGAGE LLC'S  
INITIAL BRIEF**

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## **STATEMENT OF ISSUES ON APPEAL**

- I. Whether Appellants were entitled to dismissal of Nationstar's foreclosure action.
- II. Whether the lower court properly awarded summary judgment to Respondent Nationstar Mortgage LLC for its foreclosure cause of action.
- III. Whether South Carolina law permits special referees to recuse themselves from action referred to them unilaterally.
- IV. Whether Appellants are entitled to a jury trial for Nationstar' equitable foreclosure action.

## **STATEMENT OF THE CASE**

This case concerns an equitable foreclosure action that Respondent Nationstar Mortgage LLC ("Nationstar") filed against the mortgagor, Barbara Gibbs, on October 23, 2013. Melvin Gibbs is also a named defendant because he received an interest in the collateral encumbered by Nationstar's mortgage loan after the mortgage was recorded. Westbrook Phase IV Homeowners Association is also a named defendant because of liens or assessments that are junior in priority to Nationstar's mortgage. (R. pp. \_\_\_, Compl.) Appellants appeal the summary judgment that the lower court awarded to Nationstar for its foreclosure claim. Based on record developed before the lower court and applicable South Carolina law, the lower court's judgment should be AFFIRMED.

### **The Mortgage Loan Transaction**

On February 23, 2005, Appellant Barbara Gibbs signed a promissory note ("Note") to borrow the principal sum of \$329,600.00. (R. pp. \_\_\_, Compl. ¶ 4, R. pp. \_\_\_, Note.) To secure her repayment obligations, Mrs. Gibbs also executed a mortgage ("Mortgage") that encumbered her real property at 4257 Monterey Dr., Florence, SC ("Property") and was recorded with the Register of Deeds for Florence County. (R. pp. \_\_\_, Compl. ¶ 5; R. pp. \_\_\_, Rec. Mortg.) After origination of the Note and Mortgage, Mrs. Gibbs conveyed an interest in the Property encumbered by the

Mortgage to her husband, Melvin Gibbs. Mr. Gibbs is not an obligor on the Note, and he did not sign the Mortgage.

During the repayment term, Mrs. Gibbs agreed to the terms of a modification agreement on January 1, 2006 (“Loan Modification” and together with the Note and Mortgage, the “Mortgage Loan”) that altered the repayment terms for the Mortgage Loan. (R. pp. \_\_, Mod. Agr.)

**Mrs. Gibbs Defaults on Her Mortgage Loan Obligations**

Ultimately, Mrs. Gibbs defaulted on her monthly payment obligations under the Mortgage Loan by failing to remit timely the payment due on December 1, 2011. (R. pp. \_\_, Foreclosure Judg.; R. pp. \_\_, Aff. C. Vieau ¶ 9 (6/26/2018).)

In addition to failing to remit all of the monthly payments that came due under the Mortgage Loan, Mrs. Gibbs failed to pay increased monthly escrow amounts to cover an increase in county tax assessments for the Property. (R. pp. \_\_, Aff. C. Vieau ¶ 15; R. pp. \_\_, Mortg. ¶¶ 3, 4; R. pp. \_\_, Foreclosure Judg.) Critically, the payments for the Mortgage Loan increased from \$2,197.32 per month to \$2,205.96 per month beginning with the April 1, 2013 payment because of a tax re-assessment for the Property. (R. pp. \_\_, Aff. C. Vieau ¶ 15.) Nationstar notified Mrs. Gibbs that the payment increased via a mortgage statement sent to her. (R. pp. \_\_, Aff. C. Vieau ¶ 15.) But Mrs. Gibbs did not remit the increased amount due under the terms of the Mortgage Loan.

In further breach of the mortgage loan’s terms, Mrs. Gibbs also failed to maintain hazard loss insurance for the Property. (R. pp. \_\_, Aff. C. Vieau ¶¶ 11-14.) To protect its security interests in the Property, Nationstar had to advance payment of an insurance premium to maintain coverage for the Property in March 2013 because Mrs. Gibbs ignored Nationstar’s written request to provide proof of existing hazard loss coverage for the Property. (R. pp. \_\_, Aff. C. Vieau ¶¶

11-14; R. pp. \_\_, Mortg. ¶¶ 3, 5.) After paying an insurance premium, Nationstar sent Mrs. Gibbs a mortgage statement sent to her, to notify her that the monthly payment was increasing to \$2,990.59 as of June 1, 2013 because of the hazard loss coverage that Nationstar purchased. (R. pp. \_\_, Aff. C. Vieau ¶¶ 17; R. pp. \_\_, Mortg. ¶¶ 3, 5.) Because Mrs. Gibbs failed to cure her existing arrearage and failed to remit the requisite increased monthly payments that came due from April 1, 2013 through August 1, 2013, Mrs. Gibbs ultimately defaulted on her repayment obligations. (R. pp. \_\_, Compl. ¶ 5; R. pp. \_\_, Aff. T. Braune ¶¶ 7 & 9 (1/15/2019); R. pp. \_\_, Aff. C. Vieau ¶¶ 9 & 11-20.)

Because of the default, Nationstar sent Mrs. Gibbs a notice of default on or about September 5, 2013 via certified mail to notify her that she needed to pay \$7,226.85 by October 10, 2013 to cure her payment arrearage. (R. pp. \_\_, Aff. T. Braune ¶ 8; R. pp. \_\_, Notice of Default; R. pp. \_\_, Foreclosure Judg.)

#### **Nationstar's Foreclosure Action**

Because Mrs. Gibbs failed to cure her payment arrearage by October 10, 2013, Nationstar filed a foreclosure action with the Court of Common Pleas for Florence County ("Florence Circuit Court") on October 23, 2013. This foreclosure action was assigned case number 2013-CP-21-02795. Mr. and Mrs. Gibbs were served with Nationstar's foreclosure complaint on November 8, 2013. (R. pp. \_\_, Cert. of Serv.) Thereafter, Mr. and Mrs. Gibbs moved to dismiss Nationstar's complaint. (R. pp. \_\_, Mot. to Dismiss.) Mr. Gibbs subsequently filed an answer. (R. pp. \_\_, Ans.) Mrs. Gibbs never filed a responsive pleading in response to the complaint after Nationstar filed its certification of Appellants' non-compliance with the South Carolina Supreme Court's Administrative Order for Foreclosures. (R. pp. \_\_, Cert. of Non-Compliance (filed 12/18/2013); R. pp. \_\_, Cert. of Non-Compliance (filed 4/10/2014); R. pp. \_\_, Foreclosure Judg.)

The lower court entered the first order of reference on March 11, 2014, to refer the foreclosure action to Special Referee Benjamin D. Moore. (R. pp., Order of Ref. (entered 3/11/2014).) After referral of the action to the special referee, Nationstar filed and served a motion for summary judgment and memorandum in support for its foreclosure claim. (R. pp. \_\_, Mot. Summ. Judg.)

In two previously dismissed appeals filed with this Court (Nos. 2014-000596 and 2015-001873) during the foreclosure action, Mr. Gibbs sought appellate review of orders of reference entered in the foreclosure action and the lower court's denial of his motion to dismiss. (R. pp. \_\_, Order Dismissing Appeal No. 2014-000596; R. pp. \_\_, Order Dismissing Appeal No. 2015-001873.) This Court dismissed the appeals because the lower court's order of reference and denial of the motion to dismiss did not raise any immediately appealable issues at that time (R. pp. \_\_, Order Dismissing Appeal No. 2014-000596; R. pp. \_\_, Order Dismissing Appeal No. 2015-001873.)

After dismissal of the first appeal, the special referee recused himself from the foreclosure because Mr. Gibbs had amended a complaint that he filed in a *pro se* action in the United States District Court for the District of Colorado to add the special referee as a defendant. (R. pp. \_\_, Recusal Ord. (entered 5/19/2014); R. pp. \_\_, Recusal Ord. (entered 5/30/2014).) At a subsequent hearing, the lower court granted a motion for reference and referred the foreclosure case to the Master-in-Equity for Horry County. Because of the referral, the action was transferred to the Horry County Court of Common Pleas for Horry County ("Horry Circuit Court"), which assigned the case number 2015-CP-26-06384. After the conclusion of the second appeal, Appellants sued the Master-in-Equity for Horry County in the United States District Court for the District of Maryland. Upon motion by Nationstar, the Master-in-Equity recused herself from the action (R. pp. Mot. to

Recuse & Vacate Ord. of Reference; R. pp. \_\_\_, Mot. to Restore Action to 12<sup>th</sup> Cir.; R. pp. \_\_\_, Recusal Ord. (entered 3/5/2018)), and the Horry Circuit Court returned the action to the Florence Circuit Court. (R. pp. \_\_\_, Venue Ord. (entered 10/10/2018); R. pp. \_\_\_, Venue Order 12/18/2018).

In preparation for a hearing for its motion for summary judgment, Nationstar supplemented its motion by filing and serving an updated affidavit of indebtedness, an updated affidavit of fees and costs, and an Affidavit of Plaintiff as to Payment Application (“Affidavit as to Payments”). (R. pp. \_\_\_, Aff. T. Braune; R. pp. \_\_\_, Aff. H.G. Murrell (dated 2/06/2019); and R. pp. \_\_\_, Aff. C. Vieau.) During the hearing for Nationstar’s motion for summary judgment, the lower court presented Mrs. Gibbs with the opportunity to present arguments and evidence in response to Nationstar’s motion for summary judgment, but she elected not to present any argument or evidence during the hearing. (R. pp. \_\_\_, lines 16-25 & \_\_\_, lines 1-7, Hrg. Tr. (02/20/2019).) Given the arguments and materials presented by the parties, the lower court granted Nationstar’s motion for summary judgment by an order entered on March 4, 2019. (R. pp. \_\_\_, Foreclosure Judg.) Appellants now appeal that decision.

### ARGUMENT

#### **I. THE LOWER COURT CORRECTLY CONCLUDED THAT NATIONSTAR’S FORECLOSURE ACTION WAS NOT SUBJECT TO DISMISSAL.**

Because Nationstar stated a claim for foreclosure of a mortgage in the complaint and because the record establishes that Nationstar complied with the South Carolina Supreme Court’s Administrative Order, the lower court properly concluded that Nationstar’s foreclosure action was not subject to dismissal.

**A. Nationstar fully pleaded a foreclosure cause of action in the complaint.**

“[I]n reviewing the dismissal of an action pursuant to Rule 12(b)(6), S.C.R.C.P., the appellate court applies the same standard of review as the lower court.” *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). “The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief.” *Id.* at 395, 645 S.E.2d 247-48 (citing *Gentry v. Yonce*, 337 S.C. 1, 522 S.E.2d 137, 139 (1999)).

In their brief, Appellants contend that Nationstar’s complaint should have been dismissed because Appellants’ bank records purportedly showed that they had remitted payments around the time of the payment default identified in the complaint. Extraneous evidence, however, is not a ground to secure dismissal of a complaint. Instead, South Carolina courts determine whether dismissal of a complaint is appropriate by focusing on the allegations in the complaint. *See Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987) (“A ruling on a 12(b)(6) motion to dismiss must be based solely upon the allegations set forth on the face of the complaint and the motion cannot be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case.”). Accordingly, Appellants’ reference to materials beyond the allegations in Nationstar’s complaint never entitled them to dismissal of Nationstar’s foreclosure action.

Finally, Appellants argue that the absence of the mortgage loan and lack of an affidavit of debt as exhibits to the foreclosure complaint required dismissal of Nationstar’s foreclosure action. A review of the allegations in the complaint, however, reveals that Nationstar fully pleaded a viable foreclosure claim as required by South Carolina law. In South Carolina, “the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor’s default on

that debt.” *U.S. Bank Trust Nat’l Ass’n v. Bell*, 385 S.C. 364, 684 S.E.2d 199 (Ct. App. 2009).

Pursuant to the following allegations, Nationstar fully stated a claim for foreclosure of a mortgage in its complaint:

- Appellant Barbara Gibbs signed a promissory note on February 23, 2005 to borrow the principal sum of \$329,600.00 (R. pp. \_\_, Compl. ¶ 4);
- To secure her repayment obligations, Mrs. Gibbs also executed a mortgage that encumbered Mrs. Gibbs’s real property at 4257 Monterey Dr., Florence, SC, and the mortgage was recorded with the Register of Deeds for Florence County on March 4, 2005 in Book A909 at Page 1711 (R. pp. \_\_, Compl. ¶ 5); and
- Mrs. Gibbs defaulted on her repayment obligations (R. pp. \_\_, Compl. ¶ 5).

In addition to alleging the elements of a foreclosure claim, Nationstar also established its right to foreclose the mortgage by alleging the assignment of Mrs. Gibbs’s Mortgage Loan to Nationstar along with Nationstar’s status as the holder of Mrs. Gibbs’s mortgage loan. (R. pp. \_\_, Compl. ¶¶ 8-9.) Because Nationstar alleged that it was the holder of Mrs. Gibbs’s mortgage loan, Nationstar fully alleged its standing to foreclose the mortgage that Mrs. Gibbs signed. *See, e.g. Bank of America, N.A. v. Draper*, 403 S.C. 214, 223-24, 746, S.E.2d 478, 482-83 (Ct. App. 2013) (affirming summary judgment award to foreclosing plaintiff that presented evidence that it was the holder of the mortgage loan at issue pursuant to S.C. Code Ann. §§ 36-1-201(20) & 36-3-602(a)).

Viewing the allegations upon the face of the complaint in the “light most favorable to” Nationstar, the allegations reflect a properly pleaded cause of action for foreclosure. Accordingly, the lower court properly determined that dismissal of Nationstar’s foreclosure complaint was not warranted.

**B. Nationstar complied with the requirements of the South Carolina Supreme Court’s Administrative Order for Foreclosures.**

Nationstar’s compliance with the Administrative Order for Foreclosures precluded dismissal of its foreclosure action.

Under the Administrative Order, the South Carolina Supreme Court required counsel for foreclosing lenders to serve borrowers with a notice of the borrowers' right to foreclosure intervention before advancing any foreclosure actions filed after May 5, 2011 to a merits hearing. *See* S.C. Admin. Ord. No. 2011-05-02-01 (Sup. Ct. May 5, 2011). Additionally, if the borrower did not engage the lender in the foreclosure intervention process within thirty days of being served notice of foreclosure intervention rights, then lender's counsel could certify this fact to the lower court and advance the foreclosure. *Id.*

The record for this case reflects Nationstar's full compliance with the Administrative Order. First, the pleadings for this case show that Nationstar filed a Notice of Foreclosure Intervention and a Request for Foreclosure Intervention form along with the summons and complaint to initiate its foreclosure action. (R. pp. \_\_\_, Notice of Fore. Intv.) Next, the certificates of service confirming service upon Appellants show that a process server served Appellants with the summons, complaint, a Notice of Foreclosure Intervention, and a Request for Foreclosure Intervention form on November 8, 2013 at Appellants' property at 4257 Monterrey Drive, Florence, SC. (R. pp. \_\_\_, Cert. Serv. to M. Gibbs; R. pp. \_\_\_, Cert. Serv. to B. Gibbs.) Because Appellants did not engage Nationstar's counsel in foreclosure intervention procedures during the 30-day period after being served notice of their foreclosure intervention rights, Nationstar's counsel filed a certification with the lower court to certify that Appellants "failed, refused, or voluntarily elected not to participate in the foreclosure intervention process." (R. pp. \_\_\_, Cert. of Mortgagor Non-Compliance (dated 12/17/2013)).

After filing the Certification of Non-Compliance, Nationstar voluntarily sent Appellants a loss-mitigation application on March 19, 2014. (R. pp. \_\_\_, Cert. of Mortgagor Non-Compliance (dated April 9, 2014).) The instructions for the loss mitigation application included instructions

for completing the application and required return of a completed application and required financial documents within twenty (20) days. (*Id.*) Because Appellants did not provide any of the financial documents requested, Nationstar's counsel filed another Certification of Non-Compliance with the lower court to document Appellants' failure to participate in the loss mitigation process. (*Id.*)

The procedural history for this action reflects Nationstar's full compliance with the South Carolina Supreme Court's Administrative Order for Foreclosures. Therefore, Appellants failed to show any basis for dismissal of Nationstar's foreclosure action.

## **II. THE LOWER COURT PROPERLY AWARDED SUMMARY JUDGMENT TO NATIONSTAR.**

### **A. The lower court correctly concluded that Appellants' opposition to summary judgment failed to identify any triable issue of material fact.**

Because Appellants failed to present evidence that Mrs. Gibbs timely remitted the full amount of every payment coming due under the Mortgage Loan, the lower court properly concluded that there was no genuine issue of material fact to be determined at trial.

"When reviewing an order granting summary judgment, the appellate court applies the same standard as the lower court." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *David v. McLeod Regional Medical Center*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). "To withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence." *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 734 S.E.2d 161 (2012)(citing and quoting *Hancock v. Mid-South Mgmt Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009))

(internal quotations omitted). Moreover, “[a] court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner.” *David v. McLeod Regional Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

In their brief, Appellants contend that because they submitted affidavits and various bank records detailing payments of \$2,197.32 to Nationstar from January 2012 and to December 2013, a material question of fact regarding Mrs. Gibbs’s default existed. (App. Br. at 2-3, ¶¶ 14.a.-14.b & at 6, ¶ 21; R. pp. \_\_\_, Aff. B. Gibbs at ¶ 4 (2/26/2019); R. pp. \_\_\_, Aff. M. Gibbs ¶ 17 (2/26/2019); R. pp. \_\_\_, Aff. B. Gibbs at ¶ 4 (3/11/2019); R. pp. \_\_\_, Aff. M. Gibbs at ¶ 17 (3/11/2019).) Appellants also noted that Nationstar returned payments that they remitted for alleged payments due for October 3, 2013 through December 4, 2013. (R. pp. \_\_\_, Aff. B. Gibbs at ¶ 4 (2/26/2019); R. pp. \_\_\_, Aff. M. Gibbs ¶ 17 (2/26/2019); R. pp. \_\_\_, Aff. B. Gibbs at ¶ 4 (3/11/2019); R. pp. \_\_\_, Aff. M. Gibbs at ¶ 17 (3/11/2019).) None of this evidence, however, creates any material issue of fact because Appellants failed to present any evidence showing that they timely remitted the increased monthly payment of \$2,205.96 due for the months of April 1, 2013 and May 1, 2013, or the increased monthly payment of \$2,990.59 that came due as of June 1, 2013 and thereafter. (R. pp. \_\_\_, Aff. C. Vieau ¶¶ 15 & 17 & Exs. I & J.)

At the hearing for Nationstar’s motion for summary judgment, the lower court ordered Appellants to submit all affidavits supporting their position along with proposed orders. (R. pp. \_\_\_ - \_\_\_, lines 22-3, Hrg. Tr.) Appellants’ affidavits do not contest the increase in the monthly payment for the Mortgage Loan reflected in Nationstar’s evidence identifying an increase in property taxes and an advance to pay for hazard insurance coverage. (R. pp. \_\_\_, Aff. C. Vieau.)

Thus, Appellants failed to submit any evidence to contest Nationstar's motion for summary judgment, and the lower court's judgment should be affirmed. *See David v. McLeod Regional Med. Ctr.*, 367 S.C. at 250, 626 S.E.2d at 5 (“[S]ummary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner.”).

According to the uncontested evidence reviewed by the lower court, the monthly payments for the Mortgage Loan increased to \$2,205.96 as of April 1, 2013 because county taxes increased and caused the escrow portion of the monthly payment to increase from \$141.05 to \$149.69. (R. pp. \_\_, Aff. C. Vieau ¶ 15 & Ex. I.) Thereafter, the mortgage loan payment further increased to \$2,990.59 as of June 1, 2013, because Nationstar had to pay a hazard loss insurance premium of \$5,634.00. (R. pp. \_\_, Aff. C. Vieau ¶¶ 14 & 17 & Exs H, I, J.) Nationstar paid the hazard loss premium because Mrs. Gibbs failed to provide Nationstar with any written confirmation of her maintenance of coverage for the Property from December 16, 2012 through December 16, 2013, as required by the Mortgage Loan. (*Id.*; R. pp. \_\_ Mortg. ¶5.) Accordingly, because Appellants failed to present any evidence challenging the increase in the monthly payments identified by Nationstar and because Appellants never presented any evidence showing timely submission of the required payments, the lower court properly concluded that there was no genuine issue of material fact as to Mrs. Gibbs's default on repaying the Mortgage Loan.

**B. The procedural history for the foreclosure action reflects Nationstar's full compliance with the South Carolina Supreme Court's Administrative Order for Foreclosures.**

Because Nationstar complied with the requirements of the Administrative Order for Foreclosures, the lower court properly granted Nationstar's motion for summary judgment. In their brief, Appellants challenge the lower court's summary judgment award by claiming that

Nationstar failed to comply with the requirements of the Administrative Order for Foreclosures.

As detailed in part I.B. of this brief, Nationstar fully complied with the requirements of the Administrative Order by serving Appellants with a Notice of Foreclosure Intervention Rights on November 8, 2013, and then filing Certifications of Mortgagor Non-Compliance with the lower court before proceeding with the summary judgment hearing and advancing the foreclosure action. Moreover, because the Administrative Order authorizes judges to determine questions of compliance, the lower court properly concluded that Nationstar complied with the Administrative Order based upon the record before it. S.C. Admin. Ord. No. 2011-05-02-01 (“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.”)

**C. Summary judgment was not granted prematurely because Appellants had a full and fair opportunity to conduct and pursue appropriate discovery.**

Appellants contend that they were somehow precluded from pursuing any discovery since the filing of Nationstar’s foreclosure action. Because Appellants had a full and fair opportunity to pursue discovery in the years preceding the summary judgment hearing, the lower court’s grant of summary judgment was not premature.

Under South Carolina law, “[s]ummary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. Nonetheless, the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is not merely engaged in a fishing expedition.” *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (quoting *Baughman v. America Tel. & Tel. Co.*, 306 S.C. 110, 112, 410 S.E.2d 537, 544 (1991)).

Nationstar served its foreclosure complaint upon Appellants on November 8, 2013. and filed its motion for summary judgment on March 20, 2014. (R. pp. \_\_, Cert. of Serv.; R. pp. \_\_, Mot. Summ. Judg.) Along with the motion for summary judgment, Nationstar also served a memorandum in support along with various evidence and affidavits in support. (R. pp. \_\_, Mot. Summ. Judg.) To supplement its summary judgment record, Nationstar also served an Affidavit as to Payments upon Appellants on July 2, 2018. This Affidavit detailed the receipt of payments from the Appellants, specified instances of default, and explained Mrs. Gibbs's failure to maintain hazard loss insurance coverage and pay increased tax escrows. (R. pp. \_\_, Aff. Payment App.) The hearing for Nationstar's motion for summary judgment was not held until February 20, 2019. (R. pp. \_\_, Notice of Hrg. (filed 02/07/2019).)

Here, the procedural history for this case shows that Appellants practically had over five years to pursue whatever relevant discovery they desired to address the allegations in the foreclosure complaint and Nationstar's motion for summary judgment. In their motion to reconsider and their appellate brief, Appellants fail to advance any reasons, let alone sufficient ones, to explain why further discovery would uncover additional relevant evidence to create any genuine issue of material fact. During the six years of this foreclosure action's existence, Appellants have had a full and fair opportunity to pursue discovery but have failed to do so. Accordingly, the lower court's award of summary judgment to Nationstar was not premature, and the Court should affirm the lower court's ruling.

### **III. SOUTH CAROLINA LAW PERMITTED THE SPECIAL REFEREES APPEARING IN THE FORECLOSURE ACTION TO RECUSE THEMSELVES *SUA SPONTE*.**

Both of the special referees properly exercised their judicial discretion under South Carolina law to recuse themselves from the pending foreclosure action because of conflicts of

interest manufactured by Appellants' suing Special Referee Benjamin Moore and Master-in-Equity Cynthia Graham Howe in separate, frivolous federal actions filed outside of South Carolina.

In South Carolina, "a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to, instances where he has a personal bias or prejudice against a party." *Patel v. Patel*, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004). Moreover, "[t]he decision to recuse is within the discretion of the trial judge." *Ness v. Eckerd Corp.*, 350 S.C. 399, 404, 566 S.E.2d 193, 196 (Ct. App. 2002). Under the South Carolina Rules of Civil Procedure, masters-in-equity and special referees also have the discretion to recuse themselves from an action. *See* Rule 53(c), S.C.R.C.P. ("Once referred, the master or special referee shall exercise all power and authority which a circuit judge sitting without a jury would have in a similar matter.")

Both of the special referees assigned to Nationstar's foreclosure action issued recusal orders because Appellants sued the special referees in federal district courts outside of South Carolina. . (R. pp. \_\_, Recusal Ord. (entered 5/19/2014); R. pp. \_\_, Recusal Ord. (entered 5/30/2014); R. pp. \_\_\_\_, Recusal Ord. (entered 3/5/2018).) Indeed, both special referees believed that recusal was appropriate to avoid any appearance of impropriety. Accordingly, Appellants' arguments that recusal was improper is unavailing and without merit. *See, e.g., Christy v. Christy*, 317 S.C. 145, 452 S.E.2d 1 (Ct. App. 1994) (recognizing that a family court judge properly recused himself by stating: "We will not second guess his determination, for whether or not he was able to exercise impartiality, he judiciously chose to avoid the appearance of impropriety.").

Finally, Appellants' contention that referral of the foreclosure action to any special referee or master-in-equity or changes in venue give rise to appealable error is a moot question because a circuit court judge for the Florence Circuit Court decided the motion for summary judgment after

entry of the special referees' respective recusal orders. (See R. pp. \_\_ Hrg. Tr. (reflecting hearing conducted by Cir. Ct. J. M. Nettles; R. pp. \_\_, Foreclosure Judg. (reflecting entry by Cir. Ct. J. M. Nettles).)

**IV. APPELLANTS ARE NOT ENTITLED TO A JURY TRIAL FOR NATIONSTAR'S EQUITABLE FORECLOSURE ACTION.**

Because the foreclosure action is an action in equity, Appellants are not entitled to a trial by jury.

In *Wachovia Bank, N.A. v. Blackburn*, the Supreme Court of South Carolina explained that “[a] mortgage foreclosure is an action in equity.” 407 S.C. 321, 328, 755 S.E.2d 437, 440 (2014). “Because a foreclosure action is one sounding in equity, a party is not entitled, as a matter of right, to a jury trial.” *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 778 S.E.2d 106 (2015). Accordingly, Appellants’ arguments that they are entitled to a trial by jury for Nationstar’s foreclosure action fail as matter of law.

**CONCLUSION**

For the foregoing reasons, Nationstar respectfully requests that this Court affirm the decisions of the lower court and allow the foreclosure case to proceed without further delay.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned attorney for the Respondent Nationstar Mortgage LLC certifies that its *Respondent's Initial Brief* was served on the parties to this action by depositing a copy thereof in the United States Mail, first class, postage prepaid, on November 26, 2019, to the following:

Barbara Gibbs and Melvin Gibbs  
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November 26, 2019

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The Honorable Jenny Abbott Kitchens  
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Florence Common Pleas No. 2018-CP-21-03238  
Court of Appeals Number: 2019-000486

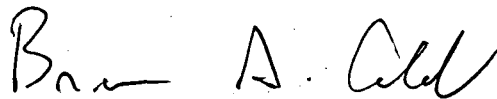
Dear Ms. Kitchens:

Enclosed please find an original and one (1) copy of Respondent Nationstar Mortgage LLC's Initial Brief and Designation of Matter to be included in the Record on Appeal in connection with the above-referenced matter. Please file the original and return the certified file stamped copy to me in the self-addressed envelope provided for your convenience.

By copy of this letter, I am serving Pro Se Appellants of record.

Thank you in advance for your kind consideration in this matter.

Sincerely,



Brian A. Calub

*Attorney for Respondent Nationstar Mortgage LLC*

Enclosures

cc: Barbara and Melvin Gibbs

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