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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY

Court of Common Pleas

The Honorable Shannon M. Phillips, Circuit Court Judge

Case No. 2021-CP-42-04184

(Appellate Case No. 2024-000371)

Jamie T. Nesbitt,.....Appellant,

v.

Cenlar FSB, Amerihome Mortgage,.....Respondents.

Company, LLC, Lakeview Loan Services, LLC

APPELLANT'S INITIAL REPLY BRIEF

JOHNSTON LAW FIRM, LLC

s/ *Andrew J. Johnston*
ANDREW J. JOHNSTON (SC Bar No. 3064)
PO BOX 3252
SPARTANBURG, SC 29304
T:(864) 591 – 1093
ATTORNEY FOR APPELLANT

Spartanburg, South Carolina

August 5, 2024

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ARGUMENT IN REPLY

I. EVEN THOUGH THE RESPONDENTS DID MAKE A ONE-SENTENCE REFERENCE TO THE FIDUCIARY DUTY CAUSE OF ACTION IN ITS MOTION FOR SUMMARY JUDGMENT, THE MOTION DID NOT REFERENCE NEGLIGENCE AS A STAND-ALONE CAUSE OF ACTION. WHILE THE RESPONDENTS MAY HAVE MADE AN ARGUMENT ABOUT BOTH THESE CAUSES OF ACTION IN THEIR BRIEF IN SUPPORT, NEITHER OF THESE CAUSES OF ACTION WAS EVEN MENTIONED IN THE ORAL ARGUMENT.

Petitioner (hereinafter "Nesbitt") concedes that she made an incorrect statement in her Brief indicating that no reference was made in Respondent's (hereinafter "Lenders") Motion for Summary Judgment to the Nesbitt's cause of action for Breach of Fiduciary Duty. In their Motion, Lenders made a one-sentence reference to the issue. "Nor can [Nesbitt] establish as a matter of law that an arms-length transaction between a bank and a customer gave rise to fiduciary duties or duties of care." Nesbitt also concedes that both issues were argued in Lenders' Brief in Support. Nesbitt regrets the error.

However, Nesbitt stands by the statement that her cause of action for negligence was not set forth in Lender's Motion for Summary Judgment. Further, a review of the Transcript shows that Lenders did not argue either issue before the lower court at oral argument.

II. THE TRIAL COURT'S ORDER IS ENTIRELY CONCLUSORY AND SO LACKING IN FACTUAL AND LEGAL ANALYSIS THAT THIS COURT SHOULD REMAND THE CASE TO THE TRIAL COURT TO ARTICULATE RELEVANT FINDINGS AND CONCLUSIONS OF LAW.

In *Woodson v. DLI Properties, LLC,* 406 S.C. 517, 753 S.E.2d 428, (2014), the South Carolina Supreme Court stated that it was the better practice—and in most cases common practice—as well as beneficial to the judicial process for a trial judge to articulate relevant findings and conclusions of law in an order granting summary judgment. *Woodson,* 406 at 526–27, 753 at 433.

In *Woodson*, the Court went on to say, however, that Rule 52, SCRCP, provides that findings of facts and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56. Thus, such findings and conclusions are not required for appellate review, and, for this reason, and the court overruled *Bowen v. Lee Process Systems Co.,* 342 S.C. 232, 536 S.E.2d 86 (Ct.App.2000) to the extent it is relied upon to vacate and remand orders granting summary judgment.

There is a significant difference in *Woodson* from this case. In *Woodson*, the Supreme Court was able to determine that the circuit court's reasoning was clear from the order, as the Court of Appeals had plainly referenced the evidence the circuit court considered in making its decision. The Supreme Court stated that "not all situations require a detailed order, and the circuit court's form order may be sufficient if the appellate court can ascertain the basis for the circuit court's ruling from the record on appeal"). *Woodson,* 406 at 526–27, 753 at 433.

Nesbitt respectfully submits that the trial court's reasoning in the instant case cannot be ascertained as significant factual and legal contentions were left both unmentioned and undetermined.

III. THIS COURT SHOULD APPLY THE SAME STANDARD AS THE TRIAL COURT SHOULD HAVE APPLIED UNDER RULE 56(C), SCRCP.

In reviewing a grant of summary judgment, an appellate court applies the same standard as the trial court under See Rule 56(c), SCRCP; see also *Quail Hill, L.L.C. v. Cnty. of Richland,* 387 S.C. 223, 234, 692 S.E.2d 499, 505 (2010).

Summary judgment is proper if, viewing the evidence and inferences to be drawn therefrom in a light most favorable to the nonmoving party, the pleadings, depositions, answers to

interrogatories, admissions, and affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.

IV. IN THIS CASE THE TRIAL COURT FAILED TO ANALYZE OR EVEN RECOGNIZE THE EXISTENCE OF THE CENTRAL FACTUAL DISPUTE.

The resolution of Nesbitt's statutory cause of action under S.C. Code Ann. § 29-3-320, turns on a factual dispute. S.C. Code Ann. § 29-3-320 states:

> **Any holder of record of a mortgage having received such payment, satisfaction, or tender as aforesaid who shall not, by himself or his attorney, within three months after such certified mail, or other form of delivery, with a proof of delivery, request and tender of fees of office, repair to the proper office and enter satisfaction as aforesaid shall forfeit and pay to the person aggrieved a sum of money not exceeding one-half of the amount of the debt secured by the mortgage, or twenty-five thousand dollars, whichever is less, plus actual damages, costs, and attorney's fees in the discretion of the court, to be recovered by action in any court of competent jurisdiction within the State. And on judgment being rendered for the plaintiff in any such action, the presiding judge shall order satisfaction to be entered on the judgment or mortgage aforesaid by the clerk, register, or other proper officer whose duty it shall be, on receiving such order, to record it and to enter satisfaction accordingly.**
>
> **Notwithstanding any limitations under Sections 37-2-202 and 37-3-202, the holder of record of the mortgage may charge a reasonable fee at the time of the satisfaction not to exceed twenty-five dollars to cover the cost of processing and recording the satisfaction or cancellation. If the mortgagor or his legal representative instructs the holder of record of the mortgage that the mortgagor will be responsible for filing the satisfaction, the holder of the mortgage shall mail or deliver the satisfied mortgage to the mortgagor or his legal representative with no satisfaction fee charged.**

Under the statute, if Nesbitt's tender satisfied the debt, Lenders were required to accept it and satisfy the mortgage or face legal penalties. On the other hand, if the tender was "short," Lenders had no such duty.

The tender was not short, or at a minimum, there is conflicting evidence as to whether it was short. The disputed difference in the amounts owed revolves around whether the Spartanburg County real property taxes for tax year 2020 had been paid by Lenders prior to the tender or not. The amount of the taxes owed was $1363.46. There is at least conflicting evidence as to:

a) whether the taxes were paid to Spartanburg County tax authorities by Lenders.

b) whether the taxes were paid by Lenders to Spartanburg County tax authorities by Nesbitt.

The only "evidence" of payment of real property taxes is contained in Exhibit 3 attached to the Affidavit of Daniel Anderson (Anderson Dep. Ex. 3, p. 1 l.33-34). That entry reads "County Tax" with an internal and undescribed code of Payee Number 39083.

Lenders have never "come clean" as to how, or to whom, the intended tax payment of $1363.46 was disbursed. No evidence as to the identity of Payee Number 39083 was provided.

In Anderson's affidavit, he uses the term "tax disbursement" not the term "payment." (Anderson Aff. p. 3, ¶ 15). No tax receipt or other acknowledgment of actual receipt from the Spartanburg County Tax authorities by Lenders was offered in evidence. Neither was a canceled check or even a completed check register listing Spartanburg County as a payee offered.

This distinction is significant. If the funds were "disbursed" to another Department within Lenders' organizations, or if those funds were "disbursed" to a third-party payee service, then the tender was not "short" because the intended tax payment was still within the control of the Lenders.

This lack of evidence is in sharp contrast to the unrefuted documentary evidence submitted by Nesbitt. In his affidavit, Timothy Ray, the closing attorney, identified his attached Trust account check number 11969. He stated it had been made payable to Spartanburg County in the amount of $1362.46 and was issued by him on December 7, 2002, for payment in full for Nesbitt's 2020 Spartanburg County Real Property Taxes. Further, the canceled check indicated deposit by Spartanburg County. (Ray Aff., p. 60, p. 1-2, Exhibit 1).

In sum, the dispute as to whether Nesbitt's payoff was "short," is quintessentially a genuine issue of material fact. Thus, reversal of the trial court's order is warranted, and these issues should be submitted to a jury for consideration.

V. SOUTH CAROLINA PRECEDENT IS CLEAR THAT A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO NESBITT'S NEGLIGENCE CLAIM

In order to establish a claim for negligence the plaintiff must prove the following elements: 1) a duty of care owed by the defendant to the plaintiff; 2) a breach of that duty by the defendant's negligent act or omission; 3) the plaintiff was damaged; and 4) the damages proximately resulted from the breach of the duty. *Thomasko v. Poole,* 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002). "An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff." *Bishop v. S.C. Dep't of Mental Health,* 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998). The issue of whether the law

recognizes a particular duty is an issue of law to be decided by the court. *Ellis by Ellis v. Niles,* 324 S.C. 223, 479 S.E.2d 47 (1996).

In their brief, Lenders state the trial court's order granting summary judgment on Nesbitt's negligence claim was correct, stating that South Carolina does not recognize a duty of care in this context. (Resp't Br. 17).

Duty is generally defined as "the obligation to conform to a particular standard of conduct toward another." *Shipes v. Piggly Wiggly St. Andrews* 269 S.C. 479, 483, 238 S.E.2d 167, 168 (1977). Ordinarily, common law imposes no duty on a person to act. *Carson v. Adgar,* 326 S.C. 212, 486 S.E.2d 3 (1997). An affirmative legal duty to act exists if created by statute, contract, relationship, status, property interest, or some other special circumstance. Id.

The case of *Murray v. Bank of Am., N.A.,* 354 S.C. 337,580 S.E.2d 194, (Ct. App. 2003), provides a stark contrast to the cases cited by Lenders in their Brief as to the Duty of care for a bank dealing with consumers.

Murray lost her driver's license in May 1997. On May 14, 1997, a woman opened an account with the Bank in Murray's name. The imposter presented Murray's driver's license and a social security card to the Bank employee and deposited $100.00 in the account. The employee contacted Check Systems, which is a company that verifies credit, to determine if Murray had any prior check writing problems. Check Systems did not reveal any detrimental information about Murray. The imposter wrote sixty fraudulent checks from the account totaling approximately $7,500.

Murray had never had a checking account with the Bank or any other bank. Murray did not become aware of the account opened in her name until employees of Thermax Carpet Cleaning came to her apartment and asked for her to return a rented carpet cleaner. When

Murray went to Thermax, the manager established that she was not the one who rented the cleaner. The manager told Murray that the cleaner had been rented by someone writing a check in her name with the account at the Bank.

On June 2, 1997, Murray went to the Bank and discovered an imposter had opened the account in her name using her driver's license. Murray demanded the Bank close the account. She also requested the Bank inform the merchants who submitted the checks that were returned for insufficient funds that she was innocent and that this was a fraudulent account. She testified that she trusted the Bank to take the requested actions. The Bank, however, failed to close the account until June 30, 1997. Murray also reported the fraudulent account to the police.

On June 2, Murray went to the Bank and spoke with Thomas Wright, a former vice-president and banking center manager with the Bank. She testified that she requested the Bank close the fraudulent account and notify the merchants who submitted checks written on the account that the account was fraudulent. When she left, she felt assured that the Bank would handle the matter. Wright testified he notified the Bank's headquarters in Charlotte on May 21, 1997, that the account was overdrawn and requested its closure. The Bank did not close the account until June 30, 1997, which was almost a month after Murray requested it close the account and notify the merchants. Wright stated the Bank failed to follow its own procedures.

The Murray Court found a relationship between the Bank and Murray arose sufficient to impose upon the Bank a duty of care when Murray went to the Bank seeking closure of the account. The Bank failed to follow its own procedures, did not timely close the account, and did not notify any merchants that the account was fraudulent. The Court found sufficient

evidence in the record from which the jury could determine the Bank breached its duty to Murray after this duty arose.

In the instant case, Nesbitt had an ongoing financial dealing with Lenders involving large amounts of money. A jury could certainly find that when Nesbitt's closing attorney and her mortgage broker brought up the issue of the real property tax payment, it had a duty of care to investigate whether the taxes had been paid.

VI. THE QUESTION OF WHETHER A FIDUCIARY DUTY EXISTS IN THIS PRECISE CONTEXT IS ONE OF FIRST IMPRESSION IN SOUTH CAROLINA BUT PRECEDENT DOES EXIST TO SUPPORT THE CREATION OF FIDUCIARY RELATIONSHIP UNDER THE FACTS OF THIS CASE.

Lenders are correct in their assertion that a normal bank-depositor arrangement creates a creditor-debtor relationship rather than a fiduciary one. *Burwell v. South Carolina National Bank,* 288 S.C. 34, 340 S.E.2d 786 (1986). In *Rush v. S.C. Nat. Bank,* 288 S.C.560, 343 S.E.2d 667 (Ct. App. 1986) the court cited *Burwell*.

However, the *Rush* court also ruled that in limited circumstances, a fiduciary relationship may be created between a bank and a customer if the bank undertakes to advise the customer as a part of the services the bank offers. *Id.* The Court said that unless the funds are deposited into a special account or specifically designated to be kept separate, the relationship between a general deposit and the bank is that of the creditor and debtor, and a trust is not created.

The *Rush* court went on to state whether a general account could become by some transaction a special account that would entail a fiduciary relationship. The transition depends upon the intent of the parties and the evidence of that intent may be what is said and done when the transaction took place. Unless the funds are deposited into a special account or specifically designated to be kept separate, the relationship between a general

depositor and the bank is that of creditor and debtor, and a trust is not created. *Rush,* 288 S.C. at 562, 343 S.E.2d at 668 (Ct. App. 1986).

In this case, from the beginning, the tax funds were to be segregated and escrowed by the original Mortgagee and used for specific purposes, such as tax payments. (Anderson Aff., Exhibit 1, Section 3). This obligation was later assumed by Lenders. Just as described in Rush, these funds were deposited into a special account or specifically designated to be kept separate, and a trust was created.

A jury could have concluded that Lenders' actions in failing to ensure that Nesbitt's escrow payment was properly applied, as well as failing to give an accurate accounting was a breach of their fiduciary duty.

CONCLUSION

Based upon the foregoing, Nesbitt respectfully requests the trial court's order granting summary judgment be reversed and remanded for trial on the merits of all her claims.

JOHNSTON LAW FIRM, LLC

s/ *Andrew J. Johnston*

ANDREW J. JOHNSTON (SC Bar No. 3064)
PO BOX 3252
SPARTANBURG, SC 29304
T:(864) 591 – 1093
ATTORNEY FOR APPELLANT

OTHER COUNSEL OF RECORD:
William Farley, III, Esquire, Counsel for Cenlar, FSB
Benjamin W. White, Esquire, Counsel for Cenlar, FSB
301 South College St. Suite 3400
Charlotte, NC 28202 704-998-4050