

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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APPEAL FROM LEXINGTON COUNTY

COURT OF COMMON PLEAS

Lisa Smith, Special Referee

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Appellate File No.: 2018-001161

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Albert J. Sanders,.....Appellant,

v.

Wells Fargo Bank, NA, Ultimate Successor to First Union Bank.....Respondent.

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**WRIT OF CERTIORARI**

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**RECEIVED**

**Aug 19 2021**

**S.C. SUPREME COURT**

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## STATEMENTS OF ISSUES ON APPEALS

- I. THE FINDING OF THE SPECIAL REFEREE THAT PLAINTIFF COMPLIED WITH THE SOUTH CAROLINA SUPREME COURT ADMINISTRATIVE ORDER 2009-05-22-01 (hereinafter, "the Administrative Order") WAS IN ERROR AS DEFENDANT PROVIDED AMPLE PROOF THAT PLAINTIFF DID NOT COMPLY DESPITE NUMEROUS REQUESTS BY DEFENDANT.
- II. THE ORDER OF THE SPECIAL REFEREE GRANTING JUDGMENT TO THE PLAINTIFF WAS IN ERROR AS DEFENDANT'S TESTIMONY AND EVIDENCE SUBMITTED SHOWED PLAINTIFF ACTED WITH "UNCLEAN HANDS" IN THIS MATTER AND WAS NOT ENTITLED TO JUDGMENT.
- III. THE COURT OF APPEALS CONCLUDING THE APPELLANT DID NOT ARGUE RESPONDENT DID NOT COMPLY WITH THE ADMINISTRATIVE ORDER.
- IV. THE COURT OF APPEALS IN RULING APPELLANT DID NOT ARGUE UNCLEAN HANDS AND THE ISSUE WAS NOT PRESERVED THROUGH THE FILING OF A RULE 59(e) MOTION

## STATEMENT OF THE CASE

This matter was filed on October 19, 2011 by Plaintiff, seeking foreclosure of real property owned by Defendant involving the construction of the home. The Defendant timely answered on November 18, 2011 denying the allegations of the complaint and raising numerous defenses including failure of the Plaintiff to comply with the Administrative Order and Unclean Hands. A final hearing was held in front of the Honorable Lisa Lee Smith on March 15, 2018. By an Order filed May 15, 2018, Plaintiff was granted the relief requested in the form of an Order of Foreclosure and Sale. Pursuant to the issuance of that Order, a timely appeal was filed to this court on June 13, 2018.

The Court of Appeals issued an Order on May 12, 2021 holding that Appellant did not argue that Respondent failed comply with the 2009 Administrative Order in his answer or during trial. The Court of Appeals also held that the issue of unclean hands was not preserved for review as the Special Referee did not rule on the issue and no Rule 5(c) motion was filed seeking a ruling from the trial court. Further, the Court of Appeals had not argued the motion to the Special Referee.

## ARGUMENTS

Appellant contends the Special Referee erred in finding the Plaintiff complied with the Administrative Order as there was no evidence presented by Plaintiff showing such compliance while Defendant testified adamantly that he made continued efforts to obtain loan modification. The Special Referee found that Plaintiff complied with the Administrative Order. Order Page 2 para.9.

The Appellant testified he sought loan modification numerous times, even contacting Respondent's attorney, but had received no response Tran. P.49 Lines 13-22-: He further testified he received no documentation from the Plaintiff at any time regarding possible modification Tran. P.50 Lines 14-16.

In response, Respondent presented correspondence it purported was sent from the lender to Appellant dated November 15, 2011. Tran. P 69 Lines23-25. Tran. P.70 Lines 1-17.

The record suggests this correspondence was an application for assistance sent by Respondent to Appellant. Tran. P.70 Line 25 and Tran. P.71 Lines 1-17. Though the Plaintiff initially entered this document into evidence as Plaintiff's Exhibit 11, it was later withdrawn. Tran. P.73 Lines 12-16. Tran. P.75 Lines 17-21.

With the withdrawal of this Exhibit, Respondent presented no evidence that they had even attempted to comply with the Administrative Order and the testimony of the Defendant was not refuted in any manner. As the Appellant presented unrefuted evidence of *his* attempts to have the loan considered for modification as required by the Administrative Order, the Special Referee erred in finding compliance on behalf of the Respondent. The failure of the Respondent to follow the Administrative Order is one of the basis for Appellant's defense of Unclean Hands as alleged in his Answer. In *Straight v. Goss*, 383 S.C. 180, 678 S.E.2d 443, 457-58 (Ct. App. 2009) (citations omitted), the Court stated as follows:

The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief.

The Court of Appeals considered this matter and held the Appellant did not argue Respondent did not comply with the Administrative Order. This ruling was issued despite Appellant testifying he sought loan modification numerous times throughout the foreclosure process but had not received any response from the Respondent. He further testified he received no documentation from the Respondent regarding loan modification. The Respondent initially entered a document into evidence purportedly showing communication regarding loan modification from Respondent to Appellant dated November 15, 2011 but later withdrew this document

Appellant respectfully submits that Appellant's testimony in trial suffices as argument that Respondent did not comply with the Administrative Order and specifically challenged any assertion that they did. Further, the Respondent presented no evidence disputing these allegations as they withdrew the one document they claimed to support their defense to this claim.

Appellant respectfully submits the testimony of the Appellant and the failure of the Respondent to introduce any evidence which contradicts such testimony shows that Appellant did challenge Respondent's compliance with the Administrative Order and that Respondent did not comply with same.

The Court of Appeals also held Appellant did not argue Unclean Hands and the issue was not preserved through the filing of a Rule 59(c) motion. Appellant alleges Respondent's failure to comply with the Administrative Order is the crux of its unclean hands. As Appellant testified to this failure, he would argue that the issue was raised at trial. Further, the Order of the Special Referee specifically found the Respondent did comply with the Administrative Order which Appellant would contend is a ruling on the issue of unclean hands.

Appellant would respectfully request the Court reconsider and issue an opinion finding this issue was argued by Appellant and ruled upon by the Special Referee and then find that Appellant is entitled to have the judgment of the trial court dismissed with prejudice.

#### CONCLUSION

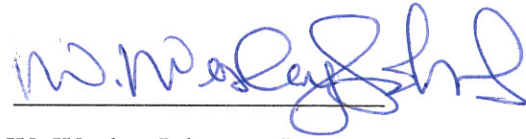
The Special Referee's Order in this matter finds that Respondent complied with the Administrative Order regarding required attempts at loan modification though Respondent presented no evidence showing any attempt at compliance. This failure to comply with the Administrative Order despite Appellant's repeated entreaties for assistance constitutes Unclean Hands on behalf of the Plaintiff. Both of these contentions support a finding for the Appellant that Respondent is not entitled to an Order of Foreclosure and Sale in this matter.

Appellant respectfully submits the Court of Appeals misconstrued the facts and law in reaching its decision. Appellant testified in detail about the failure of Respondent to offer loan modification without contradiction by Respondent. Further, as the failure of the Respondent to offer loan modification as required is the basis of the unclean hands defense of Appellant and the Special Referee ordering the Respondent had complied with the Administrative Order constitutes a ruling on the issue of Unclean Hands, he would argue that the issue was properly before the trial court which issued a decision ruling on that specific issue.

For all of the above reasons Appellant would respectfully request the Court to conclude Appellant is entitled to a reversal of the judgment of the Court of Appeals and trial court.

Therefore, we respectfully ask *this* court to reverse the judgment in this case and to find for the Appellant.

RESPECTFULLY SUBMITTED

A handwritten signature in blue ink, appearing to read "W. Wesley Johnson, Jr.", written over a horizontal line.

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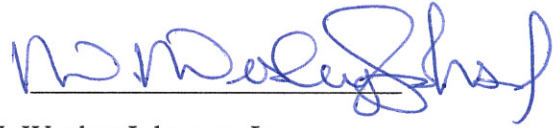
**Aug 19 2021**

CERTIFICATION

**S.C. SUPREME COURT**

Pursuant to Rule 242 of the South Carolina Appellate Court Rules, counsel for the

Appellant attests that a petition for rehearing was made and finally ruled on by the Court of Appeals.



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