

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2011-CP-10-7407

Capital Bank, N.A.,

.....Respondent,

v.

Charles A. Moore a/k/a
Charles A.B. Moore,

.....Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENT AS TO THE ISSUE OF LIABILITY?
- II. WHETHER APPELLANT'S ARGUMENT THAT SUMMARY JUDGMENT WAS PREMATURE BECAUSE DISCOVERY WAS NOT COMPLETE IS NOT PRESERVED AND WITHOUT MERIT?
- III. WHETHER RESPONDENT SET FORTH ADMISSIBLE EVIDENCE TO PROVE THERE WAS NO GENUINE ISSUE OF MATERIAL FACT REGARDING WHETHER APPELLANT WAS LIABLE UNDER THE NOTE?

STATEMENT OF THE CASE

Respondent Capital Bank brought suit against Appellant Charles A. Moore to collect amounts owed under a promissory note. Appellant filed an answer and counterclaims. Subsequently, Respondent moved for summary judgment on its causes of action and Appellant's counterclaims. The trial court partially granted Respondent's motion as to the issue of liability and denied Respondent's motion as to the amount of damages and Appellant's counterclaims. Appellant's motion to reconsider the partial grant of summary judgment in favor of Respondent was also denied. Appellant appeals the trial court's grant of partial summary judgment in favor of Respondent and the denial of Appellant's motion to reconsider.

STATEMENT OF THE FACTS

On February 19, 2008, Appellant executed and delivered to Respondent's predecessor in interest, First National Bank of the South, an interest only home equity line of credit with a credit limit of Seven Hundred Fifty Thousand dollars (\$750,000.00) (the "Note"). Subsequently, the Note was assigned to NAFH National Bank pursuant to a certain Purchase and Assumption Agreement dated July 16, 2010, between NAFH National Bank and the Federal Deposit Insurance Corporation, as Receiver for First National Bank of the South. On June 30, 2011, NAFH National Bank merged with Capital Bank, N.A., with the resulting bank title of Capital Bank, N.A. Accordingly, Respondent is the current owner and holder of the Note.¹

Respondent initiated this collection action with the filing of the Summons and Complaint on October 12, 2011. Appellant filed a Motion to Dismiss the Complaint on the grounds that

¹ Pursuant to federal and state law, when a merger takes effect, the title to all real estate and other property owned by each corporation party to the merger is vested in the surviving corporation without reversion or impairment. S.C. Code Ann. § 33-11-106 (2012); 12 U.S.C. § 215(e) (2012). Further, by virtue of such merger, title to all real estate and other property is vested in the surviving corporation without any deed or other transfer. 12 U.S.C. § 215(e).

Respondent lacked standing to sue on the Note. Appellant's Motion to Dismiss was denied. Appellant filed an Answer and Counterclaims, disputing Appellant's liability to Respondent, the amount of Respondent's claim, and asserting certain violations of the Fair Debt Collection Practices Act and the South Carolina Consumer Protection Code .

Respondent filed a Motion for Summary Judgment on its causes of action and Appellant's Counterclaims. In support of its motion, Respondent attached the following exhibits: the affidavit of Randy Foster², an assignment of the Note to Respondent, a certification letter of the merger between NAFH National Bank and Capital Bank, and default notices that had been sent to Appellant. Appellant filed an Objection to Respondent's Motion for Summary Judgment. In support of his objection, Appellant filed an affidavit of Charles A. Moore.

The trial court granted partial summary judgment in favor of Respondent at a hearing held on February 12, 2013. In its Order Granting Partial Summary Judgment, the trial court held that Appellant was liable under the Note in an amount to be determined and that Respondent was the owner and holder of the Note and the proper party to bring and maintain this action.

Appellant filed a motion to reconsider, which he later amended. On May 28, 2013, the trial court held a hearing on Appellant's motion to reconsider. The trial court denied Appellant's motion to reconsider by filing of a form order. This appeal followed.

STANDARD OF REVIEW

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP." *Bovain v. Canal Ins.*, 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009). Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a trial court may grant a motion for summary judgment "if the pleadings, depositions,

² Randy Foster is the Vice President – OREO (Other Real Estate Owned) Officer of Respondent.

answers to interrogatories, and admissions on file, together with the affidavits, if any, show that 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(c), SCRC. “In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.” *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009). A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

ARGUMENTS

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT AS TO THE ISSUE OF LIABILITY.

The trial court properly granted summary judgment as to liability in favor of Respondent. Through its summary judgment motion and attached exhibits, Respondent established that it was the proper party to bring this action against Appellant as the owner and holder of the Note, and that Appellant was in default of his obligations under the Note. Respondent established that there was no genuine issue as to whether Appellant was liable to Respondent under the Note. Further, while Appellant disputed that Respondent was the owner and holder of the Note, he offered no evidence to support this contention. Rather, Appellant relied on the following general allegation contained in Charles Moore’s affidavit in an attempt to create a genuine issue: “[Appellant] disputes that [Respondent] has shown that it is the owner and holder of the note or that it is entitled to collect on the note.” This generic statement was simply not enough to refute the fact that Respondent was the owner and holder of the note. *See Russell v. Wachovia Bank*,

N.A., 353 S.C. 208, 220, 578 S.E.2d 329, 335 (2003). (“When opposing a summary judgment motion, the nonmoving party must do more than simply show that there is a metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial.” (internal quotation marks and citation omitted)); *see also David* at 250, 626 S.E.2d at 5 (providing summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner). Accordingly, the trial court properly granted Respondent summary judgment as to the issue of liability under the Note.

II. APPELLANT’S ARGUMENT THAT SUMMARY JUDGMENT WAS PREMATURE BECAUSE DISCOVERY WAS NOT COMPLETE IS NOT PRESERVED AND IS WITHOUT MERIT.

Appellant contends that summary judgment on the liability issue was premature because discovery had not yet been completed. *See App. Br.* p.6. Appellant’s argument is not preserved and is wholly meritless.

“The rulings of a trial [court] in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion.” *Bayle v. S.C. Dep’t of Transp.*, 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001). An abuse of discretion occurs when the trial court’s ruling is based upon an error of law or, when based on factual conclusions, is without evidentiary support. *Id.*

Initially, Respondent notes that Appellant did not move for a continuance in which to pursue further discovery at the summary judgment hearing. Therefore, this issue is not preserved for review on appeal. *See Pryor v. Northwest Apartments, Ltd.*, 321 S.C. 524, 529, 469 S.E.2d 630, 633 (Ct. App. 1996) (holding that the issue as to whether the trial court erred in granting

summary judgment because discovery requests were outstanding was not preserved where appellant did not ask court to continue the case so discovery could be completed).

Even if this issue were preserved, it is without merit. Although discovery was outstanding at the time of the summary judgment hearing, the record does not establish that further discovery would uncover any evidence to refute the fact that Respondent is the owner and holder of the Note or that Appellant was in default thereunder. Appellant claims that summary judgment was premature because he did not have the opportunity to conduct depositions for the purpose of asking witnesses questions regarding Respondent's assertion that it is the owner and holder of the Note.³ However, Appellant did not demonstrate that there was any likelihood that these depositions would uncover evidence to refute the fact that Respondent is the owner and the holder of the Note. *See Thomas v. Waters*, 315 S.C. 524, 526, 445 S.E.2d 659, 660 (Ct. App. 1994) (affirming grant of summary judgment when plaintiff did not demonstrate likelihood that further discovery would produce additional relevant evidence). Accordingly, the trial court properly found that discovery was complete for purposes of summary judgment as to Appellant's liability to Respondent under the Note. *See Bayle*, at 128, 542 S.E.2d at 742 ("The rulings of a trial [court] in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion.").

III. RESPONDENT SET FORTH ADMISSIBLE EVIDENCE TO PROVE THERE WAS NO GENUINE ISSUE OF MATERIAL FACT REGARDING APPELLANT'S LIABILITY UNDER THE NOTE.

Appellant raises at least half a dozen intertwined and muddled arguments relating to the admissibility of the affidavit of Randy Foster. In addition to being unpreserved and meritless,

³ At the time of the summary judgment hearing, Appellant had not noticed any depositions in this case.

several of these arguments are inscrutable.⁴ For brevity's sake, Respondent has attempted to summarize those arguments and will address each in turn to the extent it is possible.⁵

A. Appellant's Affidavit and Exhibit Related Arguments Are Not Preserved.

Appellant contends that summary judgment was improperly granted because Foster's affidavit was insufficient and the exhibits attached to the affidavit were inadmissible. All of Appellant's arguments relating to the insufficiency of the affidavit and inadmissibility of the exhibits, with the exception of Appellant's argument regarding Foster's personal knowledge, are unpreserved for appellate review.

In Appellant's Objections to Respondent's Motion for Summary Judgment and at the summary judgment hearing, Appellant raised only a generic argument contending that the Foster affidavit was facially and substantively defective. During the hearing, Appellant advanced only one specific reason why the affidavit was allegedly defective— he asserted Foster lacked personal knowledge of the matters stated in the affidavit. Appellant provided no other specific reasons or argument, either in his objections or at the hearing, that support his assertion that the affidavit was defective.

In his motion to reconsider, Appellant confirmed that he did not raise specific arguments regarding the insufficiency of the affidavit or the inadmissibility of the exhibits during the summary judgment motion hearing. In fact, Appellant stated that his purpose for filing the motion for reconsideration was to raise specific affidavit and exhibit related arguments for the

⁴ As an aside, Appellant's brief appears to be entirely cut and pasted from his Brief in Support of Amended Rule 59(E) Motion.

⁵ Further, Respondent asserts that this Court will ordinarily not consider any point of an appellant's brief which is not set forth in the statement of the issues on appeal. Rule 208(b)(1)(B), SCACR.

first time.⁶ Accordingly, all of Appellant's affidavit and exhibit related arguments, with the exception of the argument relating to Foster's personal knowledge, are not preserved for appellate review. *See Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) (providing an issue raised for the first time in a motion to reconsider is not preserved for review).

B. Even if Appellant's Arguments Are Preserved, They Are Without Merit.

Even if Appellant's arguments are preserved, they are without merit. Respondent submitted a sufficient affidavit and admissible exhibits to prove there was no genuine issue of material fact regarding the issue of liability.

1. The Facts Stated in Foster's Affidavit Were Based on Foster's Personal Knowledge.

Rule 56(e), SCRCP, provides that supporting and opposing affidavits must be made on personal knowledge. "To comply with Rule 56(e), there must be a showing that the statements made in the affidavits were made on personal knowledge." *Catawba Indian Tribe v. South Carolina*, 978 F.2d 1334, 1342 (4th Cir. 1992). Further, corporate officers are assumed to have personal knowledge of the acts of their corporations. *Id.*

Appellant contends that Foster's affidavit is insufficient because it was not made on personal knowledge. *See* App. Br. p.10. Specifically, Appellant contends that Foster's affidavit alleges only that Foster has "knowledge," not personal knowledge. *See* App. Br. p.10. Contrary to Appellant's assertion, the facts included in Foster's affidavit are based on his personal knowledge. Foster's affidavit established that he had personal knowledge of the facts contained

⁶ In Appellant's motion for reconsideration, he stated, "[Appellant] was not provided a full and fair opportunity to be heard on [Appellant's] arguments regarding why [Appellant] believes that the affidavit was incompetent . . . and why the exhibits referenced in the affidavit were inadmissible [Appellant] therefore raises those arguments in this Motion"

in the affidavit and that the basis for his knowledge was obtained from reviewing the records in regard to the Note. *See Englert, Inc. v. Neth. Ins. Co.*, 315 S.C. 300, 303, 433 S.E.2d 871, 873 (Ct. App. 1993) (providing for purposes of Rule 56(e), SCRCPP, the affidavit must establish that the affiant has knowledge of the facts therein or has a basis for such knowledge); *see also S. Bank & Trust Co. v. Praestans One, LLC*, No. 2:12-cv-450, 2013 WL 1155526, at *22 (E.D. Va. Mar. 19, 2013) (“[A]n affiant who reviews the business records of the organization that he or she is affiliated with, and who testifies on the basis of information acquired through the performance of his or her official duties, may be deemed competent by the court to testify as to those records.”). Further, as a corporate officer of Respondent, Foster is assumed to have personal knowledge of the acts of Respondent. *See Catawba*, 978 F.2d at 1342. Accordingly, this argument is without merit.

2. Foster Is Competent to Testify to the Matters Stated in His Affidavit.

Appellant next argues that Foster’s affidavit fails to show that he is competent to testify to the matters alleged therein. In addition to being unpreserved, this argument is also without merit.

Rule 56(e), SCRCPP, provides that supporting and opposing affidavits for summary judgment “shall show affirmatively that the affiant is competent to testify to the matters stated therein.” The rules and South Carolina state case law do not specify what is required to affirmatively show that the affiant is competent to testify to the matters stated in the affidavit. The district court of South Carolina, however, has provided guidance on this topic. In *United States v. Tejada-Ramirez*, the court provided that the rule would be satisfied if the affidavit was “executed by a person who would be competent to testify as to matters contained in the affidavit if he or she were called to the witness stand.” Cr. No. 6:06-393-HMH, 2011 U.S. Dist. LEXIS

79837, at *2 (D.S.C. July 21, 2011). Rule 601, SCRE, provides that “[e]very person is competent to be a witness except as otherwise provided by statute or these rules.” A witness must have personal knowledge of the matter and must swear or affirm to tell the truth. Rule 602 & 603, SCRE. Further, “an affiant who reviews the business records of the organization that he or she is affiliated with, and who testifies on the basis of information acquired through the performance of his or her official duties, may be deemed competent by the court to testify as to those records.” *S. Bank & Trust Co., LLC*, No., at *8.

Foster’s affidavit affirmatively shows that he is competent to testify to the matters stated within his affidavit. As stated above, the affidavit shows that Foster has personal knowledge of the facts contained in the affidavit from his review of the records in regard to the Note and from his position as a corporate officer of Respondent. Thus, Foster would be competent to testify to the matters contained in his affidavit if he was called to testify at trial because he has personal knowledge of such. *See United States v. Tejada-Ramirez*, at *2 (providing that the affiant is competent to testify to the matters stated in the affidavit if the affiant would be competent to testify to those matters if he or she was called to the witness stand). Accordingly, Foster’s affidavit satisfies the competency requirement in Rule 56(e), SCRCPP, and Appellant’s arguments are without merit.

3. Foster’s Affidavit and Attached Exhibits Are Admissible.

Appellant argues that certain aspects of the testimonial evidence provided by Foster in his affidavit are inadmissible. Regarding the affidavit, Appellant appears to contend that the testimonial evidence regarding the Note, an assignment of the Note, the certification letter regarding the merger, and the default notices is inadmissible because Foster lacks personal knowledge of such. Appellant’s arguments are unpreserved and baseless.

Affidavits submitted by a party must set forth facts that would be admissible in evidence. Rule 56(e), SCRPC. All of the facts contained in Foster's affidavit are admissible because he has personal knowledge of such. As stated above, Foster had personal knowledge of the matters contained in the affidavit because he reviewed the records regarding the Note and from his position as a corporate officer. Thus, if Foster was called to the witness stand, he would properly be able to testify to the facts stated within the affidavit. Accordingly, the facts stated within the affidavit are admissible.

Additionally, Appellant contends that the exhibits attached to the affidavit are inadmissible. This argument is unpreserved and meritless. An assignment of the Note, a certification letter from the Comptroller of the Currency Administrator of National Banks of the merger between NAFH National Bank and Capital Bank, and the default notices sent to Appellant are all admissible under the business records exception to the hearsay rule.

Rule 803(6), SCRE, provides that business records may be given by a "custodian or other qualified witness." Further, the business records must be "made . . . by a person with knowledge" or "made . . . from information transmitted by a person with knowledge." Rule 803(6), SCRE. Additionally, the business records must have been made as part of the regular practice of that business activity, kept in the course of a regularly conducted business activity, and made at or about the time described. *Id.*

The trial court has broad discretion in deciding whether to admit evidence, and its decision will be overturned only for an abuse of discretion. *Clark v. Cantrell*, 339 S.C. 369, 385, 529 S.E.2d 528, 537 (2000). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. *Fields v. Reg'l Med. Ctr.*, 363

S.C. 19, 26, 609 S.E.2d 506, 509 (2005). Further, to warrant reversal based on the admission of evidence, the appellant must prove both the error of the ruling and the resulting prejudice. *Id.*

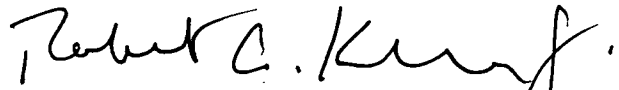
Foster is the Vice President OREO Officer of Respondent. As the Vice President OREO Officer, Foster makes and maintains business records regarding loans in the regular course of his business, which included the making and maintaining of the records regarding this Note. Additionally, Foster attested that all of the exhibits were made on the respective dates as reflected on the exhibits. Accordingly, these exhibits are admissible as business records through Foster. *See* Rule 803(6), SCRE.

Further, the trial court made a discretionary determination that the exhibits were admissible. *See Clark*, 339 S.C. at 385, 529 S.E.2d at 537 (providing that the trial court has broad discretion in deciding whether to admit evidence). Moreover, even if the trial court erred in ruling the exhibits were admissible, Appellant was not prejudiced because Foster's testimonial evidence which established that Respondent was the owner and holder of the Note would still be admissible. *See Fields*, 363 S.C. at 26, 609 S.E.2d at 509 (providing appellant must prove both error and resulting prejudice from the admission of evidence to warrant reversal). Accordingly, Appellant's argument that the trial court improperly granted summary judgment because its decision was based on inadmissible evidence is without merit.

CONCLUSION

For the foregoing reasons, the trial court's order granting summary judgment as to liability in favor of Respondent and the order denying Appellant's motion for reconsideration should be affirmed.

Respectfully submitted,



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