

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-in-Equity for Lexington County

Case No. 2012-CP-32-2757

Capital Bank successor in
interest by merger to Carolina
National Bank & Trust
Company,

Respondent,

v.

Attic Space Self Storage,
LLC, James Michael Seguin
and Christy Duffell-Seguin,

Appellants.

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SC COURT OF APPEALS

INITIAL BRIEF OF APPELLANT

Drake H. Kaiser, Esq.
736-D St. Andrews Road
PMB #170
Columbia, SC 29210
(803) 772-6830
Attorney for Appellant

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STATEMENT OF ISSUES ON APPEAL

1. DID THE MASTER-IN-EQUITY ERR IN DISMISSING DEFENDANT'S DEFENSE SOUNDING IN UNCLEAN HANDS?
2. DID THE MASTER-IN-EQUITY ERR IN FINDING DEFENDANT'S POTENTIAL ABILITY TO REPAY THE 2010 TAXES INSUFFICIENT TO ADVANCE THE DEFENSE?
3. DID THE MASTER-IN-EQUITY ERR IN RELYING ON EVIDENCE NOT PROPERLY BEFORE THE COURT?

STATEMENT OF THE CASE

On July 2, 2012, Capital Bank, successor in interest by merger to Carolina National Bank & Trust Company, brought an action before the Lexington County Court of Common Pleas seeking foreclosure of certain real property in Lexington County on which operated a business, Attic Space Self Storage, LLC. The bank also sued James Michael Seguin and Christy Duffell-Seguin, co-signers of the Note underlying the action, and demanded a deficiency judgment.

Defendants filed Answer on August 1, 2012. Capital Bank filed a Motion for Summary Judgment on January 15, 2013. The Hon. James O. Spence, Master-in-Equity for Lexington County, heard Plaintiff's Motion on April 18, 2013, and after oral arguments and submission of memoranda, issued an Order on May 15, 2013 granting Plaintiff's motion with respect to liability. Said order was filed on May 17, 2013.

Appellant received written notice of entry of this Order on May 20, 2013. And served Notice of Appeal on Capital Bank on May 31, 2013.

FACTS

Attic Space Self Storage, LLC, executed the Note and Mortgage underlying this matter on January 10, 2008. Mr. and Mrs. Seguin also signed as guaranties for the Note on January 10, 2008. Defendants in their Answer admitted to being about two (2) months behind with mortgage payments. Defendants also acknowledge that they were supposed to pay property taxes for 2010, but were unable to do so. Plaintiff paid the 2010 taxes on December 2, 2011. Plaintiff then paid the 2011 taxes on December 19, 2011, even though the tax was not due until January 17, 2012.

Defendant's defense for the foreclosure action is in Defendant's Answer ¶ 8, to wit: "Defendants admit that they were two months behind in their monthly payments but that said delinquency would have been made up had Plaintiff not added the 2011 tax liability, which was not in default yet, to the amount demanded by Plaintiff."

SUMMARY JUDGMENT STANDARD

An appellate court applies the same standard applied by the trial court when reviewing a grant of summary judgment. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is only appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c) SCRPC. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 234-35; 692 S.E.2d 499, 505 (2010). The nonmoving party is only required to submit a mere scintilla of evidence in order to withstand a

motion for summary judgment. *Team IA, Inc. v. Lucas*, 395 S.C. 237, 244, 717 S.E.2d 103, 106 (Ct. App. 2011). The Court gives every benefit of the doubt to the nonmoving party. *Watters v. Terminix Service, Inc.*, 376 S.C. 632, 635, 658 S.E.2d 110, 111 (Ct. App. 2008). “Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is a dispute as to the conclusion to be drawn from those facts.” *Gignilliat v. Gignilliat, Savitz & Bettis, LLP*, 382 S.C. 452, 456, 684 S.E.2d 756, 758 (2009).

ARGUMENTS

I. THE MASTER-IN-EQUITY ERRED IN DISMISSING DEFENDANT’S DEFENSE SOUNDING IN UNCLEAN HANDS.

Plaintiff called the Note in this case after paying the 2011 untimely. In law, a mortgagee is authorized to pay taxes on a mortgaged property “upon which the mortgagor shall have failed to pay the tax.” S.C. Code § 29-3-30. The statute does not authorize a mortgagee to pay taxes when the mortgagor has not yet failed to pay. Likewise, the Promissory Note at issues provides:

If you [the mortgagee] are authorized to pay, on my behalf, charges I [the mortgagor] am obligated to pay...then you may treat those payments made by you as advances and add them to the unpaid principal under this note, or you may demand immediate payment of the charges. (Plaintiff’s Complaint Exhibit A)

Under the terms of the Note, the mortgagee may only recover funds it was authorized to pay. The Mortgage at issue provides:

If Mortgagor fails to perform any of Mortgagor’s duties under this Mortgage...Lender may, without notice, perform the duties or cause them to be performed. (Plaintiff’s Complaint Exhibit C, ¶ 13)

Again, the terms allow the mortgagee only to perform mortgagor’s duties if mortgagor has failed to perform.

With regard to property taxes, at law “[a]ll [property] taxes are due and payable between the thirtieth day of September and the fifteenth day of January after their assessment in each year.” S.C. Code § 12-45-70. However, a taxpayer is not in default until after the fifteenth day of January, and the taxes only become delinquent when they remain unpaid after the fifteenth day of January. *Dibble v. C & M Petroleum Co.*, 335 S.C. 260, 266, 516 S.E.2d 459, 461 (S.C. App. 1999).

Defendant had not “failed to pay” the 2011 tax on December 19, 2011. Plaintiff’s provision of the tax was gratuitous and *ultra vires*. Therefore the Master-in-Equity erred in finding that Plaintiff “rightfully paid the property taxes on the Property and included those amounts in its notice of default and acceleration” (Order p. 5 ¶ 13).

Further, since Defendant argues in Answer, Memoranda, and Affidavit that the minor delinquency would have been made up had Plaintiff not added the 2011 tax liability, Plaintiff’s calling the Note when it did, how it did, constituted an abuse of the contractual relationship between Plaintiff and Defendant—a claim sounding in unclean hands.

The issue of the 2011 taxes and its relationship to Defendant’s defense remains an issue properly resolved in trial, and therefore summary judgment is not appropriate.

II. THE MASTER-IN-EQUITY ERRED IN FINDING DEFENDANT’S POTENTIAL ABILITY TO REPAY THE 2010 TAXES INSUFFICIENT TO ADVANCE THE DEFENSE.

As a general rule, a nonmoving party may not rely on mere speculation to withstand a summary judgment motion. *RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 471, 597 S.E.2d 881, 883 (Ct.App. 2004). However, “speculation” means not founded on facts. *E.g., Sterling Dev. Co. v. Collins*, 309 S.C. 237, 242, 421 S.E.2d 402, 405 (1992). If a belief can be logically and rationally drawn from a fact, it is no mere speculation.

Here Defendant has an Affidavit before the Court, and Plaintiff has Defendant’s Deposition

before the Court, both relying on personal knowledge, setting forth facts admissible in evidence.

Defendant testified that “I believe I could have secured funding to offset arrearages, but the additional demand for the 2011 tax payment knocked the demand amount too high, beyond my ability to find the funding.” Defendant’s 11-5-12 Affidavit, ¶ 16. Defendant’s assertion that he could have secured funding is not mere speculation because it is based in a fact/relationship in evidence before the Court, viz., Defendant believes he could have satisfied arrearages by recourse to a family member, a father-in-law. Seguin Dep. at 76:16.

In the light most favorable to the nonmoving party, there is a logical and rational inference that may be drawn from a familial relationship and potential financial support. Being derived from a specific fact, the inference is not mere speculation, and raises a genuine issue of material fact sufficient to defeat summary judgment.

III. THE MASTER-IN-EQUITY ERRED IN RELYING ON EVIDENCE NOT PROPERLY BEFORE THE COURT.

Pursuant to Rule 56(c) SCRC, the Court should consider evidence found in pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits. The Order being appealed makes a conclusion of law that “Lexington County would not accept only the 2010 tax payment and required Capital Bank to pay the 2011 taxes” (Order p. 6 ¶ 19).

Upon review of pleadings, depositions, answers to interrogatories, and admissions on file, Appellant finds no support for this conclusion of law except an Affidavit of Capital Bank provided by Kaye H. Gaddis on May 2, 2013, and attached as an exhibit to Plaintiff’s Supplemental Memorandum in Support of Its Motion for Summary Judgment. Said affidavit was not present to the

Court at or prior to the motion hearing of April 18, 2013.¹ Further, the affidavit is not offered in connection with pleadings, deposition, or discovery.

The Court should only consider affidavits “on file” at the time of the motion hearing. *See Loyd’s Inc. v. Good*, 306 S.C. 450, 453, 412 S.E.2d 441, 443 (Ct. App. 1991). The affidavit of Kaye Gaddis was not on file at the time of the motion hearing, so any assertion provided therein not corroborated by information on file is inappropriate for Court consideration.

Since the Order being appealed makes conclusions of law based on assertions not properly before the Court, the ruling is flawed and should be reversed, allowing the factual matters to be fully explored at trial.

CONCLUSION

For the reasons stated, this Court should reverse the May 17, 2013 order granting summary judgment.

Respectfully submitted,



Drake H. Kaiser, Esq.
736-D St. Andrews Road
PMB #170
Columbia, SC 29210
(803) 772-6830
Attorney for Appellant

July 1, 2013

¹ Also, according to Lexington County tax invoices, the taxes were paid on different days (See 2011 and 2010 tax invoices).

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DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

1. Order Granting Plaintiff's Motion for Summary as to Defendant's Liability;
2. Plaintiff's Complaint, including exhibits;
3. Defendant's Answer;
4. Plaintiff's Supplemental Memorandum in Support of Its Motion for Summary Judgment, including exhibit;
5. Defendant's 11-5-12 Affidavit;
6. Lexington County Tax Invoice 2010-039998-108; and
7. Lexington County Tax Invoice 2011-040193-102.

[certification on next page]

I certify that this designation contains no matter which is irrelevant to this appeal.

July 1, 2013



Drake H. Kaiser, Esq.
736-D St. Andrews Road
PMB #170
Columbia, SC 29210
(803) 772-6830
Attorney for Appellant

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PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant and the Designation of Matter to be Included on the Record on Appeal to Capital Bank successor in interest by merger to Carolina National Bank & Trust Company by depositing a copy of it in the United States Mail, postage prepaid, on July 1, 2013, addressed to his attorney of record, Frank B. Knowlton, PO Box 11070, Columbia, SC 29211-1070.

July 1, 2013

Reddick & Kaiser, LLC



By: Drake H. Kaiser, Esq.
1000-A St. Andrews Road
Columbia, South Carolina 29210
(803) 772-6830
Attorney for Appellant

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