

STATE OF SOUTH CAROLINA
 COUNTY OF Oconee
 IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2011 CP-37-01250

Branch Banking and Trust Company-sbm, et al

Sarah L. Gray, et al

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : Plaintiff Defendant
 or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.
 Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

s/J. Cordell Maddox, Jr.

Circuit Court Judge

2131

Judge Code

08/13/2013

Date

FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT

STATE OF SOUTH CAROLINA THE COURT OF COMMON PLEAS

COUNTY OF OCONEE

2013 AUG 16 P 8:00 ACTION NO: 2011-CP-37-1250

Branch Banking and Trust Company,

Plaintiff,

v.

Sarah L. Gray, Jeffery Gray, Suntrust Bank,
West Union Development, LLC, and Bank of
Anderson, N.A.

Defendants.

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT
AS TO DEFENDANTS
SARAH L. GRAY'S AND
JEFFERY GRAY'S COUNTERCLAIMS
AND JURY TRIAL DEMAND
AND
ORDER REFERRING THE
FORECLOSURE ACTION TO THE
MASTER-IN-EQUITY FOR
OCONEE COUNTY**

This matter comes before the Court upon Motion of Plaintiff Branch Banking and Trust Company ("BB&T")'s for Summary Judgment as to Defendants Sarah L. Gray and Jeffery Gray ("the Grays") Counterclaims and Jury Trial Demand and for an Order referring the foreclosure action to the Master-In-Equity for Oconee County.

A hearing on the Motion occurred on July 30, 2013 at which time Wm. Douglas Gray and Weyman C. Carter appeared on behalf of BB&T. Charles R. Griffin, Jr. appeared on behalf of the Grays. After reviewing BB&T's Memoranda and attached Affidavits in support of its Motion and hearing arguments by counsel on behalf of their respective clients, this Court grants BB&T's Motion and refers the foreclosure action to the Master-In-Equity for Oconee County for the reasons set forth hereinafter.

SUMMARY JUDGMENT STANDARD

Rule 56(c) of the South Carolina Rules of Civil Procedure, SCRPC, provides in pertinent part as follows:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show 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(e), SCRCPP, also provides in pertinent part as follows:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify as to the matters stated therein....When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

As to when opposing Affidavits must be served, Rule 56(c) SCRCPP provides:

The adverse party may serve opposing affidavits not later than two (2) days before the hearing.

In determining whether any triable issues of fact exist, the Court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the non-moving party. *Worsley Companies, Inc. v. The Town of Mount Pleasant*, 339 S.C. 51, 528 S.E.2d 657 (2000). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. *Ellis v. Davidson*, 558 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004). A court should grant summary judgment against a party who has failed to make a showing sufficient to establish the existence of an essential element of that party's case. *Harris v. Rose's Stores, Inc.*, 315 S.C. 344, 433 S.E.2d 905 (Ct. App. 1993).

PERTINENT FACTS

BB&T filed its Complaint on December 21, 2011 seeking to foreclose a mortgage made, executed, and delivered by the Grays upon certain real estate, located in Oconee County, South Carolina. Pursuant to Rule 36, SCRCPP, BB&T served upon the Grays certain Requests for Admissions. The Grays admitted the following:

- On July 29, 2003, the Grays made, executed, and delivered to BB&T a promissory note in the amount of \$180,000.00.
- In order to secure the payment of the note, the Grays on July 29, 2003 made, executed, and delivered to Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for BB&T a mortgage covering the real property as described therein located in Oconee County, South Carolina.
- Prior to or during the closing of the loan which is the subject of the foreclosure action, the Grays signed the "borrower's preference of legal counsel/insurance agent" in selecting James S. Belk, Esquire as their attorney.
- The Grays acknowledged they were provided with and signed a Federal-Truth-In-Lending Disclosure statement.
- The Grays admitted that they are in default on the terms of the promissory note in that they have not made all payments as they have become due.

The uncontroverted Affidavit of Richard L. Miller, BB&T's Foreclosure Manager, establishes that BB&T was the original lender and creditor and did not purchase or acquire the loan from a third party. The mortgage was executed in favor of MERS as nominee for BB&T. MERS serves as Mortgagee of Record for residential mortgage loans originated by BB&T and this is done to facilitate the sale and transfer of mortgage loans on the secondary market since MERS maintains a register of ownership of loans for which it serves as Mortgagee of Record. In this case, however, BB&T did not sell the loan but continued to hold the loan and service it. According to Miller's Affidavit, at the time the foreclosure action was filed in December of 2011, installments due on and after May 1, 2011 are unpaid and as of July 18, 2013 the total

amount due and owing BB&T exclusive of foreclosure fees and costs was the sum of \$43,357.32.

The uncontroverted Affidavit of John I. Hobbs, Vice President of BB&T, establishes that he was one of several officers of BB&T appointed as "signing officers" of MERS by a corporate resolution dated March 27, 2011. Pursuant that authority, Mr. Hobbs executed an assignment of real estate mortgage on December 1, 2011 for purposes of assigning the mortgage dated July 29, 2003 given by the Grays to MERS as nominee for BB&T and the assignee was BB&T. The assignment was made prior to the institution of the foreclosure action.

COUNTERCLAIM, LAW, AND ANALYSIS

The Grays allege in their Counterclaim purported causes of action for (1) violation of South Carolina Unfair Trade Practices Act, (2) breach of contract and/or breach of contract accompanied by fraudulent act, (3) violation of the South Carolina Consumer Protection Code, and (4) violation of the Federal Fair Debt Collection Practices Act. Upon review of the allegations, it appears that the only specific factual allegations underlying the Counterclaims are that BB&T failed to comply with the "Attorney Preference" requirement of the South Carolina Consumer Protection Code and that BB&T "acquired" the loan by means of a false or fraudulent assignment from MERS. As noted earlier herein, the Grays admitted they received and signed the "Attorney Preference" form selecting James S. Belk, Esquire as their closing attorney. The Miller Affidavit further establishes that BB&T provided the Grays with written notice of their right to select the closing attorney and the insurance agent. The Hobbs Affidavit refutes the allegation relating to any false or fraudulent assignment of the Mortgage.

At the hearing on July 30, 2013, the attorney for the Grays proffered an Affidavit of Jeffery Gray which was faxed to Weyman C. Carter's legal assistant on Sunday, July 28, 2013.

The fax of the Affidavit does not comply with the service requirement of Rule 5(b)(1), SCRPC, in that it was not delivered to counsel for BB&T or mailed. The Court takes judicial notice that service by electronic means is not recognized in state courts in South Carolina. Additionally, the Affidavit does not comply with Rule 56(c) in that it was not served more than two (2) days before the hearing. BB&T further objects to the content of the Affidavit in that it contains hearsay and does not set forth such facts as would be admissible in evidence. While the Court agrees with BB&T's objections in part, the Court does not find it necessary in granting BB&T's Motion to make any additional rulings on the issues pertaining to service, the manner, and timeliness of the Affidavit and its content.

The Court has reviewed each one of the alleged causes of action in the Counterclaim and finds them without merit. The claim relating to the violation of the South Carolina Fair Trade Practices Act is based upon the factual premise that the assignment by MERs to BB&T was false is refuted by the Hobbs Affidavit.

The claim for breach of contract and/or breach of contract accompanied by fraudulent act fails because the Grays, by their own admissions, failed to comply with the terms of the promissory note by making timely payment. In South Carolina, a party may not insist upon the performance of a contract or a provision thereof where that party is guilty of a material or substantial breach of that contract or provision. *See, Ralph King Anderson, Jr. South Carolina Request to Charge – Civil 2009, § 19-16.*

The claim relating to violations of the South Carolina Consumer Protection Code is based on the allegation that BB&T did not ascertain the preference of the Grays as to legal counsel but as previously shown, the Grays admitted they signed the Attorney Preference form and selected James S. Belk, Esquire as the closing attorney. In addition, the Miller Affidavit establishes that

the notice required by statute was provided. Therefore, there is no issue of material fact regarding this claim.

The Grays also contend in their Counterclaim violations of the Federal Fair Debt Collection Practices Act ("FDCPA"). This cause of action fails because BB&T is not a "debt collector" within the meaning of the FDCPA. The Grays fail to assert in their Counterclaim facts to substantiate their allegation that BB&T is a debt collector and merely alleging an entity is a "debt collector" is, by itself, insufficient. *See*, 15 U.S.C.A. § 1692(a), citing *Swain v. CACH, LLC* M.D. Cal. 2009, 699 F. Supp. 2nd 1109. BB&T is not a "debt collector" because it falls within the creditor exemption of FDCPA. The Act defines "creditor" as "any person who offers or extends credit creating a debt to whom the debt is owed." 15 U.S.C.A. § 1692(a)(4). Because BB&T is the entity "to whom a debt is owed" with respect to the note signed by the Grays, it follows that BB&T is not a debt collector with respect to the promissory note.

CONCLUSION

The Grays have failed to show there is a genuine issue of material fact relating to the Counterclaim and pursuant to Rule 56, SCRC, BB&T is entitled to an Order granting it Summary Judgment as to the Grays' Counterclaim. Accordingly, the Complaint asserting BB&T's action for foreclosure remains. An action for the foreclosure of a real estate mortgage is one in equity. *Collier v. Green*, 244 S.C. 367, 137 S.E.2d 277 (1964). Since the Grays' Counterclaim has been disposed of, there is no longer any claim triable by jury.

IT IS HEREBY ORDERED, that

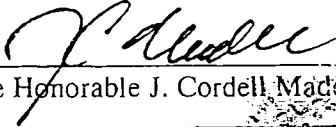
1. BB&T's Motion for Summary Judgment as to Defendants Sarah L. Gray's and Jeffery Gray's Counterclaims and Jury Trial Demand is hereby granted.

2. This action is hereby referred to the Honorable Ellis B. Drew, Jr., Master-in-Equity for Oconee County, with authority to enter a final judgment in the action, and to hear and determine any post-judgment motions or proceedings. Any appeal from the judgment entered by the Master-in-Equity shall be to the South Carolina Court of Appeals or to the South Carolina Supreme Court.

3. The Master-in-Equity may hold the hearing(s) in this case in either Oconee County or in Anderson County, in the Master's discretion.

4. The Order of Foreclosure and Sale, if one be entered, may direct that the foreclosure sale be held on a day other than the first Monday of the month.

It is so ORDERED this 13 day of August, 2013.


The Honorable J. Cordell Maddox, Jr.

FILED OCONEE SC
BEVERLY H. WHITE
CLERK OF COURT
2013 AUG 16 10 31 AM

