

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM OCONEE COUNTY
HONORABLE CORDELL MADDOX CIRCUIT COURT JUDGE

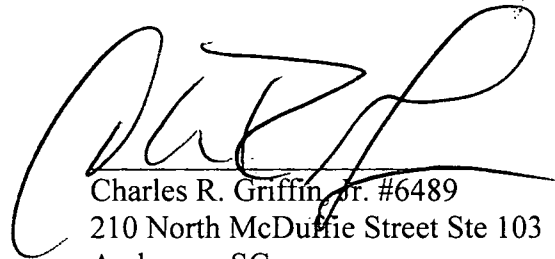
APPELLATE CASE NO.: 2013002037

BRANCH BANKING AND TRUST COMPANY ... RESPONDENT

VS

SARAH L. GRAY, JEFFERY GRAY, SUNTRUST BANK, WEST UNION
DEVELOPMENT, LLC AND BANK OF ANDERSON, N.A., ... of whom
JEFFERY GRAY is APPELLANT

INITIAL BRIEF OF APPELLANT



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April 14, 2014

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

Did the Trial Court err in granting Respondent's Motion for Summary Judgment?

STATEMENT OF THE CASE

On or about July 29, 2003, Appellant made, executed and delivered a certain Note ("Note") in the principal sum of \$180,00.00, payable in monthly installments. This loan transaction was incurred by Appellant primarily for personal, family or household purposes. Gray Affidavit Page 1

In order to secure the payment of the Note according to the terms and conditions thereof, Appellant made, executed and delivered unto Mortgage Electronic Registration Systems (MERS) a certain real estate mortgage ("Mortgage"), covering the following described property and any and all improvements to the property;

All that certain piece, parcel or lot of land, lying and being situate in the State of South Carolina, County of Oconee, being shown and designated as Lot Number Fifteen (15) of the Summit Phase I, as shown and more fully described on a plat thereof prepared by R. Jay Cooper, PE & LS #4682 of Clemson Engineering Services, dated June 23, 1997 and recorded in the Office of the Clerk of Court for Oconee County, South Carolina in Plat Book A508 at Page 5. The metes, bounds, courses and distances as shown upon said plat are incorporated herein by reference thereto. Reference being invited to said plat for a fuller more accurate description of the above described property.

This being the same property conveyed unto Jeffery A. Gray and Sarah L. Gray herein by deed of Laura Leigh Zane, Trustee of the Revocable Living Trust of Laura Leigh Zane dated November 1, 2001 and recorded on December 3, 2001 in the Office of the Oconee County Register of Deeds in Book 1186 at Page 305. Thereafter, this being the same property conveyed to West Union Development, LLC by deed from Jeffery A. Gray and Sarah L. Gray dated November 24, 2010 and recorded November 29, 2010 in Book 1805 at Page 289.

TMS NO. 209-08-01-013

Property address: 202 S Summit Drive Seneca, SC 29672

Gray Affidavit Pages 1 – 2.

This action was initiated when Responent filed and served a forelclosure complaint claiming Appellant failed to make payments due from and after May 1, 2011.

Complaint ¶ 13.

Attached to the foreclosure complaint was document titled ASSIGNMENT OF REAL ESTATE MORTGAGE which provided:

“FOR VALUE RECEIVED, the sufficiency of which is hereby acknowledged, Mortgage Electronic Registration Systems, Inc. as nominee for Branch Banking and Trust Company of South Carolina, its successors and assigns, hereby sells, assigns, transfers and sets over unto Branch Banking and Trust Company, that certain Mortgage dated July 29, 2003, executed by Sarah L. Gray and Jeffery Gray, which said mortgage is in the original principal amount of \$180,000.00 and is recorded in the Office of the Clerk of Court/Register of Deeds for Oconee County, State of South Carolina, recorded on August 13, 2003 in Book 1727 at Page 136, together with the certain note(s) described therein, with all interest, all liens, and any rights due or to become due thereon.”

Exhibit A to Complaint

The ASSIGNMENT OF REAL ESTATE MORTGAGE is dated December 9, 2011, well after the date of May 1, 2011 that Respondent claims Appellant failed to make payments. Exhibit A to Complaint; Complaint ¶ 13.

A person claiming to be Ivan Hobbs, a VP for MERS executed the ASSIGNMENT OF REAL ESTATE MORTGAGE. Exhibit A to Complaint.

After Appellant was served with the foreclosure complaint Appellant telephoned MERS on or about January 9, 2012, and Appellant asked the person working at MERS if an Ivan Hobbs was employed by MERS. Gray Affidavit Page 2.

Appellant was informed by MERS' agent that there was no one employed by MERS by that name. Gray Affidavit Page 2.

To the contrary, a person claiming to be Ivan Hobbs executed an affidavit stating that he was one of Respondent's officers who was "appointed" by MERS as a signing officer by a corporate resolution dated March 27, 2011. Hobbs Affidavit Pages 2 – 3, L. 9.

Further, according to the foreclosure complaint, the Respondent claimed Appellant was in default on the payments at the time the mortgage was assigned to the Respondent. Gray Affidavit Page 2; Complaint ¶ 13.

According to the Mortgage which is the subject of this action, the Plaintiff was the Lender and MERS, a separate corporation, and was Plaintiff's nominee in the transaction and served as Mortgagee in the transaction. Gray Affidavit Page 2; Exhibit B Page 1 to Motion For Summary Judgment.

According to Ivan Hobbs, MERS is a separate company that provides a service to mortgage lenders and servicers who, as "members" of MERS, have a contractual relationship whereby MERS serves as the mortgagee of record for home mortgage loans. Hobbs Affidavit Pages 2, L. 6.

At closing Appellant was not provided with any Truth In Lending Disclosure documents by MERS, which, according the mortgage is a distinct and separate corporate entity from the Lender in the transaction. Gray Affidavit Page 4. Exhibit B Page 1 to Motion For Summary Judgment; Hobbs Affidavit Pages 2, L. 6.

Further, both Respondent and MERS failed to timely furnish Appellant with required servicing disclosures required by 12 USCS § 2605 after the assignment purportedly occurred on December 9, 2011. Gray Affidavit Page 4.

Appellant was unaware that MERS had purportedly assigned the Mortgage to Respondent until Appellant was served with the Summons and Complaint in this action. Gray Affidavit Page 4.

Respondent and MERS obtained a mortgage loan secured by Appellant's residence at an exceptionally high APR and/or failed to comply with applicable

disclosure laws and/or concealed material facts from the Appellant that Appellant was entitled to know and understanding prior to executing the note and mortgage which is the subject of this action. Counterclaim ¶ 15.

MERS failed to timely obtain Appellant's preference as to legal counsel as required by § 37-10-102 S.C. Code of Laws Ann. Counterclaim ¶ 8.

Appellant has alleged Four causes of action in his Counterclaim:

- (1) Violation of South Carolina Unfair Trade Practices Act. Counterclaim ¶¶ 19 – 25.
- (2) Breach of Contract Accompanied by Fraudulent Act. Counterclaim ¶¶ 26 – 29.
- (3) Violation(s) of the South Carolina Consumer Protection Code. Counterclaim ¶¶ 30 – 32.
- (4) Violation(s) of the Federal Fair Debt Collections Practices Act. Counterclaim ¶¶ 33 – 41.

Appellant claims that Respondent is not a holder in due course. Counterclaim ¶ 9.

Appellant has alleged that the loan transaction which is the subject of this action was and is unconscionable within the meaning of § 37-10-105 S.C. Code of Laws Ann., and/or was induced by unconscionable conduct in violation of and prohibited by § 37-10-105 S.C. Code of Laws Ann. Counterclaim ¶ 17.

After a hearing, the Court signed an Order granting Respondent's motion for Summary Judgment Order Page 7.

Thereafter, Appellant initiated this Appeal.

ARGUEMENTS

THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.

When reviewing an order granting summary judgment, an appellate court employs "the same standard applied by the trial court under Rule 56, SCRPC." Rule 56 provides the trial court shall grant summary judgment if "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), SCRPC. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." ... "However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Johnson v. Alexander, 2014 S.C. App. LEXIS 43, 2-3 (S.C. Ct. App. Mar. 19, 2014).*

Appellant claims that Respondent is not a holder in due course. Counterclaim ¶ 9.

"Under S.C. Code Ann. § 36-3-3-2(1), a holder in due course is a holder who takes the instrument (a) for value; and (b) in good faith; and (c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person. The purchaser has notice of a claim or defense if the purchaser has notice that the obligation of any party is voidable in whole or in part. S.C. Code Ann. § 36-3-304(1)(b). A person has notice of a fact when he has actual knowledge or notice or, from all the facts and circumstances known to him at the time in question, he has reason to know that it exists. S.C. Code Ann § 36-1-201(25). "Good faith" means honesty in fact in the conduct or transaction concerned. S.C. Code Ann. § 36-1-201(19). *Specialty Flooring Co. v. Palmetto Federal Sav. Bank, 302 S.C. 107 (S.C. Ct. App. 1990)*"

It undisputed that at the time the mortgage was assigned to the Respondent, the Respondent claimed Appellant was in default on the payments. Gray Affidavit Page 2; Complaint ¶ 13.

1. Violation(s) of the South Carolina Consumer Protection Code.

Appellant has alleged that Respondent and MERS obtained a mortgage loan secured by Appellant's residence at an exceptionally high APR and/or failed to comply with applicable disclosure laws and/or concealed material facts from the Appellant that Appellant was entitled to know and understanding prior to executing the note and mortgage which is the subject of this action. Counterclaim ¶ 15.

Appellant has alleged that the aforementioned actions, conduct and/or omissions of Respondent and MERS are in violation of and prohibited by § 37-10-101 et seq S.C. Code of Laws Ann., and further said violations were intentional and deliberate. Counterclaim ¶ 31.

"Creditor" means 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 Ann. § 37-1-301(13). A mortgage being a mere security, is an evidence of debt, being an instrument the purpose of which is to secure a debt. No other written evidence of the debt than that furnished by the instrument itself is necessary to sustain a mortgage. *Plyler v. Elliott*, 19 S.C. 257, 264 (S.C. 1883).

MERS served as mortgagee of record in the instant transaction. Hobbs Affidavit Pages 2, L. 6.

Clearly MERS is a creditor within the meaning of the South Carolina Consumer Protection Code.

S.C. Code Ann. § 37-10-102(a) provides:

“Whenever the primary purpose of a loan that is secured in whole or in part by a lien on real estate is for a personal, family or household purpose -(a) The creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction and except in the case of a loan on property that is subject to the South Carolina Horizontal Property Act (Section 27-31-10 et seq.) the insurance agent to furnish required hazard and flood property insurance in connection with the mortgage and comply with such preference.”

S.C. Code Ann. § 37-10-105 provides:

(A) If a creditor violates a provision of this chapter, the debtor has a cause of action, other than in a class action, to recover actual damages and also a right in an action, other than in a class action, 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. No debtor may bring a class action for a violation of this chapter. No debtor may bring an action for a violation of this chapter more than three years after the violation occurred, except as set forth in subsection (C). The three-year statute of limitations applies to actions commenced after May 2, 1997. No inference should be drawn as to the applicable statute of limitations for any pending actions. This subsection does not bar a debtor from asserting a violation of this chapter in an action to collect a debt which was brought more than three years from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action. (B) No creditor may be held liable in an action brought under this section for a violation of this chapter if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error. (C) If the court finds as a matter of law that the agreement or transaction is unconscionable pursuant to Section 37-5-108 at the time it was made, or was induced by unconscionable conduct, the court may, in an action other than a class action: (1) refuse to enforce the agreement, or a term, or part of the agreement or transaction that the court determines to have been unconscionable at the time it was made; (2) enforce the remainder of the agreement without the unconscionable term or part, or limit the application of the unconscionable term or part to avoid an unconscionable result; (3) rewrite or modify the agreement to eliminate an unconscionable term, part, or result and enforce the new agreement; or (4) award: (a) not more than the total amount of the loan finance charge and allow repayment of the unpaid balance of the loan without any finance charge; (b) not more than double the amount of the excess loan finance charge or other charges or fees actually received by the creditor or paid by the debtor to a third party; and (c) attorney's fees and costs.

Clearly it is unconscionable to allow MERS, Respondent's assignor, to obtain a security interest in Appellant's residence with complying with the required disclosures dictated by the South Carolina Consumer Protection Code.

Since Respondent is not a holder in due course, Respondent took the mortgage subject to all claims and defenses that Appellant had or may have had against MERS.

Thus a genuine issue of material fact exists as to whether or not Respondent and MERS violated the South Carolina Consumer Protection Code which claims may be asserted against Respondent as there are issues of fact as to whether Respondent is a holder in due course.

2. Violation(s) of the Federal Fair Debt Collections Practices Act.

Appellant initiated a claim for statutory and actual damages caused by Counter-Defendant's violations of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692 *et seq.*, which prohibits a debt collector from engaging in deceptive, unfair and/or unconscionable debt collection practices. Counterclaim ¶ 34.

Appellant has alleged that the Respondent is a debt collector within the meaning of the FDCPA. Counterclaim ¶ 35.

The FDCPA defines a debt collector as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects . . . debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). Excluded from the definition are those entities who collect or attempt to collect "any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person." § 1692a(6)(F). **"The legislative history of section**

1692a(6) indicates conclusively that a debt collector does not include the consumer's creditors, a mortgage servicing company, or an assignee of a debt, as long as the debt was not in default at the time it was assigned." *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985); see also *Solomon v. HSBC Mortg. Corp.*, 395 F. App'x 494, 495 (10th Cir. 2010) (unpublished); *Kee v. R-G Crown Bank*, 656 F. Supp. 2d 1348, 1355 (D. Utah 2009) ("a loan servicer such as Fifth Third is only a 'debt collector' within the meaning of the FDCPA if it acquires the loan after it is in default"). *Lewis v. JP Morgan Chase Bank, N.A.*, 2014 U.S. Dist. LEXIS 38420, 27-28 (D. Colo. Mar. 24, 2014). (Bold Added).

MERS is a distinct and separate corporate entity from the Respondent. Gray Affidavit Page 4. Exhibit B Page 1 to Motion For Summary Judgment; Hobbs Affidavit Pages 2, L. 6.

Clearly, from the record it is apparent that the mortgage was in default when it was assigned from MERS to Respondent. Gray Affidavit Page 2; Complaint ¶ 13.

There have been no facts set forth by Respondent that MERS or Respondent have merged into a single corporate entity.

Niether Respondent nor MERS timely furnished Appellant with the required servicing disclosures required by 12 USCS § 2605. Gray Affidavit Page 4.

Appellant was unaware that MERS had purportedly assigned the Mortgage to Respondent until Appellant was served with the Summons and Complaint in this action. Gray Affidavit Page 4.

12 USCS § 2605(c) provides:

- (c) Notice by transferee or loan servicing at time of transfer.
- (1) Notice requirement. Each transferee servicer to whom the servicing of an

federally related mortgage loan is assigned, sold, or transferred shall notify the borrower of any such assignment, sale, or transfer.

(2) Time of notice.

(A) In general. Except as provided in subparagraphs (B) and (C), the notice required under paragraph (1) shall be made to the borrower not more than 15 days after the effective date of transfer of the servicing of the mortgage loan (with respect to which such notice is made).

Respondent is the transferee with regard to the Assignment of the mortgage from MERS to Respondent.

Violations of consumer protection statutes set forth a basis for alleging violations the FDCPA. *Fontell v. Hassett*, 870 F. Supp. 2d 395 (D. Md. 2012).

Appellant has alleged that the Respondent violations of the FDCPA include: Threatening to take action that cannot legally be taken or that was not intended to be taken as prohibited by 15 U.S.C. § 1692e(5); Engaging in conduct which had the natural consequence of harassing, oppressing, or abusing Appellant in connection with the collection of a debt in violation as prohibited by 15 U.S.C. § 1692d; Falsely representing the character, amount or legal status of the debt as prohibited by 15 U.S.C. § 1692e(2)(A); and Generally using a false representation or deceptive means to collect a debt as prohibited by 15 U.S.C. § 1692e(10).

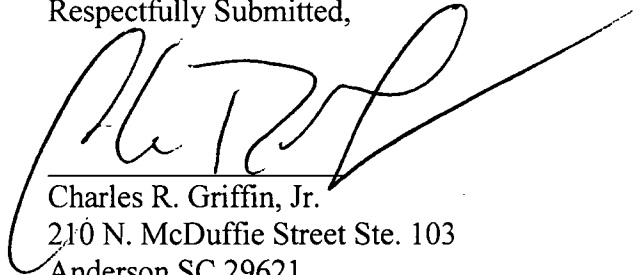
Generally, whether or not a statutory violation has occurred is a question of fact for the jury. See *Cooper by Cooper v. County of Florence*, 306 S.C. 408 (S.C. 1991). (The determination of whether a motorist statute has been violated is ordinarily a question of fact for the jury.)

CONCLUSION

Clearly, there are genuine issues of material fact as to whether not Respondent's action, conduct and/or omissions were in violation of and prohibited by the South Carolina Consumer Protection Code and the Federal Fair Debt Collection Practices Act.

For the reasons stated above, the Appellant asks that the Order of the Court appealed from be reversed.

Respectfully Submitted,



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September 22, 2013

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS
HON. CORDELL MADDOX. CIRCUIT COURT JUDGE

CASE NO: 2013-002037

SARAH L. GRAY, JEFFERY GRAY, SUNTRUST BANK, WEST UNION
DEVELOPMENT, LLC AND BANK OF ANDERSON, N.A., ... of whom
JEFFERY GRAY is APPELLANT

VS

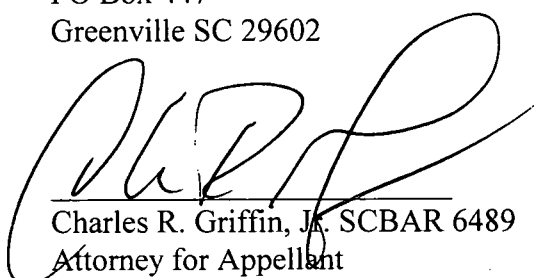
BRANCH BANKING AND TRUST COMPANY ... RESPONDENT

PROOF OF SERVICE

I hereby certify that on April 14, 2014 a copy of the Appellant's Initial Brief and Designation of Matter to be Included in Record on Appeal was served by regular United States Mail by depositing with the United States Mail a copy of same with postage prepaid and addressed to:

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