THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Mikell R. Scarborough
Trial Court Case No. 2014-CP-10-07484

Appellate Case No. 2018-002228

Bayview Loan Servicing, LLC, a Delaware Limited Liability Company,
Respondent,

v.

Isabelle Murray, William Murray, Bernard Murray, Roland Murray, County of Charleston, and the South Carolina Department of Revenue, Defendants,

Of Whom Bernard Murray and Roland Murray are the Appellants.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Bayview Loan Servicing, LLC, a Delaware Limited Liability Company's ("Bayview") predecessor-in-interest filed the underlying mortgage foreclosure action on November 24, 2014. Defendants Isabelle Murray and William Murray and Appellants Bernard Murray and Roland Murray, all siblings (sometimes collectively the "Siblings"), were named as parties to the action who may claim an interest in the real property encumbered by the mortgage commonly known as 833 5th Ave. Charleston, S.C. ("Property"). On January 6, 2004, Isabelle Murray, as Personal Representative of the Estate of James Murray, conveyed the Property from the Estate to herself by Deed of Distribution recorded in Book M481 at Page 433 in the Charleston County Register of Mesne Conveyances ("RMC") on January 15, 2004. See August 21, 2018 Order at Finding #1 (R. p. 55). Isabelle Murray gave a mortgage encumbering the Property to Bayview's predecessor-in-interest, Citifinancial, Inc., on November 25, 2005 and recorded in the RMC in Book T563 at Page 189 on November 28, 2005 ("Mortgage")[1]. Id. The Mortgage secured a Note in the original principal amount of $75,109.19 given contemporaneously to Citifinancial, Inc. by borrowers Isabelle Murray and William Murray. See Complaint ¶4 (R. p. 2).

Five years following the execution and recordation of the Mortgage, the Siblings were parties to a quiet title action, Case No. 2009-CP-10-2245 ("Sibling Action"). See Complaint ¶10 (R. p. 3); see August 21, 2018 Order at Finding #3 (R. p. 55). Neither Bayview nor its

[1] Bayview is the current holder of the Mortgage by virtue of the assignments referenced in ¶7 of the Complaint (R. p. 3) and the April 27, 2017 Order Substituting Party Plaintiff (R. p. 18).

predecessors-in-interest were parties to the Sibling Action. See Appellant's Statement of the Case, 2nd ¶, 2nd Sentence; see August 21, 2018 Order at Finding #3 (R. p. 55). The Sibling Action made a finding that Isabelle Murray held an 81.25% interest in the Property, and each remaining Sibling held a 6.25% interest. See Id. The underlying foreclosure was referred to the Charleston County Master-In-Equity, The Honorable Mikell R. Scarborough.

Appellants did not file an Answer in the underlying action. Counsel for the Bayview signed a Notice of Default on Appellants and Defendant William Murray on September 6, 2017, which was served on September 8, 2017 and filed with the Charleston County Clerk of Court on September 13, 2017. See Notice of Default (R. p. 49). The March 15, 2018 Order enters Appellants into Default. See Findings of Fact ¶4 (R. p. 29); Conclusions of Law ¶8 (R. p. 33).

Judge Scarborough heard Bayview's summary judgment motion on December 17, 2017 ("December 2017 MSJ Hearing") that Appellant Bernard Murray attended, and counsel Willie B. Heyward, Esq. attended and appeared for the first time, though no notice of appearance had been filed or ever was filed with the Clerk of Court by Mr. Heyward. By Order dated March 15, 2018, Judge Scarborough granted foreclosure in favor of the Bayview as to the interests of Isabelle Murray and William Murray, and gave the Appellants and Bayview additional time to conduct discovery so that further inquiry could be taken into whether the Mortgage encumbered the interests of Appellants. Pertinent transcript discussions from said hearing and pertinent discovery appear as Exhibits in Bayview's subsequent March 16, 2018 Motion for Partial Summary Judgment ("March 2018 MSJ"). The March 2018 MSJ was heard May 8, 2018 and Judge Scarborough announced at the hearing the Mortgage encumbered the entire fee of the Property and that summary judgment was being awarded in favor of Bayview.

Judge Scarborough signed the Order Granting Plaintiff's Motion for Partial Summary

Judgment and Order of Judicial Sale on August 21, 2018 ("August Final Order"), which was filed with the Clerk's office on August 27, 2018. In the August Final Order, Judge Scarborough found that the 2005 Mortgage encumbered the entire fee of the Subject Property by virtue of her 100% ownership from the 2004 Deed of Distribution; that Appellants failed to respond to a request to admit that they conveyed their interest in the Subject Property to Isabelle Murray on or prior to November 25, 2005; that Bayview was protected as a lender under S.C. Code § 62-3-910 (2012); and that Appellants were not entitled to a *Res Judicata* defense since Bayview or its predecessors were not parties to the Prior Siblings Action. See August 21, 2018 Order at Findings #1-5 (R. p. 55).

The August Final Order set the Property to be sold on October 2, 2018. On August 29, 2018, "Notice of Entry of Judgment/Order Pursuant to Rule 77 SCRCP" was "mailed first class on Wednesday August 29, 2018 to all counsel of record and/or all parties entitled to receive notice" by the Charleston County Clerk of Court's Office ("Clerk"). See Notice of Entry of Judgment (R. p. 83).

On September 18, 2018, Martha Dennis, Esq., Judicial Law Clerk to Judge Scarborough ("Master's Judicial Law Clerk"), emailed all attorneys, including Mr. Heyward, notification that the August Final Order was filed on August 27, 2018, that a scanned copy could be found online, and to contact her with any questions. See The September 18, 2018 Email from Dennis to Heyward With Notice of the August Final Order ("Notice Email") (R. p. 84).

More than ten days later, Appellants' counsel emailed Judge Scarborough's office a motion entitled "Defendants Roland Murray and Bernard Murray's Motion to Set-Aside Foreclosure Sale" on the evening of October 1, 2018 ("Attempted Post-Trial Motion"). Judge Scarborough allowed a hearing concerning the Attempted Post-Trial Motion at 10:30 a.m. on October 2, 2018, prior to

the 11:00 a.m. sale that same day. A one hundred (100%) percent interest in the Property was sold at the 11:00 a.m. sale on October 2, 2018 pursuant to the August Final Order. The judge issued an Order denying the Attempted Post-Trial Motion on October 19, 2018 ("October 2018 Order") ruling that it was untimely, that it raised *res judicata* previously raised and ruled upon in the August Final Order, and for further reasons as stated in the October 2018 Order. See October 2018 Order (R. pp. 34-35). On November 28, 2018, Appellants served their Notice of Appeal of the October 2018 Order, and only of the October 2018 Order[2].

STANDARD OF REVIEW

A mortgage foreclosure is an action in equity. Fibkins v. Fibkins, 303 S.C. 112, 115, 399 S.E.2d 158, 160 (Ct.App. 1990). In an action in equity referred to a master or special referee for final judgment with direct appeal to the Court of Appeals, the appellate court may view the evidence to determine facts in accordance with its own view of the preponderance of the evidence, though it is not required to disregard the findings of the master or special referee. Friarsgate, Inc. v. First Federal Sav. & Loan Ass'n, 317 S.C. 452, 456, 454 S.E.2d 901, 904 (Ct. App. 1995).

ARGUMENT

1. The August Final Order is the law of the case because Appellants failed to timely file a post-trial motion and failed to timely appeal the August Final Order, and the March 2018 Order.

The Master's Judicial Law Clerk emailed all counsel of record, including Appellant's counsel, on September 18, 2018, stating the following:

> *Mr. Walker,*
>
> *The order was filed in the clerks* (sic) *office on August 27, 2018. A scanned copy can be found online. If you have any further questions, please let me know.*

[2] Appellants fail to include the October 2018 Order in their Designation of Matter.

Best,
Martha "Marti" Dennis, Esq.

(emphasis added). Ms. Dennis emailed this to Appellant's counsel's (Willie Heyward, Esq.) email address as listed with the South Carolina Bar AIS system: wheyward80@gmail.com, as well as his other personal email address of Heywarddwighth@msn.com. See Notice Email (R. p. 84). This Notice Email constitutes "receipt of written notice of the entry of the order." See Rules 50, 52 and 59, SCRCP; see also Rule 203(b)(1), SCACR; see also Wells Fargo Bank, N.A. v. Fallon Properties South Carolina, LLC, 422 S.C. 211, 810 S.E.2d 856 (2018); see also Canal Ins. Co. v. Caldwell, 338 S.C. 1, 524 S.E.2d 416 (Ct.App. 1999). The August Final Order constitutes a final order that ordered the Property to be sold October 2, 2018.

Further, the Clerk mailed first class notice to "all counsel of record and/or all parties entitled to receive notice" on August 29, 2018. See Notice of Entry of Judgment (R. p. 83). If Mr. Heyward failed to file the proper written notice of his appearance as counsel of record entitling him to written notice of orders, then the orders that the Clerk mailed to his clients is sufficient notice as of August 29, 2018. Judge Scarborough's October 2018 Order correctly finds that Mr. Heyward did not make a written filing in the matter until October 2, 2018. See October 2018 Order (R. pp. 34-35). If Mr. Heyward did take sufficient action to entitle him to notice from the Clerk, then there is nothing of record, in the Appellants' brief, or in the Designation of Matter that supports any contention that Mr. Heyward did not receive Notice of Entry of Judgment.

Whether this Court counts from August 29, 2018 or September 18, 2018, the Appellants failed to file a post-trial motion within ten (10) days of either date. The Attempted Post-Trial Motion was signed by Mr. Heyward and emailed to the Court on October 1, 2018 and filed with the Clerk on October 2, 2018, both of which are more than the ten days required under Rule 59, SCRCP and Fallon, supra.

The failure to timely file a Rule 59 motion causes the appellate clock to run from, at best, September 18, 2018. See Rule 203(b)(1), SCACR. Appellants did not sign their Notice of Appeal in the instant matter until November 2, 2018 and, at best, served it on that day[3], which is more than thirty (30) days after September 18, 2018. Therefore, the August Final Order is the law of the case and there is no jurisdiction for this Court to consider an appeal of the August Final Order. Mears v. Mears, 287 S.C. 168, 337 S.E.2d 206 (1985). Further, the Notice of Appeal is only as to the October 2018 Order. The October 2018 Order cannot be considered because the underlying Attempted Post-Trial Motion was served and filed on, at best, October 1, 2018, which is more than ten days after September 18, 2018. The court lacks jurisdiction to hear an appeal on the October 2018 Order under Rule 203(b)(1) because Appellants failed to timely file a post-trial motion, and their November 2, 2018 Notice of Appeal was more than thirty days after their last day to appeal on October 17, 2018. Id.

The Fallon case sets a standard that controls this appeal. Due to the dilatory timing of the Attempted Post-Trial Motion and the failure of it to come within the Fallon standard, this Court simply cannot reach any merits of the substantive issues in this appeal and must dismiss the case on procedural and jurisdictional precedent.

2. Judge Scarborough correctly ruled against Appellants and in favor of Bayview on the substantive grounds in his August Final Order and October 2018 Order.

Judge Scarborough correctly relied on the evidence presented at the May 2018 hearing on the March 2018 MSJ to rule in favor of Bayview. Appellants' sole argument at the May 2018

[3] Appellants Certificate of Service filed with this Court shows a service date of November 28, 2018 for the Notice of Appeal. The undersigned's office did receive a copy of the Notice of Appeal by mail on November 8, 2018. In any event, the Notice of Appeal could not have been served prior to the day it was signed on November 2, 2018, which is more than thirty days after the September 18, 2018 Notice Email.

hearing was that Bayview, who encumbered the Property with its Mortgage in 2005, should be bound by the Sibling Action. Neither Bayview nor its predecessors-in-interest were parties to the Sibling Action. See Appellant's Statement of the Case, 2nd ¶, 2nd Sentence; see August 21, 2018 Order at Finding #3 (R. p. 55); see 2009 Decree as to Quiet Title caption (R. p. 66). Judge Scarborough correctly ruled that *Res Judicata* cannot apply when Bayview and its predecessors were not parties to the Sibling Action.[4] See Judy v. Judy, 393 S.C. 160, 167, 712 S.E.2d 408, 412 (2011) (holding that the following elements must be proven for *res judicata* to bar an action: (1) identity of parties; (2) identity of subject matter; (3) adjudication of the issue in the former suit); see also May 8, 2018 transcript excerpts. Appellants' argument in their brief that constructive notice through a lis pendens that is five years subsequent to Bayview's Mortgage can somehow unwind a valid, prior mortgage lien simply cannot stand and contradicts common law and common sense. There is no ongoing duty of a 24/7/365 title search after a mortgage validly encumbers a property. It was incumbent on the parties to the Sibling Action to name Bayview in that action if they wanted to affect its priority lien position. Because they did not, *Res Judicata* must fail as Judge Scarborough correctly held in his August Final Order. He correctly held in his October 2018 Order on the Attempted Post-Trial Motion that, to the extent it was timely (which it was not for the reasons argued above), *Res Judicata* had been raised and ruled upon in the August Final Order and was therefore properly denied.

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[4] Mr. Heyward ... – res judicata is our position, that this --
The Court: Let me just say, I don't think it's *res judicata*. One, we don't have identity of the parties. Okay? I understand what you're saying, but that lender was not a party to that action in 2009 that was decided in 2011. The interest that the Court made is what's of interest to me, but I'm trying to figure out how it was that the Brush law Firm decided to give a $75,000 loan on the signature of two of the siblings and not four of the siblings. That's the question for the Court. We're going prior to 2009. We're going to 2005. See May 8, 2018 Transcript Page 16 at Line 3 – 13 (R. p. 92, lines 1-13)

At the May 18, 2018 hearing on the March 2018 MSJ, Judge Scarborough inquired into the title upon which Bayview's predecessor relied in giving its Mortgage in 2005. The Court found without dispute or evidence to the contrary that Isabelle Murray held a 100% interest in the Property in 2005 per the Deed of Distribution[5] upon which Appellant's predecessor relied, and was protected under S.C. Code 62-3-910 (2012).[6] See August 21, 2018 Order (R. pp. 54-59); see also May 8, 2018 transcript excerpts(R. pp. 92-95); see also Deed of Distribution (R. p. 70).

Moreover, Bayview attached exhibits to its March 2018 MSJ that it argued at the May 2018 hearing showing that Appellants conveyed any interest they may have claimed in the Property to Isabelle Murray by way of quitclaim deed prior to the Mortgage. Judge Scarborough's finding that Appellants failed to respond to Request to Admit #2 that was served on them January 5, 2018 that was an Exhibit to the March 2018 MSJ, which deems the Request admitted under Rule 36, SCRCP, is further grounds to affirm his substantive ruling. The admission is as follows: *Admit*

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[5] A copy of the Deed of Distribution that is a public record recorded in the Charleston RMC was handed up to the judge and counsel without objection; See Id. Page 20; Line 6 (R. p. 20, lines 2-7).

[6] Mr. Walker: Your Honor, there is a Probate statute that protects mortgagees for value without notice. I don't know it by heart, but I can certainly get that to the Court.
The Court: Okay. Just one second. Where is my order? All right. Well, this case didn't make sense to me until I got this Deed of Distribution. I think it was agreed that James Murray was the owner of the property at the time of his death. For whatever reason, and under whatever source, Isabelle Murray was appointed Personal Representative of the estate. She then, by Deed of Distribution, conveyed title to herself individually.
Mr. Heyward: That is correct. See Id. Page 20, Line 25 – Page 21, Line 14 (R. p. 93).
Mr. Heyward: All of this was litigated without notice to the other parties she deeded it to herself with this 100 percent interest and went and got this loan.
The Court: Well, that puts them in the position of a BFP. They're not a purchaser but they're a lender. They're entitled to rely on the record. See Id. Page 23 at Line 25 (R. p. 94, lines 22-25 through R. p. 95, lines 1-3).
The Court: That makes all the sense in the world to me, but what the lender is entitled to rely upon is the record at the time that the loan is made. What we did in 2009 was to go back after the fact and find that the title should have been other than what the title was at the time the loan was taken out. See Id. Page 24 at Line 17 (R. p. 95, lines 17-23)

you conveyed by deed your interest in the Subject Property to Isabelle Murray on or prior to November 25, 2005. (emphasis added). See Exhibit 2 to the March 2018 MSJ (R. p. 99 and R. p. 111). Exhibits 1 and 3 to the March 2018 MSJ are further sustaining grounds for Judge Scarborough's motion.

In the underlying matter, Appellants failed to introduce any opposing affidavits per Rule 56, SCRCP, to counter the grounds for the March 2018 MSJ. Appellant's Initial Brief is void of any citation to a record or any document in its Designation of Matter.

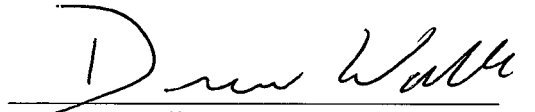
Appellants misrepresent Bayview's positions in their brief. Bayview never argued *Res Judicata*. Rather, that was the failing argument of Appellants. Bayview never argued S.C. Code 62-3-714 and Appellants cannot point to anything in the record or transcript to support such a claim. Appellants' arguments under S.C. Code 62-3-713 fail when contrasted with the applicable, controlling statute ruled upon by Judge Scarborough, S.C. Code 62-3-910 (2012).

Even though the Court cannot reach any substantive legal arguments Appellants may posit due to the jurisdictional issues in this appeal, Judge Scarborough correctly denied Appellants' only argument of *res judicata* and appropriately granted summary judgment for foreclosure of the Property.

CONCLUSION

For the foregoing reasons, Bayview respectfully requests that the August Final Order and the March 2018 Order be affirmed, and that Bayview be permitted to submit a petition for costs under Rules 222 and 240, SCACR, and that Bayview's costs be added to the remittitur.

Respectfully submitted,



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January 27, 2019

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR. Minor formatting changes have been made and typographical errors have been corrected as allowed by Rule 211(b), SCACR.

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