

STATE OF SOUTH CAROLINA
COURT OF APPEALS
DISTRICT V

Anderson Brothers Bank
Plaintiff-respondent,

Vs.

Dazarhea Monique Parson, aka Dazarhea D Parson, a/k/a Dazarhea Monique Daniels
Parson, A. Tyrone, Jr, a/k/a Arnold Tyrone)Parson, Jr., South Carolina Department of
Revenue and South Carolina Department of Motor Vehicles, Defendants,

Defendant-appellants.

Appellant's opening brief
Appeal number 2013-001865
Marion County Case number 2013-CP-33-306

Appeal from order granting summary judgment
Marion County Special Referee,
Haigh Porter, presiding

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S.C. SUPREME COURT

Arnold Jr. Dazarhea Parson
3546 Quail Roost Road
Mullins, South Carolina [29574]

October 17th 2013

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SC Court of Appeals

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- In Re: SMS Financial LLC. v. Abco Homes, Inc.*
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- Matter of Staff Mortg. & Inv. Corp.*, 550
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- Pacific Concrete F.C.U. V. Kauanoie*, 62 Haw.
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- Solon v. Godbole*, 163 Ill. App. 3d 845, 114 Ill.
Dec. 890, 516 N. E.2d 1045 (3Dist. 1987) (7)
- LYNN E. SZYMONIAK, Plaintiffs, vs. AMERICAN HOME MORTGAGE SERVICING et al., Defendants. September 20th, 2013* (5)

Statement of the issues (submitted: it is not at issue whether a summary judgment is inappropriate where the plaintiff enters no facts on the record in support of their claim – that summary judgment is inherently void where the plaintiff’s totally insufficient pleadings pose only conclusory and theoretical matters absent any facts is not in controversy).

1. Whether the circuit court has discretion to forward in a case where the record of the case shows lack of jurisdiction?
2. Whether violation of the Fair Debt Collections Practices Act deprives the alleged debtor of due process rights depriving the court of subject matter jurisdiction?
3. Whether a summary judgment is void where party fails to prove standing?
4. Whether a summary judgment is void where party fails to prove up claim?

Statement regarding oral argument

This court is noticed: In the court below the oral argument was between appellant, respondent, and special referee in the special referee’s office not in open court. For if objected to the special referee in jury court would this case stay.

Statement regarding whether
the decision should be published

In as much as rulings of compelling public interest such as whether state citizens are subjected to sham legal process for reason that “judgments” are being rendered against parties without any evidentiary support whatsoever – merely the warrants of attorneys, the decision of this court should be in publication.

Statement of the case

Anderson Brothers Bank, alleging indebtedness, without answering prior request in writing required under the Fair Debt Collections Practices Act, sued consumers Arnold Jr. and Dazarhea Parson and allegedly obtained a summary judgment. This court is noticed: Anderson Brothers Bank did not show evidence that Arnold Jr. and Dazarhea Parson had a contract with Anderson Brothers Bank. Anderson Brothers Bank did not show that Arnold Jr. and Dazarhea Parson had damaged Anderson Brothers Bank in any way. The court below had nothing to rely on to prove that Anderson Brothers Bank has standing to sue in South Carolina court's or that Anderson Brothers Bank's charter authorizes Anderson Brothers Bank to enter into fraudulent consumer debt contracts. The court below disregarded the record which contained only hypothetical and theoretical conclusions and no fact whatsoever and entered summary judgment for Anderson Brothers Bank and against Arnold Jr. and Dazarhea Parson. It is from this miscarriage of justice that Arnold Jr. and Dazarhea Parson appeals.

Argument

The circuit court lacks discretion to proceed where the record shows matters before the court do not rise to a justiciable controversy. Where there are no affidavits rebutted, or interrogatories answered, the court is without factual basis to rule judicially for the plaintiff. South Carolina summary judgment rule 56(e).

Violation of the Fair Debt Collections Practices Act deprives the alleged debtor of due process rights depriving the court of subject matter jurisdiction. The Act applies to third party debt collectors. Third party debt collectors includes lawyers and law firms who are attempting to collect any alleged debt. *George W. Heintz v. Darlene Jenkins*, 514 U.S. 291, 115 S.Ct. 1489. When a third party debt collector contacts an alleged debtor, the collector **must** in the first communication or within five (5) days thereafter furnish the alleged debtor with a “dunning letter.” The dunning letter must inform the alleged debtor that the collector is attempting to collect a debt and inform the alleged debtor that they have thirty (30) days to dispute the debt. 15 USC 1692g, 1692g(a)(3). The alleged debtor has thirty (30) days to dispute the debt requiring the collectors to furnish validation of the debt. 15 USC 1692G(b). Debt collection activity must cease if the debt is disputed. Failure to notice the alleged debtor of their due process rights or failure to cease collection activity until timely validation voids any legal proceedings. As a matter of law, a creditor violating the WCA must suffer the consequences of its wrongful repossession and prohibited debt collection practices. The WCA plainly treats venue as a jurisdictional issue. Therefore, the failure to have proper venue means the judgment is

void. Void judgments can always be challenged. Moreover, there is no need for a trial in any of the three instances. As a matter of law, the creditor violated the WCA and must suffer the consequences of its wrongful repossession and prohibited debt collection practices. This court is noticed: the court below failed to require counsel for Anderson Brothers Bank to show that the Fair Debt Collections Practices Act and the WCA had been complied with.

A summary judgment is void where party fails to prove standing. To have standing, party suing in foreclosure of debt must produce the original promissory note. Complaining party must (1). Prove standing by possession of the original promissory note, and (2). Must prove damages by appearance of a competent fact witness: Where the complaining party cannot prove the existence of the note, then there is no note. To recover on a promissory note, the plaintiff must prove: (1) the existence of the note in question; (2) that the party sued signed the note; (3) that the plaintiff is the owner or holder of the note; and (4) that a certain balance is due and owing on the note. See *In Re: SMS Financial LLC. v. Abco Homes, Inc.* No.98-50117, and the ninth district appellate court for South Carolina has ruled the same on September 20th, 2013. February 18, 1999 (5th Circuit Court of Appeals.), Volume 29 of the New Jersey Practice Series, Chapter 10 Section 123, page 566, emphatically states, "...; and no part payments should be made on the bond or note unless the person to whom payment is made is able to produce the bond or note and the part payments are endorsed thereon. It would seem that the mortgagor would normally have a Common law right to demand production or surrender of the bond or note and mortgage, as the case may be. *Carnegie Bank v, Shalleck* 256 N.J.

Super 23 (App. Div 1992), the Appellate Division held, "When the underlying mortgage is evidenced by an instrument meeting the criteria for negotiability. Since no one is able to produce the "instrument" there is no competent evidence before the Court that any party is the holder of the alleged note or the true holder in due course. New Jersey common law dictates that the plaintiff prove the existence of the alleged note in question, prove that the party sued signed the alleged note, prove that the plaintiff is the owner and holder of the alleged note, and prove that certain balance is due and owing on any alleged note. Federal Circuit Courts have ruled that the only way to prove the perfection of any security is by actual possession of the security. See *Matter of Staff Mortg. & Inv. Corp.*, 550 F.2d 1228 (9th Cir 1977). "Under the Uniform Commercial Code (codified in South Carolina under title 36) the only notice sufficient to inform all interested parties that a security interest in instruments has been perfected is actual possession by the secured party, his agent or bailee." Bankruptcy Courts have followed the Uniform Commercial Code. *In Re Investors & Lenders, Ltd.* 165 B.R. 389 (Bkrtcy.D.N.J.1994), "Under the New Jersey Uniform Commercial Code (NJUCC), promissory note is "instrument," security interest in which must be perfected by possession ..." Unequivocally the Court's rule is that in order to prove the "instrument", possession is mandatory. This court is noticed: the record in the court below does not show that Anderson Brothers Bank had standing in the underlying case.

Summary judgment is void where party fails to prove up claim. Prevailing party in civil action must prove damages. For example, see *American Red Cross v. Community Blood.Center of the Ozarks*, 257 F.3d 859 (8th Cir. 07/25/2001). Claim of damages, to be

admissible as evidence, must incorporate records such as a general ledger and accounting of an alleged unpaid promissory note, the person responsible for preparing and maintaining the account general ledger must provide a complete accounting which must be sworn to and dated by the person who maintained the ledger. See *Pacific Concrete F.C.U. V. Kauano*, 62 Haw. 334, 614 P.2d 936 (1980), *GE Capital Hawaii, Inc. v. Yonenaka* 25 P.3d 807, 96 Hawaii 32, (Hawaii App 2001), *Fooks v. Norwich Housing Authority* 28 Conn. L. Rptr. 371, (Conn. Super.2000), and *Town of Brookfield v. Candlewood Shores Estates, Inc.* 513 A.2d 1218, 201 Conn.1 (1986). See also *Solon v. Godbole*, 163 Ill. App. 3d 845, 114 Ill. Dec. 890, 516 N. E.2d 1045 (3Dist. 1987).

Conclusion and remedy sought

Determination by this court that the record in the court below does not verify compliance with consumer debtor law, does not verify standing on the part of Anderson Brothers Bank, and does not verify damages in the form of verified sums due and owing Anderson Brothers Bank, requires vacating the lower court's order of summary judgment and remand to the court below with instructions of recoupment to repair damages incurred by Arnold Jr. and Dazarhea Parson.

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Certificate of Mailing

We certify that this brief was deposited in the United States mail for delivery to the Court of Appeals by certified mail. We further certify that the brief was correctly addressed and postage was pre-paid.

October 18th, 2013

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