

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Richard L. Booth, Master-In-Equity

Case No.: 2009-CP-43-2538

First Citizens Bank and Trust Company, Inc.....Appellant,

v.

Charles T. Brooks III and the South Carolina Department of Revenue, Defendants,
of whom Charles T. Brooks is theRespondent.

CERTIFICATE OF SERVICE

I hereby certify that this day I have deposited a copy of the

RESPONDENT'S INITIAL BRIEF AND DESIGNATION OF MATTER TO

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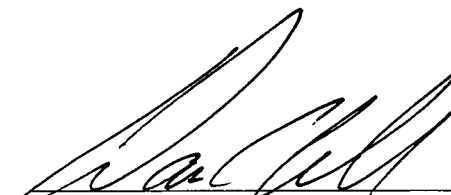
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SC Court of Appeals



Damon C. Wlodarczyk

July 15, 2013

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RESPONDENT'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. THE TRIAL COURT CORRECTLY FOUND THAT THE FORBEARANCE AGREEMENT PROVIDED FOR ONGOING PAYMENT OF THE MONTHLY PAYMENTS DUE UNDER THE NOTE AND LINE OF CREDIT.
- II. THE LOWER COURT CORRECTLY FOUND THAT THE FORBEARANCE AGREEMENT CONTAINED A TERM THAT "THE ACCEPTANCE OF MONIES UNDER THE AGREEMENT WAS NOT AN ESTOPPEL, PREJUDICE OR WAIVER OF PLAINTIFF'S RIGHT TO PROCEED WITH THE FORECLOSURE ACTION" WITHOUT MAKING ADDITIONAL FINDINGS REGARDING THE AGREEMENT.
- III. THE LOWER COURT CORRECTLY FOUND THAT APPELLANT HAS BREACHED THE TERMS OF THE FORBEARANCE AGREEMENT BY AGREEING TO WITHDRAW HIS ANSWER BUT BY FAILING TO DO SO.

STATEMENT OF THE CASE

The Respondent is not dissatisfied with the Appellant's Statement of the Case with the noted exception that follows and elects not to provide a detailed Statement of the Case aside from setting forth the following exception. With regard to Appellant's footnote 1 stating that since no court reporter was present, Respondent arguably could not have complied with Rule 71, SCRPC. [Appellant's Initial Brief, p. 4]. Had the lower court granted summary judgment and issued an Order for Foreclosure and Sale, a written record would have been prepared, signed by the lower court, and filed with the Clerk of Court which would have complied with Rule 71, SCRPC. However, the issue is immaterial for the purposes of this appeal.

FACTS

This case involves the foreclosure of a commercial mortgage involving Appellant's business property located in Sumter County. [R. pp. ____, Complaint, Exhibit A and B to Affidavit of Davies). The validity of the Note, Line of Credit and Mortgage, the terms of the Note, Line of Credit and Mortgage, the default of the terms of the Note, Line of Credit and Mortgage prior to the initiation of the foreclosure action, the Respondent's right to accelerate the payment prior to the initiation of the foreclosure action, and Respondent's right to foreclose on the property in an attempt to satisfy the debt are not in dispute based upon the Affidavit and Counter-Affidavit filed and served prior to the summary judgment hearing. The specific terms of the Note, Line of Credit and Mortgage are incorporated as if more fully set forth herein verbatim. [R. pp. ____, Affidavit of Davies and Exhibits; Affidavit of Brooks]. The Note and Mortgage had a maturity date of May 5, 2010

and, therefore, the Appellant would have been in maturity default on the instruments by failing to pay the balance due on the debt by that date. [Id.].

It is further uncontested that on or about March 7, 2010, prior to maturity default, the parties entered into a settlement and forbearance agreement in which Respondent allowed Appellant the opportunity to avoid foreclosure of his business property by making payments as more fully set forth in the document entitled “Forbearance Agreement.” [R. pp. ____, Exhibit C to Affidavit of Davies]. In addition, the parties agreed as part of the Settlement that Appellant would withdraw the Answer filed and served on or about November 3, 2009, and allow the foreclosure action to remaining pending with the lower court until such time as the lower court would allow or until [Appellant] “defaults on **any portion** of this Agreement.” [R. pp. ____, Exhibit C, part 1, subpart (6)-(1) and part 3].

The terms of the forbearance agreement provided *in part* that in order to address the arrearage, Appellant would pay to Respondent an initial lump sum of \$5,000.00 no later than March 15, 2010, that Appellant would continue to make payments to Respondent in the amount of \$1,500.00 per month beginning April 1, 2010 and ending March 1, 2011, and that the “balance of the loan will become immediately due and payable, should [Appellant] and [Respondent] fail to enter a separate loan agreement by that date to cure the arrearage or pay off the loan.” [R. pp. ____, Exhibit D, part 3 to Affidavit of Davies]. It is uncontested that the loan has not been paid off and that the Respondent again failed to make monthly payments after this agreement was made. [R. pp. ____, Affidavit of Davies and Affidavit of Brooks, paragraphs 2 and 3].

It is uncontested that the Appellant failed to withdraw his Answer as provided by the terms of the settlement agreement, payoff the loan as required, or make monthly payments in or around December 2011. [R. pp. ____, Affidavit of Davies and Affidavit of Brooks].

The only evidence before the lower court for consideration at the summary judgment hearing was the Complaint, Answer, Motion for Summary Judgment with Affidavit of Dave Davies and supporting exhibits, and Counter-Affidavit of Charles Brooks. [R. pp. ____, Order pp. 1-2].

The lower court issued its Order making twenty-five (25) findings of fact which it determined were not at issue and could not be further contested. The lower court also ordered that a non-jury trial take place on February 7, 2013 for the parties to present evidence regarding the following issues:

- a. The balance due Plaintiff after giving credit for all payments made pursuant to the loan documents and also the forbearance agreement;
- b. The intention of the parties in Defendant Brooks' payment of and Plaintiff's acceptance of monthly forbearance payments after the March 1, 2011 maturity date of the original forbearance agreement, the relevance of the language of the forbearance agreement referring to acceptance of payments, and the effect on Plaintiff's right to proceed with foreclosure;
- c. Whether or not Plaintiff made any monthly payments as they came due under the existing loan documents after entering into the settlement and forbearance agreements, and the effect of the forbearance agreement upon the post-maturity status of the line of credit note at the inception of the forbearance agreement and the maturity of the real estate note and mortgage during the forbearance period.

[R. pp. ____, Order, p. 6]. This appeal followed.

STANDARD OF REVIEW

The appellate court applies the same standard as the trial court when reviewing an order granting summary judgment. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). It is appropriate to grant summary judgment when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Id. citing Rule 56(c), SCRPC. “In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. “ Id.

The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact. However, once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent’s case, the opponent must come forward with specific facts showing there is a genuine issue for trial.” Garvin v. Bi-Lo, Inc., 337 S.C. 436, 523 S.E.2d 481 (Ct. App. 1999). The opponent cannot merely rely upon the pleadings, but must submit some additional evidence creating a genuine issue of material fact. Id.

ARGUMENT

I. THE TRIAL COURT CORRECTLY FOUND THAT THE FORBEARANCE AGREEMENT PROVIDED FOR ONGOING PAYMENT OF THE MONTHLY PAYMENTS DUE UNDER THE NOTE AND LINE OF CREDIT.

Appellant contends that the lower court erred in finding that, in addition to the lump sum payment of \$5,000.00 and monthly payments of \$1,500.00, the

Forbearance Agreement also provided for ongoing payment of the payments due and payable under the Note and Line of Credit. Appellant contends that to the extent the payment requirements set forth above which are stated in paragraph 3 of the Forbearance Agreement conflict with other provisions in the agreement, paragraph 3 should control. Appellant argues that the conflicting provisions create an ambiguity that should be resolved in favor of the Appellant. [Appellant's Initial Brief, pp. 18-19].

As an initial matter, Respondent contends the issue is not preserved for appellate review.

In order for an issue to be preserved for appellate review, with few exceptions, it must be raised and ruled upon by the trial judge. When a trial court makes a general ruling on an issue, but does not address the specific argument raised by a party, that party must make a Rule 59(e) motion asking the trial court to rule on the issue in order to preserve it for appeal.

Cowburn v. Leventis, 366 S.C. 20, 41, 619 S.E.2d 437, 449 (Ct. App. 2005) (internal citations omitted).

The only evidence regarding the specific terms of the Forbearance Agreement is contained in the agreement itself. Respondent's Affidavit in support of summary judgment provides no evidence concerning the specific provisions of the Forbearance Agreement other than stating that the Forbearance Agreement was attached to the affidavit and the terms were incorporated by reference. [R. pp. ____, Affidavit of Davies].

Appellant's counter-affidavit does not address the payment terms of the Forbearance Agreement and does not allege any matter related to the forbearance payments as they relate to the monthly payments under the Note and Line of Credit.

[R. p. ____, Affidavit of Brooks]. Finally, there is no argument set forth in the Order relating to Appellant's contention that there was ambiguity relative to whether Appellant was required to make regular monthly payments as required by the Note and Line of Credit in addition to the forbearance payments. [R. pp. ____, Order, pp. 2-3]. Finally, Appellant did not file a Rule 59(e), SCRCPC motion raising the alleged error to the lower court where it could be addressed and ruled upon.

As this issue was never specifically raised or ruled upon by the lower court either at the hearing or through a motion for reconsideration, it cannot be raised here for the first time on appeal. Leventis, 366 S.C. at 41, 619 S.E.2d at 449.

Should the Court find the issue was properly preserved, "[i]n construing a contract, the primary objective is to ascertain and give effect to the intention of the parties." Ecclesiastes Prod. Ministries v. Outparcel Associates, LLC, 374 S.C. 483, 497-98, 649 S.E.2d 494, 501-02 (Ct. App. 2007).

The parties' intention must, in the first instance, be derived from the language of the contract. To discover the intention of a contract, the court must first look to its language-if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect. "Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions. The parties' intention must be gathered from **the contents of the entire agreement and not from any particular clause thereof.**"

Id. (internal citations omitted) (emphasis added).

Contrary to Appellant's arguments, the following provisions when read as a whole support the lower court's finding:

1. Lender's Forbearance. Lender shall forbear from exercising any and all of its rights and remedies presently existing or arising during the term of this Agreement under the Loan Documents, the ongoing foreclosure action or this Agreement, provided that there

exists no Event of Default as such term is defined herein at Paragraph 5; . . .

3. Borrower's Payment of the Arrears. **THIS FORBEARANCE AGREEMENT IS NOT DESIGNED TO CURE THE ARREARAGE.** The intent of this agreement is to provide time for the Lender to sell other properties deeded to it from Borrower as part of a separate Settlement and Release Agreement dated March ____, 2010. . . .

4. Borrower's Payment of Payments Coming Due. **Commencing with the regular payment due (next regular payment date),** Borrower shall make all future Payments as they become due, which Payments may change in accordance with the terms of the Notes and Mortgage.

5. Events of Default. If Borrower fails to make any of the payments of the Arrears as specified herein on the due date thereof; **if the Borrower fails to make any of the Payments pursuant to the terms of the Notes and Mortgage;** of if Borrower fails to keep a promise or agreement or perform or discharge any agreement, covenant, obligation or undertaking created or agreed to by Borrower in the Loan Documents and this Agreement, same shall constitute an event of default ("Event of Default") hereunder and under the Loan Documents.

13. Reinstatement. In the event Borrower cures the Arrears by making all payments required under paragraphs 3, **is current with the Payments then due, and no Event of Default exists under the Loan Documents and this Agreement,** Lender shall reinstate the Notes and Mortgage according to its original terms and conditions.

(R. pp. ____, Exhibit D to Affidavit of Davies).

As evidenced above, the \$5,000.00 lump sum payment and the \$1,500.00 monthly payments set forth in paragraph 3 were not intended to cure the arrearage and the Forbearance Agreement clearly states that Appellant was obligated to make regular future payments in accordance with the terms of the Note and Mortgage as they became due which would have been the next regular payment date after executing the agreement. Moreover, the document clearly provides for default if the

borrower failed to make payments set forth in paragraph 3 or if the borrower failed to make payments under the terms of the Notes and Mortgage as set forth in paragraph

5. Accordingly, there is no ambiguity in the terms and the lower court did not err. Id.

II. THE LOWER COURT CORRECTLY FOUND THAT THE FORBEARANCE AGREEMENT CONTAINED A TERM THAT “THE ACCEPTANCE OF MONIES UNDER THE AGREEMENT WAS NOT AN ESTOPPEL, PREJUDICE OR WAIVER OF PLAINTIFF’S RIGHT TO PROCEED WITH THE FORECLOSURE ACTION” WITHOUT MAKING ADDITIONAL FINDINGS REGARDING THE AGREEMENT.

Appellant contends the lower court erred in making a factual finding that the Forbearance Agreement contained a term that “the acceptance of monies under the agreement was not an estoppel, prejudice or waiver of Plaintiff’s right to proceed with the foreclosure action” [R. p. ___, Order, paragraph 22] without making additional findings regarding alleged ambiguities in the agreement. [Appellant’s Initial Brief, p. 19-20].

The Forbearance Agreement specifically provides:

6. Lender's Rights and Remedies Upon Events of Default. . . . Noting [sic] contained herein shall constitute a waiver of any or all of the Lender's rights or remedies including the right to proceed with the foreclosure action. This Agreement shall not be construed as a discontinuance of the foreclosure action and any forbearance by the Lender and acceptance of monies hereunder shall not be deemed an estoppel, prejudice or waiver of Lender's right to proceed with the foreclosure action.

[R. p. ___, Exhibit D to Affidavit of Davies].

As previously set forth above, the only evidence regarding the terms and conditions of the Forbearance Agreement are the document itself. As the document specifically contains the term set forth in the lower court’s order, there is no error.

As to the argument that the lower court should have made additional findings of fact regarding the terms of the Forbearance Agreement, this issue was not raised or ruled upon by Appellant at the hearing or by subsequent motion and, therefore, it cannot be raised here for the first time on appeal. Leventis, 366 S.C. at 41, 619 S.E.2d at 449.

As a practical matter, Appellant's arguments are without merit as the lower court scheduled a non-jury trial in part to determine ". . .the relevance of the language of the forbearance agreement referring to acceptance of payments, and the effect on [Respondent's] right to proceed with foreclosure." Accordingly, although the lower court correctly made a finding of fact about a term contained in the Forbearance Agreement, the relevance and effect of the term was left open as an issue to be proven at trial. Accordingly, judgment was not rendered on the term to affect Appellant's rights.

III. THE LOWER COURT CORRECTLY FOUND THAT APPELLANT HAS BREACHED THE TERMS OF THE FORBEARANCE AGREEMENT BY AGREEING TO WITHDRAW HIS ANSWER BUT BY FAILING TO DO SO.

Appellant contends the lower court erred in finding as a matter of law that Appellant agreed in the Forbearance Agreement to withdraw his Answer but failing to do so. [Appellant's Initial Brief, pp. 20-21].

In support of Respondent's summary judgment motion, an Affidavit of Dave Davies was submitted along with supporting documentation. [R. pp. ____, Affidavit of Davies]. The affidavit established the following: the creation of the Note, Line of Credit and Mortgage; the terms of the original security instrument; the default by

Appellant on the terms of the security instruments; Respondent's acceleration of the debt and election to foreclose its mortgage in an attempt to satisfy the debt. Id.

Appellant's Answer admitted the Note, Line of Credit and Mortgage as being created as evidence of the underlying debts, but denied the default or right to foreclose the mortgage due to his default on the terms of the security instruments. [R. pp. ____, Appellant's Answer]. The Answer contains no legal or equitable affirmative defenses.

As evidenced by the Forbearance Agreement voluntarily entered into by the parties, which is uncontested, the Appellant agreed to the following statements:

WHEREAS, Borrower is in default in the payment of monthly installments of principal, interest, escrow, and other payments called for under the Loan Documents (the "Payments") for the period commencing on May 10, 2009 (the "Arrears")

WHEREAS, as a result of the Arrears, Lender has the right to require that Borrower make immediate payment in full of all monies remaining unpaid under the Loan Documents, and has already commenced foreclosure proceedings to foreclose the Mortgage;

...

2. Borrower's Admissions. Borrower admits the amounts owing to Lender under the Loan Documents as indicated in this Agreement, and represents and acknowledges that there are no defenses, offsets or counterclaims of any nature whatsoever to any of the Loan Documents. Borrower acknowledges valid service of the Summons and Complaint in the foreclosure action, that Borrower does not intend to enter any answer or defenses therein, and specifically waives any rights Borrower might otherwise have to do so. If Borrower has already answered, Borrower hereby withdraws its answer and defenses with prejudice;

[R. pp. ____, Exhibit D to Affidavit of Davies].

Appellant did not present any evidence in his counter-affidavit addressing the allegations in Respondent's Complaint or Appellant's failure to withdraw his Answer

after entering into the Forbearance Agreement. Accordingly, the only admissible evidence presented to the lower court is that Appellant voluntarily entered into a contract supported by consideration, admitted the material terms entitling Respondent to obtain a judgment or foreclosure and sale *prior* to the execution of the Settlement and Forbearance Agreements, agreed to withdraw the Answer, and the Answer has not been withdrawn which, in and of itself is a breach of the terms of the agreement.

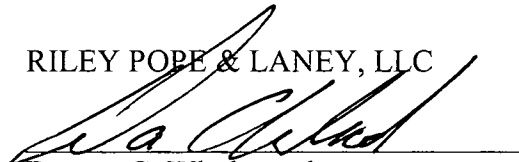
Moreover, because no counter-affidavit was served by Appellant specifically addressing the factual allegations raised in the Complaint and in-part addressed by Respondent's affidavit in support of its motion for summary judgment, there is no genuine issue of material fact as to those matters and the lower court correctly determined that Appellant cannot further contest those issues. Bi-Lo, Inc., 337 S.C. 436, 523 S.E.2d 481 (holding once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent must come forward with specific facts showing there is a genuine issue for trial and cannot merely rely upon the pleadings, but must submit some additional evidence creating a genuine issue of material fact).

Finally, there is no ruling by the lower court that Appellant's Answer was "struck" or otherwise indicating that Appellant cannot further contest the issues preserved for trial as set forth by the Order all of which involve matters that took place after the Defendant's Answer was filed.

CONCLUSION

Based upon the evidence and arguments set forth, Respondent respectfully requests that the Court find there was no error in the lower court's findings of fact, issue an Opinion affirming the lower court's Order, remanding this case to the lower court for trial as to the specific issues set forth in the Order, and for such other and further relief as may be just and property.

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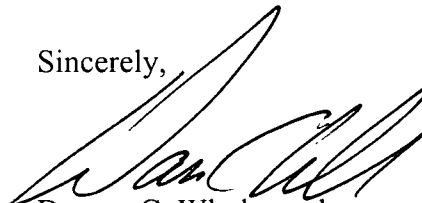
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
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Columbia, South Carolina 29211

Re: First Citizens Bank v. Charles Brooks, III
Appellate Case No.: 2013-000255
My File No.: 4026.00509

Dear Ms. Kitchings:

Please find enclosed for filing one original and one (1) of the Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal along with the original and one (1) copy of proof of service. Please return a filed copy of the Initial Brief, Designation of Matter and Certificate of Service to me in the self-addressed, postage paid envelope I have included for your convenience. Please do not hesitate to contact me with any questions.

Sincerely,



Damon C. Wlodarczyk
Attorney for Respondent

DCW/
cc: Andrew Sims Radeker, Esquire
Ronald W. Urban, Esquire

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