THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Lisa Lee Smith
Special Referee

Appellate Case No. 2018-001611
Circuit Court Case No. 2011-CP-32-03945

Wells Fargo Bank, N.A., Ultimate Successor to First Union National Bank, ... Respondent,

v.

Albert J. Sanders, Jr.; AJS Properties, LLC; Branch Banking and Trust Company, Ultimate Successor to Southern National Bank of South Carolina; First Palmetto Savings Bank, FSB, ... Defendants,

of which

Albert J. Sanders, Jr., and AJS Properties, LLC, are the ..... Appellants.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

After a bench trial, the Special Referee for Lexington County entered an order foreclosing on a note that was secured by a mortgage on Mr. Sanders's property. In the Special Referee's findings, she held that Wells Fargo complied with the South Carolina Supreme Court's Administrative Order 2009-05-22-01 regarding residential foreclosure matters. Did the Special Referee err in finding that Wells Fargo complied with that Administrative Order?

STATEMENT OF THE CASE

This is not the first time that these parties have been before this Court on an issue similar to the one at bar. Mr. Sanders owns a series of properties in Lexington County that he purchased with mortgage loans from Wells Fargo Bank, and he has long been serially delinquent on them. When Wells Fargo foreclosed on one of those other loans, Mr. Sanders argued on appeal that he was entitled to modify that loan agreement, and that the special referee assigned to that case abused his discretion by finding that the Bank had done what was required of it with respect to any potential modification. In *Wells Fargo Bank, NA v. Sanders*, Op. No. 2018-UP-104, 2018 S.C. App. Unpub. LEXIS 105, at *1–2 (S.C. Ct. App. Mar. 7, 2018), this Court summarily rejected Mr. Sanders's arguments.

This case is déjà vu all over again.

In 2002, Mr. Sanders and one of Wells Fargo's predecessors-in-interest entered into a loan agreement in the principal amount of $94,700. (R. p. 17; Complaint ¶ 4.) That loan was secured by a mortgage on real property in Lexington County. (R. p. 18; *id.* ¶ 5.) Mr. Sanders became delinquent on the loan in 2009. (R. p. 19; *id.* ¶ 14.) This foreclosure action began on October 18, 2011, when Wells Fargo filed and served a summons and complaint to foreclose on that note and mortgage. (R. p. 15; *id.* at 1.) Wells Fargo certified its compliance with the Supreme Court's administrative orders governing foreclosure actions. (R. p. 154; Certificate of Compliance.)

In September 2015, the case was referred to Lisa Smith, as Special Referee for Lexington County. (R. p. 161; Order of Reference.) She subsequently held a bench trial on March 15, 2018, during which the Court took testimony from a representative from Wells Fargo, Wells Fargo's counsel, and Mr. Sanders. (R. p. 26; Transcript of Trial.)

On May 8, 2018, Special Referee Smith signed an order of foreclosure. In that order, the Court found that Mr. Sanders is delinquent on his loan (R. pp. 4–5; Order and Judgment of Foreclosure ¶¶ 11–12, at 3–4); that the loan is secured by a mortgage (R. p. 3; *id.* ¶¶ 6–7, at 2); and that Wells Fargo complied with the Supreme Court's administrative orders regarding foreclosure actions (R. p. 3; *id.* ¶ 9, at 2).

On June 13, 2018, Mr. Sanders served his notice of appeal. (R. p. 158; Notice of Appeal.)

STANDARD OF REVIEW

A foreclosure action sounds in equity. *Wells Fargo Bank, NA v. Turner*, 378 S.C. 147, 150, 662 S.E.2d 424, 425 (Ct. App. 2008). In such cases, this Court reviews the decision below based on its own view of the preponderance of the evidence. *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989). Despite this latitude, the appellate court should "not disregard the findings of the Master [or Special Referee], who saw and heard the witnesses and was in a better position to evaluate their credibility." *Id.*

On appeal, Mr. Sanders bears the burden of proving that the Special Referee's findings were in error. *See Pinckney v. Warren*, 344 S.C. 382, 387–88, 544 S.E.2d 620, 623 (2001) ("Moreover, the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings."). He cannot possibly meet this burden, as there is nothing in the record to support his position, as explained below.

ARGUMENT

Both of the issues stated in Mr. Sanders's opening brief address a single point: whether Wells Fargo complied with the South Carolina Supreme Court's administrative orders regarding a loss-mitigation review before proceeding with this action. Mr. Sanders's appeal should fail on two fronts. First, he waived any argument regarding Wells Fargo's compliance with the

administrative process because he proceeded to trial without objection, and he has not preserved his issues for appellate review. Second, he never points to anything at all in the record to suggest that Wells Fargo did not comply with the administrative orders. That is his burden on appeal, and he has failed to meet it. Each basis for affirming the Special Referee's order is discussed below.

I. By proceeding to trial, Mr. Sanders waived any alleged deficiency under Administrative Order 2009-05-22-01 and did not preserve his argument for review.

In the wake of the financial crisis of 2008 and 2009, the South Carolina Supreme Court issued an administrative order designed to assist borrowers who had fallen behind in their mortgage payments. Through Administrative Order 2009-05-22-01 (the "2009 Administrative Order"), the Court created a procedure "[t]o insure that eligible homeowners have been afforded the benefits available" under the federal Home Affordable Modification Program ("HMP"), which applied to certain residential loans.

Under the 2009 Administrative Order, a party seeking to foreclose must include a statement in the complaint "regarding the applicability of the HMP to the matter," and whether "the HMP modification process specified in the [Treasury Department] Guidelines or [Treasury Department] Supplemental Directive has been completed without resulting in a modification." Administrative Order 2009-05-22-01, § 1. If the defending party contests those allegations, then the trial judge shall resolve the dispute. *Id.*

If this issue is contested and the trial judge determines that the modification process has not been completed, then "the foreclosure action shall not be dismissed but shall be stayed until the JMP process is completed (including any trial period before a modification becomes effective)." *Id.* § 3. Otherwise, the foreclosure action proceeds as would any other case. *Id.* § 4.

In all instances, though, the 2009 Administrative Order is designed to create a potential ***pretrial*** benefit for mortgage-foreclosure defendants. It does not create any affirmative defenses

to foreclosure or additional discovery rights, nor does it substantively alter the terms of a mortgage. *See generally JP Morgan Chase Bank, NA v. Bradley*, Op. No. 2013-UP-090, 2013 S.C. App. Unpub. LEXIS 115, at *5 (Ct. App. Feb. 27, 2013) ("Furthermore, Administrative Order 2009-05-22-01 does not provide for any discovery concerning the HAMP process, nor does it entitle Bradley to a hearing.").

Here, in compliance with the 2009 Administrative Order, Wells Fargo properly pled that it had completed HMP process prior to filing its complaint. (R. p. 19; Complaint ¶ 9.) Mr. Sanders answered and denied this allegation. (R. p. 22; Answer ¶ 3.)

In response, Wells Fargo filed a Certificate of Compliance with Administrative Order No. 2011-05-02-01 (the "2011 Administrative Order"), which is a subsequent order from the South Carolina Supreme Court that extended the reach of the 2009 Administrative Order to additional mortgages.[1] That certification confirmed that Wells Fargo had served Mr. Sanders with the proper notices of his loan-modifications rights, but that he did not participate in the process to consider his loan for a modification. (R. p. 154; Certificate of Compliance.)

Wells Fargo filed its certification of compliance with the administrative process for mortgage foreclosures in August 2013, and Mr. Sanders never said another word about the issue. Instead, over four and a half years later, this case proceeded to trial without any objections from Mr. Sanders regarding any alleged noncompliance with the 2009 Administrative Order. Even at trial, Mr. Sanders did not object to going forward with the case.

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[1] Mr. Sanders has never disputed that Wells Fargo complied with the 2011 Administrative Order, including in his opening appellate brief. In Wells Fargo's view, compliance with the 2011 Administrative Order should also satisfy the 2009 Administrative Order, as the 2009 Administrative Order requires less from a mortgage lender or servicer than does the 2011 Administrative Order. Nevertheless, the record is clear that Wells Fargo complied with the 2009 Administrative Order, and that Mr. Sanders failed to timely assert his argument regarding the foreclosure process.

By proceeding to trial without objection, Mr. Sanders waived any arguments regarding alleged noncompliance with the 2009 Administrative Order. *See, e.g.*, *Garrell v. Blanton*, 316 S.C. 186, 188, 447 S.E.2d 840, 841 (1994) ("We agree with the Court of Appeals that Garrell waived any objection to arbitration by participating without objection."); *Laughlin v. Livingston*, 233 S.C. 81, 85, 103 S.E.2d 741, 743 (1958) ("Such participation of counsel without objection constituted waiver of the claimed irregularities in the proceedings, record, and hearing upon appeal."); *Patterson v. Patterson*, 288 S.C. 282, 284, 341 S.E.2d 819, 820 (Ct. App. 1986) (finding that participating in a case without objecting to a possibly-conflicted judge hearing the case waives any subsequent objection).

By the same token, Mr. Sanders failed to preserve this issue for appeal, as he did not raise it during trial. Although Mr. Sanders made passing references to his desire to modify his loan during trial, he never actually argued that Wells Fargo had failed to comply with the 2009 Administrative Order. His generic references to loan modification certainly do not qualify to preserve the issue for appellate review. *See, e.g.*, *Wilder Corp. v. Wilke*, 300 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("Moreover, an objection must be sufficiently specific to inform the trial court of the point being urged by the objector."); *Broom v. Se. Hwy. Contracting Co.*, 291 S.C. 93, 107, 352 S.E.2d 302, 310 (Ct. App. 1986) ("An objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge.").

Accordingly, because the issue is not rightly before the Court, the Court should reject Mr. Sanders's lone appellate argument and affirm the Special Referee's foreclosure order.

II. Mr. Sanders cannot carry his burden of proof on appeal because the only evidence in the record is clear that Wells Fargo complied with the 2009 Administrative Order.

If the Court believes that an evidentiary review is appropriate, the outcome remains the same. After reviewing the evidence presented and taking testimony, Special Referee Smith expressly held that Wells Fargo complied with the 2009 Administrative Order. (R. p. 3; Order and Judgment of Foreclosure ¶ 9, at 2.) Mr. Sanders bears the burden of proving that she was incorrect in this finding. *Pinckney*, 344 S.C. at 387–88, 544 S.E.2d at 623. He cannot carry this burden, as there is nothing in the record to support a contrary finding.

First, as explained above, Wells Fargo filed a Certificate of Compliance certifying that Mr. Sanders "returned the Foreclosure Intervention Response Form within the required 30 days but has failed, refused, or voluntarily elected not to return the required documents needed for loss mitigation review." (R. p. 154; Certificate of Compliance.) Mr. Sanders has never disputed this certification.

Second, at trial, Mr. Sanders conceded that he never filled out an application for loan-modification assistance:

> Q: Do you recall ever having filled out an application sent in requesting assistance?
>
> A: No, sir.

(R. pp. 95–96; Trial Tr. 70:25–71:2.) While Mr. Sanders testified that he did not recall having received such paperwork, he admitted that he is "very sloppy on paperwork, my ex-wife did it all." (R. p. 75; Trial Tr. 50:16–19.)

This is the full scope of evidence presented on the issue: (1) Wells Fargo certified that it provided Mr. Sanders with an opportunity to participate in the loan-modification process; (2) Mr. Sanders conceded that he never filled out an application to be considered for a modification; and

(3) Mr. Sanders blamed his ex-wife for any potential oversight of paperwork that Wells Fargo sent to him.[2]

Although Mr. Sanders generally testified that he wanted assistance with his loan agreement, he never presented any proof at all that Wells Fargo failed to comply with the 2009 Administrative Order. In fact, it did comply with that administrative order, just as Special Referee Smith found. The Court should affirm that decision accordingly.

III. Nothing in the record suggests that Wells Fargo operated with "unclean hands" when dealing with Mr. Sanders.

At the close of his appellate brief, Mr. Sanders states in passing that Wells Fargo should be precluded from foreclosing on this mortgage due to "unclean hands." (Sanders Br. at 3.) There was no suggestion of "unclean hands" at trial in this matter; the word "unclean" does not even appear in the trial transcript. (R. pp. 26–108; Trial Tr. *passim.*) Nor did Special Referee Smith make any ruling regarding such an affirmative defense. (R. pp. 2–14; Order and Judgment of Foreclosure *passim.*)

Accordingly, this issue is not preserved for appellate review. *See, e.g.*, *Summersell v. S.C. Dep't of Pub. Safety*, 337 S.C. 19, 22, 522 S.E.2d 144, 145–46 (1999) ("[W]here an issue presented to the circuit court in a civil case is not explicitly ruled upon in the final order, the issue must be raised by an appropriate post-trial motion to be preserved for appellate review.").

Even if the issue were properly before this Court, there is nothing in the record to suggest that an unclean hands defense is applicable here. As described above, Wells Fargo complied with

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[2] Mr. Sanders testified that his former spouse handled all of his financial affairs. (*See, e.g.*, R. p. 84; Trial Tr. 59:20–23 ("[F]rom the time I was 15 years old until a couple years ago, probably about three or four years ago—I never wrote a check, my ex-wife did it.").) He also testified that their relationship was poor. (*See, e.g.*, R. p. 88; Trial Tr. 63:5–6 ("In 2009 she wished I was dead, so I don't know what she did.").) Wells Fargo, of course, is not responsible for any misconduct by Mr. Sanders's former spouse with respect to consideration for a potential loan modification.

the Supreme Court's administrative orders regarding loan-modification efforts, and there is no evidence to the contrary. As such, the Court should summarily reject Mr. Sanders's unclean hands argument, just as it did when he raised it in an earlier appeal of a foreclosure judgment on a different mortgage. *See Wells Fargo*, 2018 S.C. App. Unpub. LEXIS 105, at *2 (affirming ruling below and stating "[t]he special referee did not err in not finding Wells Fargo had unclean hands" when dealing with Mr. Sanders).

CONCLUSION

There is no evidentiary or legal basis for reversing the trial court's foreclosure order. The issues raised in Mr. Sanders's opening brief are not preserved for appellate review. Even if they were, there is nothing in the record that supports an argument that Wells Fargo failed to comply with the 2009 Administrative Order when dealing with Mr. Sanders. Accordingly, the Court should affirm the Special Referee's foreclosure order and judgment.

Respectfully submitted,

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January 22, 2019

CERTIFICATE OF COUNSEL

The undersigned certify that this Final Brief complies with Rule 211(b), SCACR.

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