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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY

Court of Common Pleas

The Honorable Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2024-001098

Taylor Brunson,

Respondent,

v.

Zack L. Evans, deceased, and any children and heirs at law, distributees and devisees, and if any be deceased then any persons entitled to claim under or through them; also all other persons unknown claiming any right, title, interest, or lien herein, any unknown adults being a class designated as John Doe; and any other unknown minors or persons under disability or in the military service being a class designated as Richard Roe, Tina L. Evans individually and as Personal Representative of the Estate of Zack L. Evans, Kara Pitchford, and Autumn Skye Properties, LLC, Defendants,

of whom Tina L. Evans individually and as Personal Representative of the Estate of Zack L. Evans, and Kara Pitchford are the Appellants,

Appellants.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL ii

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS.....2

STANDARD OF REVIEW 3

ARGUMENT3

I. THE TRIAL COURT DID NOT DISMISS OR STRIKE APPELLANTS’ AFFIRMATIVE DEFENSES ARISING UNDER THE SOUTH CAROLINA CONSUMER PROTECTION CODE.3

II. THE TRIAL COURT PROPERLY DISMISSED APPELLANTS’ COUNTERCLAIM ALLEGING VIOLATION OF THE ATTORNEY PREFERENCE STATUTE.4

A. Brunson Is Not Liable for an Alleged Violation of the Attorney Preference Statute by the Original Lender.4

B. Appellants’ Counterclaim Alleging Violation of the Attorney Preference Statute is Time-Barred.....5

III. THE TRIAL COURT PROPERLY DISMISSED APPELLANTS’ COUNTERCLAIM ALLEGING VIOLATION OF THE HIGH-COST AND CONSUMER HOME LOANS ACT.6

A. S.C. Code § 37-23-30 Does Not Prohibit Charging Fees In Excess of 10% of the Loan Balance.6

B. Brunson is not a Lender in a High-Cost Home Loan Pursuant to S.C. Code § 37-23-40.6

C. Brunson is Not A Mortgage Broker or Originator Subject to the Requirements of S.C. Code § 37-23-45, § 37-23-70, and § 37-23-75.....7

IV. THE ASSIGNMENT TO BRUNSON DOES NOT GIVE RISE TO ANY OBLIGATION OR CLAIM ARISING UNDER THE SOUTH CAROLINA CONSUMER PROTECTION CODE.8

A. This Court Should Not Consider Appellants’ Argument Regarding the Assignment Because The Trial Court Did Not Rule Upon This Issue.8

B. Martin Only Assigned The Rights and Obligations Under the Note and Mortgage and Not the SCCPC.....8

CONCLUSION9

TABLE OF AUTHORITIES

Cases

Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007).....5

Rosemond v. Campbell, 288 S.C. 516, 343 S.E.2d 641 (S.C. Ct. App. 1986)6

S.C. Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk
Retention Group, 347 S.C. 333, 554 S.E.2d 870 (Ct. App. 2001)10

Sloan Constr. Co. v. Southco Grassing, Inc., 377 S.C. 108, 659 S.E.2d 158 (2008).....5

Summersell v. S.C. Dep’t of Pub. Safety, 337 S.C. 19, 552 S.E.2d 144 (1999).....10

Statutes

S.C. Code § 37-1-3016

S.C. Code § 37-2-4046

S.C. Code § 37-3-1078

S.C. Code § 37-10-1026

S.C. Code § 37-10-1056, 7

S.C. Code § 37-23-209

S.C. Code § 37-23-308

S.C. Code § 37-23-409

S.C. Code § 37-23-459, 10

S.C. Code § 37-23-709, 10

S.C. Code § 37-23-759, 10

Treatises

Kathleen Goodpasture Smith, *The South Carolina Consumer Protection Code*, (2001).....8, 9

STATEMENT OF ISSUES ON APPEAL

- I. Did the Trial Court Err in Dismissing Appellants' Affirmative Claim for Relief For Violation of the Attorney Preference Statute Where Respondent Was Not The Original Lender and Where Appellants' Failed to Bring Their Claim Within Three Years of the Alleged Violation?**
- II. Did the Trial Court Err in Dismissing Appellants' Affirmative Claim for Relief For Violation of the High-Cost and Consumer Home Loans Act Where Respondent Was Not a Lender or Mortgage Broker as Defined by the South Carolina Consumer Protection Code?**
- III. Is Appellants' Argument Regarding the Assignment of Mortgage Preserved for Review?**
- IV. Does the Assignment Between Martin and Respondent Create Liability for Alleged Violation of the South Carolina Consumer Protection Code?**

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Zack L. Evans owned real property located at 141 Browning Court (hereinafter the “Property”) until his death on May 24, 2023. (Am. Answer, ¶ 3.) Upon Mr. Evans’ death, title to the Property devolved to Tina L. Evans and Kara Pitchford in equal shares. (Id.) Prior to his death, in October 2019, Mr. Evans gave a promissory note for \$17,220.00 and a mortgage secured by the Property to Wesley Martin. (Complaint, ¶ 9). After Mr. Evans’ death, Wesley Martin assigned the note and mortgage to Plaintiff. (Complaint, ¶ 12). Respondent was not associated with Martin or involved in the original loan transaction in any way. (Tr. p. 7, l. 17-21.) Respondent initiated this action on January 15, 2024, seeking foreclosure of the mortgage and alleging the Appellants failed to pay the required installments. In response, the Appellants asserted defenses and counterclaims alleging the note and mortgage were entered into in violation of the South Carolina Consumer Protection Code (hereinafter “SCCPC”). The SCCPC defenses and counterclaims all allege the Appellants are entitled to statutory damages and attorney’s fees and costs as well as cancellation of the note and mortgage. (Complaint, ¶¶ 26-46.) In response, Respondent filed a Motion to Dismiss the SCCPC counterclaims pursuant to Rule 12(b)(6).

Respondent’s Motion to Dismiss was heard by The Honorable Roger M. Young, Sr. on April 9, 2024. At the hearing, Appellants voluntarily dismissed their Fourth and Seventh Counterclaims and Defenses. (Tr. p. 16, l. 1-6; p. 17, l. 9-12.) By order dated June 10, 2024, Judge Young dismissed the remaining SCCPC counterclaims. (Order 7.) Judge Young’s order did not dismiss or strike Appellants’ remaining SCCPC defenses. (Id.) Appellants’ Notice of Appeal followed on June 28, 2024. (NOA.)

STANDARD OF REVIEW

In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court. Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007). Thus, the question for the court is whether, in the light most favorable to the claimant, and with every doubt resolved in his behalf, the allegations set forth on the face of the complaint state any valid claim for relief. Sloan Constr. Co. v. Southco Grassing, Inc., 377 S.C. 108, 659 S.E.2d 158 (2008). An appellate court will uphold the trial court's dismissal of a claim where the opposing party demonstrates that the claimant has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. Id.

ARGUMENT

V. THE TRIAL COURT DID NOT DISMISS OR STRIKE APPELLANTS' AFFIRMATIVE DEFENSES ARISING UNDER THE SOUTH CAROLINA CONSUMER PROTECTION CODE.

Appellants argue that the trial court improperly dismissed the SCCPC claims because they are entitled to assert those claims as a "defense by recoupment or set-off." However, the trial court's order does not purport to dismiss or limit Appellants' ability to raise the alleged violations as an affirmative defense. Instead, the order merely dismisses Appellants' counterclaims seeking damages and other affirmative relief. (Order, p. 7.) Because Appellants only argue that they are entitled to the defense by recoupment or set-off, they have conceded that the trial court's order dismissing their affirmative claims was proper. Therefore, Appellants' appeal should be denied in its entirety.

VI. THE TRIAL COURT PROPERLY DISMISSED APPELLANTS' COUNTERCLAIM ALLEGING VIOLATION OF THE ATTORNEY PREFERENCE STATUTE.

A. Respondent Is Not Liable for an Alleged Violation of the Attorney Preference Statute by the Original Lender.

The South Carolina Attorney Preference Statute requires a creditor to ascertain, prior to closing, the preference of a borrower as to the legal counsel that is employed to represent the debtor in all matters relating to the closing of a mortgage loan. S.C. Code § 37-10-102. If a creditor violates this provision, the debtor has a cause of action to recover actual damages and also a right “to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars.” S.C. Code § 37-10-105.

“Creditor” is defined as “the person who grants credit in a credit transaction or, except as otherwise provided, an assignee of a creditor’s right to payment.” S.C. Code § 37-1-301(13). However, the assignee of a debt “takes only the benefits, not the burdens of the assigned obligation.” Rosemond v. Campbell, 288 S.C. 516, 522-523, 343 S.E.2d 641, 645 (Ct. App. 1986). “Thus, as against the assignee, the obligor can only assert a claim defensively when the assignee seeks to enforce the obligation; *he has no common law right to sue the assignee affirmatively on a claim against the assignor arising from the underlying obligation.*” Id. (emphasis added).

Any further reliance on Rosemond is misplaced. While the Court of Appeals ultimately held that the Rosemonds could bring affirmative claims against Pickensville Investment, the Court stated that S.C. Code § 37-2-404 alters the common law rule regarding assignee liability. Specifically, Section 37-2-404 explicitly subjects assignees

of consumer credit sales to all claims and defenses of the consumer against the seller. The instant case does not involve a consumer credit sale so Section 37-2-404 does not apply and the Appellants are limited to asserting their claim defensively. Moreover, the attorney-preference statute specifically limits a debtor's right to affirmatively recover for an alleged violation of the statute only "from the person violating this chapter." S.C. Code § 37-10-105(A). Therefore, as a matter of law, Respondent cannot be held liable for an alleged violation of the Attorney Preference Statute by the original lender and the trial court appropriately dismissed Appellants' Counterclaim for violation of the Attorney Preference Statute.

B. Appellants' Counterclaim Alleging Violation of the Attorney Preference Statute is Time-Barred.

A debtor cannot bring an action for violation of the Attorney Preference Statute more than three years after the violation occurred. S.C. Code § 37-10-105(A). The subject loan was closed October 29, 2019. (Compl. ¶ 9.) Therefore, any affirmative action to recover for an alleged violation of the Attorney Preference Statute had to be brought no later than October 29, 2022. Appellant brought their counterclaims more than a year later, on February 15, 2024. Further, Appellants conceded that they cannot sue Respondent for violation of the Attorney Preference Statute. (Tr. p. 11, l. 6-9; p. 12, l. 1-2; p. 12, l. 9-11; p. 12, l. 16-17; p. 13, l. 22-25; p. 14, l. 9-13.). Therefore, Appellant's claim for affirmative relief under the Attorney Preference Statute fails as a matter of law.

VII. THE TRIAL COURT PROPERLY DISMISSED APPELLANTS' COUNTERCLAIM ALLEGING VIOLATION OF THE HIGH-COST AND CONSUMER HOME LOANS ACT.

A. S.C. Code § 37-23-30 Does Not Prohibit Charging Fees In Excess of 10% of the Loan Balance.

The Appellants' Fifth Counterclaim alleged that the subject note and mortgage violate S.C. Code § 37-23-30 because the loan charges fees of 10% of the loan balance. (Am. Answer, ¶ 36(a)). However, the plain language of S.C. Code § 37-23-30 does not contain any prohibition against charging fees of 10% of the loan balance. Therefore, the trial court properly dismissed so much of Appellant's Fifth Counterclaim that alleged a violation of S.C. Code § 37-23-30.

B. Respondent is not a Lender in a High-Cost Home Loan Pursuant to S.C. Code § 37-23-40.

The Appellant's Fifth Counterclaim alleges that the note and mortgage were entered into in violation of the South Carolina High Cost and Consumer Home Loans Act because the Lender made the loan without a written certification from a credit counselor and without reason to believe Evans could repay the loan. However, Respondent was not the lender in this case as defined by the SCCPC.

S.C. Code § 37-3-107(1) defines the term "lender" to include "an assignee of the lender's right to payment" but caveats that "use of the term does not in itself impose on an assignee any obligation of the lender with respect to events occurring before the assignment." Under the SCCPC, "though assignees take all rights conferred by the SCCPC on creditors, they are liable for the obligations imposed on creditors by [Title 37] only with respect to occurrences after assignment, unless the SCCPC provides otherwise." Kathleen Goodpasture Smith, The South Carolina Consumer Protection Code, 65 (2001). Any violation of § 37-23-40 necessarily occurred before the

assignment to Respondent. Therefore, as with Appellants' affirmative claim for violation of the Attorney Preference Statute, the trial court properly dismissed Appellant's claim for violation of S.C. Code § 37-23-40.

C. Respondent is Not A Mortgage Broker or Originator Subject to the Requirements of S.C. Code § 37-23-45, § 37-23-70, and § 37-23-75.

Chapter Twenty-Three of Title Thirty-Seven requires mortgage brokers and originators to make various disclosures to borrowers before "high-cost" or "consumer" loans are closed. Appellants asserted violation of S.C. Code § 37-23-45, S.C. Code § 37-23-70(D) and S.C. Code § 37-23-75 as counterclaims against Respondent. However, because Respondent is not a mortgage broker or originator as defined by Chapter Twenty-Three, the trial court correctly held that Appellant's counterclaim fails as a matter of law.

A "mortgage broker" is defined as "a person or organization in the business of soliciting, processing, placing, or negotiating mortgage loans for others." S.C. Code § 37-23-20(3). A "originator" is defined as "an employee of a mortgage broker or mortgage lender whose job is to inform loan applicants of rates, terms, and other aspects of the mortgage. S.C. Code § 37-23-20(12). Each of these sections "focus on those who bring lenders and borrowers together rather than lenders themselves." Kathleen Goodpasture Smith, The South Carolina Consumer Protection Code, 173 (2001).

Appellants' Answer and Counterclaim does not allege Respondent is a mortgage broker or loan originator in general or acted as either role in the subject transaction. At best, Appellants' pleadings allege that Respondent is liable for the alleged acts and omissions of the original lender, Martin, as an assignee. Because Chapter Twenty-Three applies to brokers, and not lenders themselves, the trial court correctly dismissed

Appellants' *counterclaim* for violation of S.C. Code § 37-23-45, § 37-23-70 and § 37-23-75.

VIII. THE ASSIGNMENT TO RESPONDENT DOES NOT GIVE RISE TO ANY OBLIGATION OR CLAIM ARISING UNDER THE SOUTH CAROLINA CONSUMER PROTECTION CODE.

A. This Court Should Not Consider Appellants' Argument Regarding the Assignment Because The Trial Court Did Not Rule Upon This Issue.

The Order Dismissing Appellants' Counterclaims does not address Appellants' argument that Martin assigned the SCCPC obligations to Respondent under the Assignment of Mortgage. "An issue must be raised to and ruled on by the trial court for an appellate court to review the issue." S.C. Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Group, 347 S.C. 333, 343, 554 S.E.2d 870, 875 (Ct. App. 2001). Where a party raises an issue, but the issue is never ruled on by the trial court, and the party fails to file a motion to alter or amend, the issue is not preserved. Summersell v. S.C. Dep't of Pub. Safety, 337 S.C. 19, 552 S.E.2d 144 (1999).

Appellants raised its argument regarding the assignment to the trial court during oral argument and in their proposed order denying Respondent's Motion to Dismiss. (Tr. p. 10, l. 5-16; Def. Proposed Order, p. 3.) However, the trial court's order does not address or rule upon this argument. Appellants did not file a motion to alter or amend and so this issue is not preserved for review by this court.

B. Martin Only Assigned The Rights and Obligations Under the Note and Mortgage and Not the SCCPC.

The assignment assigns "[a certain Mortgage and Promissory Note dated October 29, 2019, made and executed by Zack L. Evans . . . [s]uch Mortgage having been given to secure an original principal amount of \$17,220.00 . . . together with the note(s) and

obligations therein described and the money due and to become due thereon with interest, and all rights accrued or to accrue under such Mortgage.” The assignment only assigns those to Respondent those rights and obligations arising under the Mortgage, not any obligation or right created by the SCCPC. Because the subject counterclaims only asserted claims arising under the SCCPC, the assignment cannot be said to transfer liability under the SCCPC from Martin to Respondent.

CONCLUSION

For all the foregoing reasons, Respondent respectfully requests this court uphold the trial court’s ruling dismissing Appellants’ Third, Fourth, Fifth, Sixth, and Seventh Counterclaims.

Respectfully submitted,

December 16, 2024

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Zack L. Evans, deceased, and any children and heirs at law, distributees and devisees, and if any be deceased then any persons entitled to claim under or through them; also all other persons unknown claiming any right, title, interest, or lien herein, any unknown adults being a class designated as John Doe; and any other unknown minors or persons under disability or in the military service being a class designated as Richard Roe, Tina L. Evans individually and as Personal Representative of the Estate of Zack L. Evans, Kara Pitchford, and Autumn Skye Properties, LLC, Defendants,

of whom Tina L. Evans individually and as Personal Representative of the Estate of Zack L. Evans, and Kara Pitchford are the Appellants,

Appellants.

PROOF OF SERVICE

I hereby certify that on December 16, 2024, I served Respondent's Initial Brief and Designation of Matter To Be Included in Record on Appeal upon counsel for Appellants by delivering a copy of same by electronic service to the primary e-mail addresses listed in the Attorney Information System (AIS) as follows:

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