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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Lisa Lee Smith
Special Referee

Appellate Case No. 2021-000893
Court of Appeals Opinion 2021-UP-161
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 .... Petitioners.

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INTRODUCTION

A case must clear a high hurdle in order to merit this Court's attention through a writ of certiorari. It must raise a novel question of law, or conflict with this Court's prior precedent, or involve a substantial constitutional question, or have other "special and important reasons" that warrant Supreme Court involvement. Rule 242(b), SCACR.

This case falls far short of this standard and, instead, appears to be another attempt by Mr. Sanders to misuse the judiciary to protect his assets by delaying proceedings. *See, e.g.*, *In re Sanders*, Case No. 09-09094-dd, 2010 Bankr. LEXIS 4590, at *13–14 (Bankr. D.S.C. Apr. 29, 2010) (converting Mr. Sanders's Chapter 11 bankruptcy proceedings to proceedings under Chapter 7 because "[t]he debtor has enjoyed the protections afforded to him under the Bankruptcy Code while failing to meet his duties" of candor to the court regarding his assets, and concluding that "[h]is conduct constitutes cause requiring the conversion of his case"); *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) (rejecting Mr. Sanders's appellate efforts in a different foreclosure action involving a different loan, but making the same arguments he has presented here).

The Court should not be misled. There is nothing in the Court of Appeals' unanimous, unpublished decision that conflicts with precedent from this Court, or that raises any novel question of law, or that puts any constitutional issue in dispute. Instead, Mr. Sanders bases his appeal on arguments that he did not present to the circuit court, and the Court of Appeals rightly held that his un-presented arguments were not preserved for appellate consideration. This is hornbook South Carolina law, and it does not warrant extraordinary review by this Court. The petition should be denied accordingly.

COUNTERSTATEMENT OF THE CASE

This is not the first time that these parties have been before the South Carolina appellate courts 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), the Court of Appeals 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.)[1] 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, which are discussed below. (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,

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[1] Because the Court is currently securing materials filed with the Court of Appeals in lieu of requiring an appendix to accompany a petition for a writ of certiorari, Wells Fargo cites to the page of the Record on Appeal that was filed below. Supreme Court Order 2021-08-25-03, § (c).

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.) The Court of Appeals issued a unanimous *per curiam* opinion on May 12, 2021, affirming the Special Referee's foreclosure order. After that court denied Mr. Sanders's petition for rehearing, he filed his petition for a writ of certiorari on August 19, 2021.

BACKGROUND

This case is an unremarkable mortgage foreclosure action, but the issue on appeal requires context. Prior to this case's commencement—in the wake of the financial crisis of 2008 and 2009—the Supreme Court issued a pair of administrative orders that were designed to assist borrowers, like Mr. Sanders, who had fallen behind in their mortgage payments. Compliance with those orders is at the heart of this appeal.

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. Two years later, the Supreme Court issued Administrative Order 2011-05-02-01 (the "2011 Administrative Order"), which extended the reach of the 2009 Administrative Order to additional mortgages.

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 HMP 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.

The 2011 Administrative Order supplemented this process. Under that order, a party seeking to foreclose must give the borrower thirty days' notice of the borrower's right to foreclosure intervention. If the borrower then "failed, refused, or voluntarily elected not to participate in any foreclosure intervention process," the lender "shall certify that fact to the Court, and the foreclosure action may proceed." Administrative Order 2011-05-02-01, § (B)(2). And just as with the earlier order, any dispute as to compliance must be resolved by the trial court. *Id.* § (C).

In all instances, though, these Administrative Orders are designed to create a potential ***pretrial*** benefit for mortgage-foreclosure defendants. They do not create any affirmative defenses to foreclosure or additional discovery rights, nor do they 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.").

ARGUMENT

I. Mr. Sanders did not preserve his arguments for appellate review, just as the Court of Appeals unanimously held.

A. Mr. Sanders waived his arguments regarding compliance with this Court's Administrative Orders regarding foreclosure intervention.

Through his petition, Mr. Sanders wants this Court to review whether Wells Fargo complied with the Administrative Orders. But he failed to ask the circuit court to undertake this same analysis, which is fatal to his appeal.

To be sure, Wells Fargo indisputably complied with the Administrative Orders. It specifically pled that it had completed HMP process prior to filing its complaint. (R. p. 19; Complaint ¶ 9.) Mr. Sanders then answered and denied this allegation. (R. p. 22; Answer ¶ 3.) In response, Wells Fargo filed a Certificate of Compliance with the 2011 Administrative Order. (R. p. 154; Certificate of Compliance.) 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. (*Id.*)

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 Administrative Orders. Even at trial, Mr. Sanders did not object to going forward with the case.

By proceeding to trial without objection, Mr. Sanders waived any arguments regarding alleged noncompliance with the Administrative Orders. *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 Administrative Orders. His generic references to loan modification certainly do not qualify to preserve this specific issue for appellate review, just as the Court of Appeals held. *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.").

Even now, Mr. Sanders does not claim that Wells Fargo failed to comply with the 2011 Administrative Order; instead, on appeal (both in his petition and with the Court of Appeals), he challenges only whether Wells Fargo complied with the 2009 Administrative Order, which was superseded by the 2011 Administrative Order. (Petition, at "Statement of Issues on Appeal," Issue 1).) But compliance with the 2011 Administrative Order ***necessarily*** means that a lender has done all that it is required to do, as that order specifically creates a process to govern foreclosure-intervention procedures for all mortgage foreclosure actions—both pending and future cases. *See* Administrative Order 2011-05-02-01, § (B) (outlining guidelines for "Actions pending on May 9,

2011" and for "Actions filed after May 9, 2011"). His failure to ever challenge Wells Fargo's compliance with the controlling administrative order underscores the fact that his arguments are not preserved for further review.

Accordingly, the Court of Appeals' decision here is unimpeachable, and the Court should deny Mr. Sanders's petition as a result.

B. Mr. Sanders has waived his arguments regarding unclean hands.

As a corollary to his argument that Wells Fargo did not comply with the 2009 Administrative Order, Mr. Sanders argues that his generalized statements to the circuit court that he wanted to modify his mortgage agreement should have been sufficient to preserve an argument that Wells Fargo acted with unclean hands. (Petition at 4.) This argument misses the mark and is inconsistent with established South Carolina law.

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*.) And Mr. Sanders never filed a Rule 59 motion regarding this issue.

Accordingly, this issue is not preserved for appellate review, just as the Court of Appeals held. *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."). The petition should be denied as a result.

II. Mr. Sanders's arguments fail on their merits.

Even if the Court disagreed with the Court of Appeals' view of the issue-preservation points on which it based its decision, this case still does not warrant further appellate review

because the circuit court's ruling regarding Wells Fargo's compliance with the Administrative Orders is fully consistent with the evidence in the record.

After reviewing the evidence presented and taking testimony, Special Referee Smith expressly held that Wells Fargo complied with the Administrative Orders. (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. *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 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 Administrative Orders. In fact, it did comply with those orders, just as Special Referee Smith found.

Likewise, there is nothing in the record to suggest that an unclean hands defense is applicable here. As described above, Wells Fargo complied with 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 the Court of Appeals 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).

The Court should deny Mr. Sanders's petition for further appellate review accordingly.

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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. And it is notable that Mr. Sanders also attempted to dodge accountability for his misrepresentations to the United States Bankruptcy Court by telling that court that his ex-wife handled his financial information. *In re Sanders*, 2010 Bankr. LEXIS 4590, at *7.

CONCLUSION

Because this case does not meet any of the criteria for granting certiorari, the Court should deny Mr. Sanders's petition and remit this matter back to the circuit court to enforce its judgment.

Respectfully submitted,

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