THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas
Perry M. Buckner, Circuit Court Judge

Civil Action No. 2011-CP-03-127

21st Mortgage Corporation . . . . Appellant,

v.

Robert Youmans and Tonya Stoney . . . . .Respondents.

FINAL BRIEF OF APPELLANT

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MAR 03 2014
SC Court of Appeals

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TABLE OF CONTENTS

Table of Authorities ii
Statement of Issues on Appeal 1
Statement of the Case 1
Statement of Facts 2
Arguments

I. STANDARD OF REVIEW 4

II. THE LOWER COURT ERRED IN HOLDING THAT 21st MORTGAGE WAS BOUND BY A DEFAULT JUDGMENT IN AN ACTION THAT IT HAD NO NOTICE OF AND TO WHICH IT WAS NOT A PARTY 5

III. THE LOWER COURT ERRED IN HOLDING THAT 21st MORTGAGE HAD NOTICE OF THE JUDGMENT AGAINST THE DEALER AT THE TIME THAT THE PROMISSORY NOTE WAS ASSIGNED TO IT 7

IV. THE LOWER COURT ERRED IN HOLDING THAT 21st MORTGAGE WAS SUBJECT TO THE PUNITIVE DAMAGES AND ATTORNEY'S FEES AWARDED AGAINST THE DEALER 9

Conclusion 12

TABLE OF AUTHORITIES

Cases

American Federal Bank, F.S.B v. White, 296 S.C. 165, 370 S.E.2d 923 (Ct. App. 1988)............8
Beall v. Doe, 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984)............7
Carolina Renewal, Inc. v. S.C. Dept. of Transportation, 385 S.C. 550, 684 S.E.2d 779 (Ct. App. 2009)............6, 7
Carrigg v. Cannon, 347 S.C. 75, 552 S.E.2d 767 (Ct.App.2001)............6
Cowden Enterprises, Inc. v. East Coast Millwork Distributors, 363 S.C. 540, 611 S.E.2d 259 (Ct. App. 2005)............5
Crews v. Altavista Motors, Inc., 65 F. Supp. 2d 388 (W.D. Va. 1999)............10, 11
Gause v. Smithers, 403 S.C. 140, 742 S.E.2d 644 (2013)............11
Judy v. Judy, 383 S.C. 1, 677 S.E.2d 213 (Ct.App.2009)............6
Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997)............7
Reagans v. MountainHigh Coachworks, Inc., 117 Ohio St. 3d 22 (2008)............10, 11
Sartin v. Macik, 535 F.3d 284 (4th Cir. 2008)............6
State v. Bacote, 331 S.C. 328, 503 S.E.2d 161 (1998)............6
WDW Props. v. City of Sumter, 342 S.C. 6, 535 S.E.2d 631 (2000)............5

Statutes

S.C. Code Section 37-1-101............8
S.C. Code Section 37-2-404............8, 9

Other Authorities

Restatement (Second) of Judgments §27............6
Restatement (Second) of Judgments §28............7

STATEMENT OF THE ISSUES ON APPEAL

1. Did the lower court err in holding that 21st Mortgage was bound by a default judgment entered in an action that it had no notice of and to which it was not a party?
2. Did the lower court err in holding that 21st Mortgage had notice of the judgment against the Dealer at the time the promissory note was assigned to it?
3. Did the lower court err in holding that that 21st Mortgage was subject to the punitive damages and attorney's fees awarded against the Dealer?

STATEMENT OF THE CASE

This appeal arises out of an action filed in Allendale County for claim and delivery of a mobile home by Appellant 21st Mortgage Corporation on April 28, 2011, against Respondents Robert Youmans and Tonya Stoney. On May 18, 2011, Respondents filed an Answer and Counterclaim. The counterclaim alleged a cause of action for abuse of process. Appellant filed a Reply to the Answer and Counterclaim on June 2, 2011.

On May 1, 2012, Respondents filed an Amended Answer and Counterclaim in which they added causes of action for damages under the South Carolina Consumer Protection Code and for a declaratory judgment. On May 14, 2012, Appellant filed a Reply to the Amended Answer and Counterclaim.

The case was scheduled for a jury trial on June 10, 2013. That morning, Respondents filed a motion for summary judgment on Appellant's claim and delivery action. At the pre-trial conference with the trial judge, Respondents' counsel stated that he was willing to withdraw his counterclaims without prejudice and let the trial judge rule on his motion for summary judgment based on the facts in the record. Appellant's counsel agreed that, if the counterclaims were withdrawn, there would be no genuine issue of

material fact in the case, and the claim and delivery action could be decided on the undisputed facts in the record. Appellant's counsel requested and was given an opportunity to file his own motion for summary judgment. The trial judge then scheduled a hearing on both motions for the following day.

On June 11, 2013, the parties argued their motions for summary judgment. On July 15, 2013, the lower court issued an Order granting Respondents' motion for summary judgment and denying Appellant's motion. On July 25, 2013, Appellant filed a motion to alter or amend. On August 7, 2013, the lower court issued an Order denying the motion to alter or amend. On August 28, 2013, Appellant timely filed a Notice of Appeal.

STATEMENT OF FACTS

On March 20, 2002, Respondent Robert Youmans financed the purchase of a 1996 Pioneer Mobile Home (Serial No. PH1506GA9793) (the "Mobile Home") through The Housing Group, Inc. d/b/a Schult Home Center of Orangeburg (the "Dealer"). The terms of the financing are set forth in an Installment Note, Security Agreement and Disclosure Statement (R. 61) (the "Note"). Immediately after the sale of the Mobile Home, the Dealer assigned the Note to SouthTrust Bank, and Respondents proceeded to make monthly payments to SouthTrust.

In 2003, Mr. Youmans, along with Tonya Stoney, who is not obligated on the Note but who lives in the Mobile Home, brought an action in the Allendale County Court of Common Pleas against the Dealer alleging various problems with the Mobile Home (*Youmans v. The Housing Group, Inc.*, Civil Action No. 2003-CP-03-20) (R. 79-85). At that time, Respondents knew that they were making their monthly payments to SouthTrust and knew that SouthTrust had the lien against the Mobile Home. Despite this

knowledge, SouthTrust Bank was not named as a party to that lawsuit and, therefore, had no knowledge of the lawsuit.

The Dealer did not respond to the lawsuit filed by Youmans and Stoney and was found to be in default. (R. 58). On August 30, 2004, a damages hearing was held on the claims asserted by Youmans and Stoney against the Dealer. No one appeared on behalf of the Dealer at the damages hearing. At the conclusion of the damages hearing, the Special Referee found that Youmans and Stoney were entitled to actual damages in the amount of $13,573.00. The Special Referee trebled the actual damages and awarded attorney's fees of $13,573.00, and costs of $540.00. The total amount of the judgment entered in favor of Youmans and Stoney against the Dealer was $54,657.00. (R. 59).

The judgment against the Dealer was enrolled in the judgment index in the Office of the Allendale County Clerk of Court on November 8, 2004. The judgment was indexed in the name of The Housing Group, Inc., but was not indexed under the name Schult Home Center.

Despite obtaining a judgment against the Dealer, Respondents continued to make their monthly payments to SouthTrust Bank. In February of 2005, Appellant 21st Mortgage Corporation ("21st Mortgage") acquired the Note from SouthTrust Bank. By letter dated February 25, 2005, Respondent Robert Youmans was notified by SouthTrust that the Note was being transferred to 21st Mortgage, and he was directed to start sending the monthly payments due on the Note to 21st Mortgage. (R. 73).

After being notified that the Note had been transferred by SouthTrust to 21st Mortgage, Respondents still did not give anyone notification that they had obtained a judgment against the Dealer. Instead, in March of 2005, Respondents started mailing their

monthly payments to 21st Mortgage. They continued to make payments on the Note for more than five years, without ever notifying 21st Mortgage that they had a judgment against the Dealer. (R. 86). Payments continued until December 27, 2010, when a partial payment of $135.00 was received by 21st Mortgage. No payments were made on the Note after December 27, 2010. (R. 73, 86).

On April 28, 2011, 21st Mortgage filed this claim and delivery action seeking possession of the Mobile Home. (R. 9). On May 18, 2011, Respondents filed an Answer and Counterclaim in response to the Complaint for claim and delivery. (R. 29). In their Answer and Counterclaim, Respondents asserted that the repossession sought by 21st Mortgage was barred by the judgment Respondents obtained against the Dealer in 2004, since the amount of the judgment exceeded the balance due on the Note. (R. 30, ¶9). At this point, 21st Mortgage had held the Note for more than six years, but this was the first notice it had that there was a claim against the Dealer that might give rise to an offset against the Note. (R. 4).

ARGUMENTS

I. STANDARD OF REVIEW

This matter was heard by the lower court on cross-motions for summary judgment. The parties stipulated to the relevant facts, agreed that there was no genuine issue as to any material fact in the case, and agreed for the lower court to decide the case based on the facts in the record. (R. 45-46) The lower court based its decision on the undisputed facts in the record.

When an appeal involves stipulated or undisputed facts, the appellate court is free to review whether the trial court properly applied the law to those facts. *WDW Props. v.*

City of Sumter, 342 S.C. 6, 535 S.E.2d 631 (2000). In such cases, the appellate court is not required to defer to the trial court's legal conclusions. *Cowden Enterprises, Inc. v. East Coast Millwork Distributors,* 363 S.C. 540, 611 S.E.2d 259 (Ct. App. 2005). Accordingly, in deciding this appeal, this Court can make its own legal conclusions based on the facts in the record, and it is not bound by the conclusions of the lower court.

II. THE LOWER COURT ERRED IN HOLDING THAT 21st MORTGAGE WAS BOUND BY A DEFAULT JUDGMENT IN AN ACTION THAT IT HAD NO NOTICE OF AND TO WHICH IT WAS NOT A PARTY.

In granting Respondents' motion for summary judgment, the lower court concluded that that judgment obtained by Respondents against the Dealer could be used to offset the balance owed to 21st Mortgage on the Note. Respondents presented no evidence to support their claim against the Dealer, nor did they present any evidence of their damages. Instead, they relied exclusively on the default judgment entered in their lawsuit against the Dealer. However, it is undisputed that:

1. neither 21st Mortgage nor SouthTrust, the lender that assigned the Note to 21st Mortgage, was a party to that lawsuit;
2. neither 21st Mortgage nor SouthTrust had notice of the lawsuit; and
3. neither 21st Mortgage nor SouthTrust had an opportunity to defend the lawsuit.

(R. 74).

The legal question presented is whether collateral estoppel bars 21st Mortgage from relitigation of the issues decided in Respondents' action against the Dealer. Collateral estoppel prevents a party from relitigating an issue that was decided in a previous action. *Judy v. Judy*, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct.App.2009). The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit

was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. *Carolina Renewal, Inc. v. S.C. Dept. of Transportation*, 385 S.C. 550, 684 S.E.2d 779 (Ct. App. 2009).

The doctrine of collateral estoppel should not be rigidly or mechanically applied. *Carrigg v. Cannon*, 347 S.C. 75, 81, 552 S.E.2d 767, 770 (Ct.App.2001). Thus, even if all the elements for collateral estoppel are met, when unfairness or injustice results or public policy requires it, courts may refuse to apply it. *State v. Bacote*, 331 S.C. 328, 503 S.E.2d 161 (1998). A party may not assert collateral estoppel to prevent relitigation of a previously litigated issue unless the party sought to be precluded had a fair and full opportunity to litigate the issue in the first proceeding. *Carolina Renewal, Inc. v. S.C. Dept. of Transportation,* 385 S.C. 550, 684 S.E.2d 779 (Ct. App. 2009).

No South Carolina appellate courts have addressed the issue of whether a default judgment satisfies the "actually litigated" requirement for collateral estoppel to apply. The Fourth Circuit Court of Appeals, applying North Carolina law and relying on *Restatement (Second) of Judgments* §27, concluded that a default judgment is not entitled to collateral estoppel effect in a subsequent proceeding. *See, Sartin v. Macik*, 535 F.3d 284 (4th Cir. 2008). Similarly, in analyzing issues concerning collateral estoppel, South Carolina appellate courts consistently look to the *Restatement (Second) of Judgments* for guidance. *See Carolina Renewal, Inc. v. S.C. Dept. of Transportation*, 385 S.C. 550, 684 S.E.2d 779 (Ct. App. 2009); *Beall v. Doe*, 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984).

Even in situations where collateral estoppel would otherwise apply, South Carolina appellate courts have recognized exceptions to the general rule of issue preclusion in certain circumstances, including when the "party against whom preclusion

is sought could not, as a matter of law, have obtained review of the judgment in the initial action..." *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997), citing *Restatement (Second) of Judgments* §28. In this case, neither 21st Mortgage nor SouthTrust could have obtained review of the judgment obtained by Respondents against the Dealer.

Based on the foregoing, the lower court erred in finding that 21st Mortgage was bound by the judgment entered against Dealer. If Respondents wanted to raise their claims against the Dealer as an offset or a defense, they should have presented evidence to establish both the merits of their claim and the amount of their damages. Other than the judgment against Dealer, there is nothing in the record to establish either. Therefore, the record before the lower court was not sufficient to support the conclusion that the Respondents' claims against the Dealer offset the balance due on the Note.

III. THE LOWER COURT ERRED IN HOLDING THAT 21st MORTGAGE HAD NOTICE OF THE JUDGMENT AGAINST THE DEALER WHEN THE PROMISSORY NOTE WAS ASSIGNED TO IT.

The lower court concluded that the Note was subject to the judgment that Respondents had obtained against the Seller when 21st Mortgage acquired the Note because "all of the world was on notice" when the judgment was filed with the Allendale Clerk of Court in 2004. (R. 7). However, this conclusion is inconsistent with the South Carolina Consumer Protection Code (CPC) and case law interpreting the applicable provisions of the CPC. In fact, this conclusion is also inconsistent with the Order's holding that 21st Mortgage first received written notice of the claim against Seller "on or about May 8, 2011, when the answer and counterclaim was served in this matter." (R. 4).

The Note that is the subject of this action is governed by the South Carolina Consumer Protection Code, S.C. Code Section 37-1-101, *et seq.* Section 37-2-404 of the CPC provides that:

> A claim or defense of a consumer specified in subsection (1) may be asserted against the assignee under this section only if the consumer has made a good faith attempt to obtain satisfaction from the seller or lessor with respect to the claim or defense and then only to the extent of the amount owing to the assignee with respect to the sale or lease of the property or services as to which the claim or defense arose at the time the assignee has written notice of the claim or defense. Written notice of the claim or defense may be given before the attempt specified in this subsection. For the purposes of this section, written notice is any written notification other than notice on a coupon, billing statement or other payment medium or material supplied by the assignee.

S.C. Code Section 37-2-404(2). Based on the language of this statute, constructive notice is not sufficient. Indeed, actual notice is not sufficient unless it is meets the specific requirements of the CPC. *See American Federal Bank, F.S.B v. White*, 296 S.C. 165, 370 S.E.2d 923 (Ct. App. 1988) (stating that oral notice was not sufficient to satisfy the notice requirements of Section 37-2-404(2)).

In its Order, the lower court properly relied on *American Federal Bank* in concluding that "written notice of the claim against [the Dealer] was given on or about May 8, 2011, when the answer and counterclaim was served in this matter." (R. 4). However, in the very next paragraph of the Order, the lower court states that 21st Mortgage was charged with notice of the claim when it acquired the Note because the judgment had been filed with the Allendale Clerk of Court, putting " all of the world" on notice.

In concluding that the filing of the judgment was sufficient notice of the claim to 21st Mortgage, the lower court found that constructive notice is sufficient to establish

notice to the assignee of a consumer note. However, this is inconsistent with the finding in *American Federal Bank* that actual, oral notice is not sufficient. Furthermore, as set forth in Section 37-2-404(2), even written notice is insufficient if it is merely written by the consumer on the coupon or billing statement. If actual notice given in writing by the consumer on the payment coupon is not sufficient to meet the notice requirement of Section 37-2-404, then the filing of a judgment with a clerk of court is clearly not adequate notice under the statute. Therefore, the lower court erred in holding that 21st Mortgage was on notice of the judgment by virtue of the fact that it was filed with the Allendale Clerk of Court.

IV. THE LOWER COURT ERRED IN HOLDING THAT 21st MORTGAGE WAS SUBJECT TO THE PUNITIVE DAMAGES AND ATTORNEY'S FEES AWARDED AGAINST THE DEALER.

In its Order, the lower court held that the judgment that Respondents obtained against the Dealer offset the entire amount owed to 21st Mortgage on the Note. For the reasons stated above, 21st Mortgage should not be bound by the default judgment. However, if this Court determines that 21st Mortgage is subject to the judgment, only the actual damages awarded to Respondents should be offset against the balance due on the Note.

The amount of actual damages awarded to Respondents in their action against the Dealer was $13,573.00. At the time that this action was filed by 21st Mortgage, the balance due on the Note was $19,709.34. As of the date of the summary judgment hearing, the amount owed was $25,633.74. (R. 4).

South Carolina appellate courts have never addressed the issue of the extent to which a consumer is entitled to an offset against an assignee for misconduct by or claims against the original lender. Specifically, the issue presented is whether the offset against the assignee should be limited to the consumer's actual damages or whether it also includes punitive (or treble) damages and attorney's fees. Although no South Carolina court has addressed this issue, courts in other jurisdictions have concluded that the assignee is not subject to an offset for anything beyond the consumer's actual damages. *See Crews v. Altavista Motors, Inc.*, 65 F. Supp. 2d 388 (W.D. Va. 1999); *Reagans v. MountainHigh Coachworks, Inc.*, 117 Ohio St. 3d 22, 881 N.E.2d 245 (2008).[1]

Crews v. Altavista Motors and *Reagans v. MountainHigh Coachworks, Inc.* both involved situations in which a consumer sought to assert claims it had against the seller against an assignee of the loan. In *Crews*, the purchasers of an RV sued the seller, the manufacturer, and the assignee of their consumer credit contract. The trial court entered an award of actual damages, treble damages, and attorney's fees against the seller, but held that the assignee was not subject to the treble damages or attorney's fees. The purchasers appealed.

On appeal, the Ohio Supreme Court held that the rule which makes an assignee subject to a consumer's claims and defenses "was designed to preserve to borrowers under a consumer loan contract the claims or defenses a buyer would have against a seller that breached its duties in a sales transaction." 117 Ohio St. at 30, 881 N.E.2d at 253. The court then cited *Crews v. Altavista Motors* for the proposition that the rule creating

[1] These cases both involved the application of the Federal Trade Commission's Holder Rule, rather than a state law consumer protection code. However, both the FTC Holder Rule and the CPC both provide for the same derivative liability of an assignee in a consumer credit transaction.

derivative liability against an assignee "was not designed to act as a weapon to exact statutory and punitive damages against otherwise innocent creditors." *Crews*, 65 F. Supp. 2d at 391. Moreover, statutes which allow for treble damages and attorney's fees are not designed to compensate consumers, but to punish the seller and deter misconduct. A creditor's potential derivative liability for compensatory damages provides creditors with an incentive to discourage a seller's misconduct. Innocent assignees should not be held derivatively liable for additional awards intended as penalties against sellers. *Reagans*, 117 Ohio St. 3d at 32, 881 N.E.2d at 254.

Although South Carolina appellate courts have not had the opportunity to address the issue of derivative liability for punitive damages in the context of a consumer credit transaction, the South Carolina Supreme Court recently addressed the nearly identical issue in a case involving the family purpose doctrine. In *Gause v. Smithers*, 403 S.C. 140, 742 S.E.2d 644 (2013), the Supreme Court considered whether the imputed liability created by the family purpose doctrine allows an injured party to recover punitive damages against the parent of the at-fault driver. In concluding that punitive damages could not be recovered, the Court noted that because "punitive damages are designed to punish the actual tortfeasor, any imputation to another party should be limited." 742 S.E.2d at 651.

As set forth above, 21st Mortgage does not believe that the default judgment obtained by Respondents against the Dealer should be recognized as creating any offset of the amount owed on the Note. However, if this Court determines that 21st Mortgage is bound by the judgment, then the amount of the offset should be limited to the actual damages awarded against the Dealer. If Respondents wish to keep their mobile home,

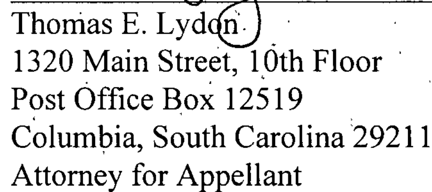
then they should be required to pay the difference between the amount currently owed on the home and the actual damages awarded against the Dealer.

CONCLUSION

21st Mortgage should not be bound by the default judgment Respondents obtained against the Dealer. Since Respondents have not presented any evidence of damages other than the judgment, they are not entitled to an offset of any amount on the Note, and 21st Mortgage is entitled to possession of the Mobile Home.

Alternatively, even if the default judgment is binding on 21st Mortgage, the amount of the offset should be limited to the actual damages awarded against the Dealer. If Respondents wish to keep the Mobile Home, they should be required to pay the difference between the amount currently owed on the home and the actual damages.

McANGUS, GOUDELOCK & COURIE, L.L.C.



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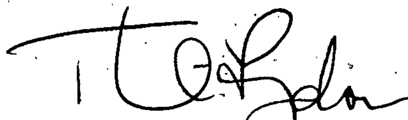
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.



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I hereby certify that I have this 3rd day of March, 2014, served the Final Brief of Appellant and Final Reply Brief of Appellant by mailing a copy of each, postage prepaid, in the United States mail, with sufficient postage affixed as follows:

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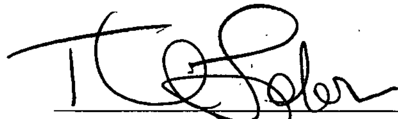

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