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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM JASPER COUNTY
Court of Common Pleas Case No. 2015-CP-27-00524
The Honorable Benjamin C.P. Sapp, Special Referee

APPELLATE CASE NO. 2017-002286

Deutsche Bank National Trust Company, as Trustee for
GSAA Home Equity Trust 2006-17, Asset-Backed
Certificates, Series 2006-17, Respondent,

v.

Louise Legare-Gardner; CIT Bank, National Association
s/b/m to IndyMac Bank, F.S.B., Defendants,

Of whom Louise Legare-Gardner is the Petitioner.

**RESPONDENT DEUTSCHE BANK NATIONAL TRUST COMPANY, AS
TRUSTEE FOR GSAA HOME EQUITY TRUST 2006-17, ASSET-BACKED
CERTIFICATES, SERIES 2006-17'S RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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2006-17, ASSET-BACKED CERTIFICATES,
SERIES 2006-17*

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QUESTIONS PRESENTED

- I. DID THE PETITIONER COMPLY WITH ALL REQUIRED PROCEDURAL PRERQUESITES BEFORE FILING HER PETITION FOR WRIT OF CERTIORARI?
- II. IS THE PETITIONER’S PETITION FOR WRIT OF CERTIORARI TIMELY?
- III. DOES THE PETITIONER’S PETITION FOR WRIT OF CERTIORARI CONTAIN ALL REQUIRED DOCUMENTS AND INFORMATION?

STATEMENT OF CASE

This Petition arises from an unpublished, *per curiam* opinion issued by the Court of Appeals. It does not present any novel question, does not raise a substantial constitutional issue, and it is not in conflict with any prior decision of this Court or the Court of Appeals. In her Petition for Writ of Certiorari to the Court of Appeals (“Petition”), Petitioner omits a statement of the facts of the case. Therefore, Respondent will briefly set forth those facts.

A. Appellant’s Default and the Trail Court’s Entry of the Order Permitting Foreclosure.

On or about July 24, 2006, Petitioner Louise Legare-Gardner (“Gardner”) executed an Adjustable Rate Note (“Note”) in favor of Quicken Loans, Inc. in the amount of \$188,000. (R. p. Supp 001, ¶ 4, lines 1-4). The Note had an interest rate of 6/375%, and was secured by a Mortgage (“Mortgage”) on the Property located at 1471 South Okatie Highway, Hardeeville, South Carolina 29927. (R. p. Supp 002, ¶ 4, line3-p. Supp 002, ¶ 5, line 25). The Mortgage was recorded on August 1, 2006 in Book 452 at pge 231, in the Jasper County Registry. (R. p. Supp 002, ¶ 6, lines 1-2). The Note and Mortgage were thereafter both transferred to Plaintiff-Respondent Deutsche Bank National Trust Company, as Trustee for GSAA Home Equity Trust 2006-17, Asset-Backed Certificates, Series 2006-17 (“Deutsche Bank”), with the assignment of Mortgage to Deutsche Bank recorded on February 6, 2012 in Book 822 at Page 122 of the Jasper County Registry. (R. p. Supp 002, ¶ 7, lines 1-3).

Deutsche bank initiated this foreclosure action against Gardner and OneWest Bank, National Association s/b/m to IndyMac Bank, F.S.B. (“One West”) on December 7, 2015. (R. pp. Supp 001-Supp 005). A Lis Pendens was also filed by Deutsche Bank that same day therewith. (R. p. Supp 008, ¶ 1, line 1). The Complaint alleged that Gardner had been in default for failing to make the February 1, 2010 and subsequent payments, and that Deutsche Bank was

in possession of the Note and entitled to enforce the Note and Mortgage. (R. p. Supp 002, ¶ 7, line 1-¶8, line 2; R. p. Supp 003, ¶ 11, lines 104; R. p. Supp 003, ¶ 15, line 1-p. Supp 004, line 8). Deutsche Bank also filed an Affidavit of Non-Military, Notice of Right to Foreclosure Intervention, and a letter to Gardner confirming that a notice of rights was mailed to her on November 12, 2015.

Gardner was properly served with the Complaint on January 20, 2016, and an Affidavit of Service was filed with the Jasper County Clerk of Court.¹ In her response to the Complaint, Gardner filed documents entitled “Notice About Citizenship,” “Affidavit of Facts Concerning American Citizens,” and “Response to Complaint” on February 16, 2016.

On February 24, 2016, the case was transferred to the Honorable Benjamin C.P. Sapp as Special Referee by an Order of Reference. The Order of Reference permitted Special Referee Sapp “to take testimony arising under the pleadings and to make his findings of fact and conclusions of law and with authority to enter final judgment in the case.” (R. p. Supp 025-Supp 026).

Deutsche Bank thereafter filed a Rule 12(f) Motion to Strike Gardner’s responsive pleading(s). Following proper notice to Gardner, a trial was held before Judge Sapp on April 1, 2016 (“Trial”), whereby Deutsche Bank presented evidence as to its ability to foreclose on the Property following Gardner’s alleged default in payment. At Trial, Deutsche Bank offered the Record of Hearing for Foreclosure Case, which was attested to by William P. Stork, and included the original Note and a copy of the original Mortgage encumbering the Property, and Mr. Stork’s sworn testimony as to the satisfaction of all South Carolina statutory and administrative

¹ Co-defendant OneWest was named as a party because it might have an interest in the Subject Property. (R. P. Supp 004, ¶ 16, lines 1-12). OneWest was later declared in default for failing to answer the Complaint.

requirements necessary to foreclose, Gardner's ongoing default of the Note, and the total amount of indebtedness arising from this default. (R. pp. Supp 026-Supp 030).

On April 25, 2016, Judge Sapp entered an Order entitled "Special Referee's Order and Judgment of Foreclosure and Sale" ("2016 Foreclosure Judgment"), which provides in pertinent part that:

- Gardner was notified of the time, date, and location of the Trial (R. p. Supp 009, ¶ 7, line 1);
- Gardner executed the Note and provided the Mortgage on the Property as security for her payment obligations under the Note (R. p. Supp 009, ¶ 8, line 1-¶10, line 1);
- The Mortgage was assigned to Deutsche Bank (R. p. Supp 009, ¶ 11, lines 1-3);
- Gardner failed to comply with her payment obligations under the Note and Deutsche Bank (as holder of the Note) accelerated the entire indebtedness (R. p. Supp 010, ¶ 15, lines 1-3);
- The total debt secured by the Note and Mortgage is \$256,627.00 (R. p. Supp 010, ¶ 16, line 21);
- Deutsche Bank expressly waived the right to a personal or deficiency judgment pursuant to Rule 71(b), SCRCF (R. p. Supp 011, ¶ 17, lines 1-3);
- That Deutsche Bank "should have judgment of foreclosure of its Mortgage; and the Property should be ordered sold at public auction after due advertisement" (R. p. Supp 011, ¶ 1, lines 1-2);
- "There is due to [Deutsche Bank] on its Note and Mortgage the sum of \$256,627.00, representing the Total Debt due to [Deutsche Bank] as outlined above, together with

interest thereon at the rate provided in the Note to the date hereof.” (R. p. Supp 011, ¶ 2, lines 1-3).

The 2016 Foreclosure Judgment was served on Gardner on July 13, 2016. **Gardner has never appealed the 2016 Foreclosure Judgment.**

B. Gardner’s Attempted Removal of the Case to Federal Court and Chapter 13 Bankruptcy Following her Failure to Appeal the 2016 Foreclosure Judgment.

Following entry of the 2016 Foreclosure Judgment, Gardner filed a Notice of Removal on June 1, 2016, seeking to remove this case to the Federal District Court for the District of South Carolina (Case No. 9:16-cv-01777-CWH). This case was remanded back to the state court on February 1, 2017 by order of the federal district court.

Following remand, Deutsche Bank filed a Notice of Sale on April 4, 2017, re-setting the sale date of the Property for May 9, 2017. In response, Gardner on April 21, 2017 filed (1) a Judicial Notice of Disclaiming Trusteeship and Affidavit in Support, (2) a response to the summons and complaint filed in 2016, and (3) a number of other documents described by the trial court as “nonsensical.”

On May 5, 2017 (four days before the scheduled foreclosure sale), Gardner filed for Chapter 13 bankruptcy protection with the District of South Carolina (Case No. 1702306-jw) and the sale of the Property was stayed by order of the bankruptcy court on June 5, 2017. Gardner’s bankruptcy proceeding was later dismissed on June 9, 2017 (34 days after she filed for bankruptcy protection), and this case was restored in the state trial court on July 10, 2017.

C. Supplemental Hearing and Appeal.

Following the dismissal of Gardner's bankruptcy proceeding, Deutsche Bank petitioned the trial court for a supplemental hearing to re-set the Property for a November 7, 2017 sale date. Gardner filed an affidavit and motion on September 1, 2017 objecting to Deutsche Bank's request for a supplemental hearing and requesting a new trial scheduling order.

A hearing was held before Judge Sapp on the parties' motions on September 5, 2017. After hearing arguments from Gardner and counsel for Deutsche Bank, Judge Sapp entered an Order Denying Defendant's Objection to Hearing Schedule and Request for Trial Scheduling Order/Motion to Set and Certificate of Readiness for Trial along with entering an Order Granting Plaintiff's Request to Re-Set Property for Foreclosure Sale (Order Resetting Property Sale). (R. P. 22-24). The Order Resetting Property Sale was served on Gardner on October 3, 2017. (R. p. 28).

On November 2, 2017, Gardner filed and served a Notice of Appeal. (R. p. Supp 019-021). On June 3, 2020 the South Carolina Court of Appeals issued their dispositional opinion affirming the trial court's ruling. On June 23, 2020 the remittitur was sent to the Circuit Court. **At no time since the Court of Appeals issued their dispositional opinion nor since the remittitur was sent did Gardner file a petition for rehearing or reinstatement.**

On December 10, 2020, a Notice of Sale was filed resetting the judicial sale for the subject property for January 5, 2021. On January 4, 2021, one day prior to the scheduled judicial sale, Gardner filed the Petition for Writ of Certiorari in an obvious attempt to further delay disposition of this matter and further delay the sale of the subject property.

ARGUMENT

IV. PETITIONER DID NOT COMPLY WITH ALL THE PROCEDURAL PREREQUISITE REQUIREMENTS PRIOR TO FILING HER PETITION FOR WRIT OF CERTIORARI

“Petitions for rehearing must be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court.” Rule 221(a), SCACR. “A decision of the Court of Appeals is not final for the purpose of review by the Supreme Court until the petition for rehearing or reinstatement has been acted on by the Court of Appeals.” Rule 242(c), SCACR.

The South Carolina Court of Appeals issued their dispositional opinion on June 3, 2020. Any petition for rehearing from Gardner must have been received by the Court of Appeals no later than June 19, 2020. At no time did Gardner file a petition for rehearing with the Court of Appeals. As is stated in Rule 242(c), SCACR, a petition for rehearing is a necessary precursor to any petition for writ of certiorari. As Gardner did not file a petition for rehearing, Gardner’s petition for a writ of certiorari is procedurally improper and should be denied.

Additionally, the proper manner to preserve any and all issues for review is through addressing those issues in a petition for rehearing. Because Gardner did not file a petition for rehearing, Gardner failed to preserve any arguments or issues for review. *Mazloom v. Mazloom*, 392 S.C. 403, 403, 709 S.E.2d 661, 661 (2011) (holding “this portion of the question is not preserved for review because it was not raised in the petition for rehearing to the court of appeals”); *Camp v. Springs Mortg. Corp.*, 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993) (“The Court of Appeals did not address this issue nor did [Petitioner’s] petition for rehearing for the court to consider it. We therefore decline to address this issue”). Because no issues have been preserved, the Court should deny Gardner’s Petition for Writ of Certiorari.

V. PETITIONER’S PETITION FOR WRIT OF CERTIORARI IS UNTIMELY

“A petition for writ of certiorari shall be served on opposing counsel and filed with proof of service with the Clerk of the Court of Appeals and the Clerk of the Supreme Court within thirty (30) days after the petition for rehearing or reinstatement is finally decided by the Court of Appeals.” Rule 242(c), SCACR.

Assuming, *arguendo*, that Gardner is granted leeway by the Court regarding her failure to file a petition for rehearing and the timeframe in which to file a petition for writ of certiorari began to run when the Court of Appeals issued their dispositional opinion, Gardner’s Petition is still extremely untimely. The Court of Appeal issued their dispositional opinion on June 3, 2020, Gardner did not file her Petition for Writ of Certiorari until January 4, 2021. Under Rule 242(c), SCACR, the petition must be filed and served within 30 days of the final order from the Court of Appeals. This time period ran on July 3, 2020. January 4, 2021, the date which Gardner finally decided to file her petition, is 215 days after the filing of the dispositional opinion from the Court of Appeals.

Because Gardner’s Petition for Writ of Certiorari is extremely untimely, it should be denied by the Court.

VI. PETITIONER’S PETITION FOR WRIT OF CERTIORARI IS FATALLY INCOMPLETE

“The petition for writ of certiorari shall contain the following:

- (1) Certification by counsel for petitioner that a petition for rehearing or reinstatement was made and finally ruled upon by the Court of Appeals.
- (2) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court. A question presented will be deemed to include every subsidiary question fairly comprised therein.

- (3) A concise statement of the case, containing the facts material to the consideration of the questions presented.
- (4) A direct and concise argument in support of the petition. The argument on each question shall include citation of authority and specific reference to pertinent portions of the Record on Appeal. Failure of a petitioner to present with accuracy, brevity, and clarity the information and arguments that are essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition.”

Rule 242(d), SCACR.

“At the same time the petition is filed, the petitioner shall also file two (2) copies of the Appendix with the Clerk of the Supreme Court. As provided by Rule 267(d), one copy filed with the Supreme Court shall be filed unbound. The Appendix shall include the following:

- (1) A copy of the Record on Appeal and brief(s), or in post-conviction relief matters, a copy of the Appendix, petition for writ of certiorari, return, reply and any briefs filed under Rule 243, SCACR.
- (2) If the matter was dismissed by the Court of Appeals for procedural or other reasons, the Appendix shall include any documents relevant to the dismissal including any motion to dismiss and any return or reply that may have been filed.
- (3) A copy of the decision of the Court of Appeals on which certiorari is sought.
- (4) A copy of the petition for rehearing or reinstatement filed in the Court of Appeals and the Court's ruling on that petition.

If the Appendix contains any of the documents specified in (2) above, a copy of the Appendix must be served on the opposing counsel and proof of service of the Appendix must be filed when the petition for writ of certiorari is filed.”

Rule 242(e), SCACR.

Gardner’s Petition for Writ of Certiorari was merely a one-page document entitled “Petition for Writ of Certiorari.” None of the aforementioned required documents or information were presented along with the one-page document filed by Gardner. Several of the above requirements cannot be satisfied by Gardner as they require certifications or information

regarding the petition for rehearing in the Court of Appeals case, and Gardner failed to file a petition for rehearing in the Court of Appeals case.

Because Gardner's Petition for Writ of Certiorari is fatally incomplete, and because several of the required filings are unobtainable due to Gardner's failure to file a petition for rehearing, the Court should deny Gardner's Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, Respondent Deutsche Bank National Trust Company, as Trustee for GSAA Home Equity Trust 2006-17, Asset-Backed Certificates, Series 2006-17 respectfully requests that the Court deny the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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January 13, 2021