

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

On Certiorari to the Court of Appeals of South Carolina
Opinion No. 5027 (S.C. Ct. App. filed August 22, 2012)

Regions Bank..... Petitioner,

V.

Richard C. Strawn, Robert K. Borchers, individually
and as Personal Representative of the Estate of Marie
Borchers, and Nancy Davidson Borchers..... Respondents.

Appellate Case No.: 2012-213178
Lower Court Case No.: 2006-CP-04-00770

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

- I. DID THE COURT OF APPEALS ERR BY FAILING TO HOLD THAT A HOLDER OF AN OPEN-END MORTGAGE WITHIN THE MEANING OF §29-3-50 OF THE SOUTH CAROLINA CODE (2007) IS NOT REQUIRED TO CANCEL SUCH MORTGAGE UNLESS THE GRANTOR THEREOF HAS REQUESTED CANCELLATION?

- II. DID THE COURT OF APPEALS ERR BY FAILING TO HOLD THAT A HOLDER OF AN OPEN-END MORTGAGE IS NOT REQUIRED BY §29-3-310 AND 320 OF THE SOUTH CAROLINA CODE (2007) TO CANCEL THE MORTGAGE WHERE THE GRANTOR OF THE MORTGAGE NEVER REQUESTED CANCELLATION THEREOF?

- III. DID THE COURT OF APPEALS ERR BY FAILING TO HOLD THAT THE HOLDER OF AN OPEN-END MORTGAGE IS NOT SUBJECT TO A PENALTY ASSESSABLE PURSUANT TO §29-3-310 AND 320 OF THE SOUTH CAROLINA CODE (2007) UNLESS THE HOLDER WAS REQUIRED TO CANCEL THE MORTGAGE?

- IV. DID THE COURT OF APPEALS ERR BY FAILING TO HOLD THAT A PERSON HAVING AN INTEREST IN AN ESTATE BOUND BY A MORTGAGE CANNOT CLAIM A VIOLATION OF §29-3-310 AND 320 OF THE SOUTH CAROLINA CODE (2007) WHERE THE ATTORNEY FOR THE INTERESTED PERSON HAD AUTHORITY UNDER §29-3-330(e) OF THE SOUTH CAROLINA CODE (2007) TO TIMELY CANCEL THE MORTGAGE?

STATEMENT OF THE CASE

1. PROCEDURAL HISTORY:

Petitioner filed this action against the Respondents in the Court of Common Pleas for Anderson County, South Carolina on March 1st, 2006 to: (a) rescind the mortgage satisfaction filed by closing attorney, James S. Belk, on December 22nd, 2005 pursuant to the provisions of S.C. Code Ann. §29-3-330(e) (2005) (R. p. 92); and, (b) to foreclose the “Open-End Mortgage” granted by the Respondent, Richard C. Strawn (“Strawn”), to the Petitioner dated October 12th, 2001 (R. p. 85) securing the payment of indebtedness of Strawn to Petitioner pursuant to Equity Asset Line Agreement (“Note”) to Petitioner dated September 3rd, 2003 (R. p. 80).

The Respondents, Robert K. Borchers, individually and as Personal Representative of the Estate Marie Borchers, and Nancy Davidson Borchers, filed a Counterclaim against the Petitioner seeking a penalty against the Petitioner for alleged failure to satisfy the Mortgage previously satisfied by the closing attorney on December 22nd, 2005.

On August 18th, 2008, the Court ruled by Honorable J. C. Nicholson, Jr. that Petitioner was equitably estopped to enforce its lien against the mortgaged premises.

On March 3rd, 2010, the action by Respondents, Robert K. Borchers, individually and as Personal Representative of the Estate of Marie Borchers, and Nancy Davidson Borchers, against the Petitioner came before the Court for trial on the issue of the penalty against the Petitioner for its alleged failure to timely

satisfy the mortgage as required by §29-3-310 and 320, Code of Laws of South Carolina, (2007). By Order of Honorable R. Lawton McIntosh, dated May 24th, 2010, the Court found the Petitioner violated §29-3-310 and 320, Code of Laws of South Carolina, (2007) and assessed a penalty against the Petitioner in the amount of \$25,000.00 and awarded attorney's fees in favor of the Respondents in the amount of \$6,500.00. (R. p. 70).

The Petitioner appealed the Order assessing the penalty to the South Carolina Court of Appeals.

2. EVIDENCE PRESENTED AT TRIAL.

On October 12th, 2001, the Respondent, Richard C. Strawn ("Grantor"), owned the residential dwelling ("Residence") being the subject matter of this action. On October 12th, 2001, the Grantor granted to the Petitioner an open-end mortgage ("Mortgage") on the Residence. (R. p. 85).

The Mortgage provided in pertinent part that "this Mortgage secures a revolving line of credit, which obligates the lender to make advances to the Grantor.... so long as Grantor complies with all terms of the Credit Agreement,... this Mortgage shall remain an open mortgage of record to secure future advances in accordance with §29-3-50... even in the event all sums secured by this Mortgage may be fully paid at any one time; however, upon the request of the Grantor, lender will cause the Mortgage to be....canceled of record upon full payment...." (Emphasis added) (R. p. 85).

It is undisputed that thereafter, the Grantor conveyed the Residence to his spouse, Cammie B. Strawn, as part of a divorce proceeding.

On October 31st, 2003, Cammie B. Strawn, former wife of the Grantor, conveyed the Residence to Marie Borchers, the Respondents testate. (R. p. 174, l. 2)

The closing attorney for the closing of the sale and purchase of the Residence from Cammie B. Strawn to Marie Borchers was James S. Belk of the Anderson Bar. (R. p. 168, l. 14-25) Closing the sale and purchase required the closing attorney to address the "Open-End" Mortgage. (R. p. 85) The Mortgage provided it would be canceled upon the request of the Grantor. (R. p. 85) No evidence was offered to show that the Grantor attended the closing or signed any request for the Petitioner to cancel the Mortgage. The testimony of the closing attorney indicated that he knew the Petitioner held a Mortgage on the residence, but did not know the Mortgage was an "Open-End" Mortgage. (R. p. 180, l. 11-14) It is undisputed the Grantor never requested the Petitioner to cancel the Mortgage. The Petitioner never canceled the Mortgage. The closing attorney was notified in December of 2005 that the Mortgage was never satisfied, was in default and foreclosure was imminent. (R. p. 177, l. 15) On December 21st, 2005, the closing attorney made, executed and filed a Mortgage Lien Satisfaction Affidavit pursuant to the authority contained in §29-3-330, Code of Laws of South Carolina (2007). (R. p. 92)

Based upon the foregoing evidence, the trial court disregarded the fact that the subject mortgage was an "Open-End" Mortgage and rejected any requirement for the Grantor to request cancellation of the line of credit and assessed a penalty and awarded attorney's fees in favor of the Respondent and against the Petitioner. The Petitioner timely filed its Motion to Reconsider and/or to Alter or

Amend Judgment (R. p. 120) requesting the Court to reconsider its decision and, in particular, to address the issue involving the requirements in the Mortgage from the Grantor to request cancellation and his failure to do so. The Motion to Reconsider was denied.

3. THE DECISION OF THE COURT OF APPEALS.

The decision of the Court of Appeals in Opinion Number 5027 was filed August 22nd, 2012 with two Justices affirming the decision of the trial court on all issues presented, with a dissenting opinion of Chief Justice Few holding in summary that the Mortgage in question was an open-ended mortgage within the meaning of §29-3-50, Code of Laws of South Carolina (2007); that cancellation of an open-ended mortgage must be made at the request of the mortgagor; that the record contains no evidence that the mortgagor requested cancellation of the mortgage and because no request cancellation was made by the mortgagor, §29-3-310 did not require cancellation of the mortgage and the §29-3-320 penalty does not apply.

ARGUMENTS

- I. BECAUSE THE SUBJECT MORTGAGE IS AN “OPEN-END” MORTGAGE WITHIN THE MEANING OF §29-3-50 OF THE SOUTH CAROLINA CODE (2007), THE HOLDER WAS NOT AUTHORIZED OR REQUIRED TO CANCEL THE SAME UNLESS THE GRANTOR REQUESTED CANCELLATION THEREOF.

The first page of the mortgage (R. p. 85) provides: “REVOLVING CREDIT LINE.” “Specifically, in addition to the amounts specified in the indebtedness definition, and without limitation, this Mortgage secures a revolving line of credit, which obligates lender to make advances to grantor up to a maximum principal amount of \$50,000.00 so long as grantor complies with all the terms of the Credit Agreement.” (Emphasis added). “Such advances may be made, repaid, and remade from time to time, subject to the limitation that the total outstanding balance owing at any one time, not including finance charges on such balances..., shall not exceed the Credit Limit as provided in the Credit Agreement. It is the intention of grantor and lender that this Mortgage secures the balance outstanding under the Credit Agreement from time to time from zero up to the Credit Limit as provided in this Mortgage and any intermediate balance.” “This Mortgage shall remain an open mortgage of record to secure future advances in accordance with §29-3-50, as amended, Code of Laws of South Carolina (1976), even in the event all sums secured by this Mortgage may be fully paid at any one time; however, upon request of the grantor” (emphasis added), “Lender will cause this Mortgage to be released and cancelled of record upon full payment of

all indebtedness then owing, and upon such cancellation of this Mortgage of record, this Mortgage shall become null and void.”

Section 29-3-50(A) of the South Carolina Code (2007) provides in pertinent part “[A]ny mortgage... creating a lien on any real estate, securing existing indebtedness or future advances to be made, regardless of whether the advances are to be made at the option of the lender, are valid from the day and hour when recorded so as to affect the rights of subsequent creditors, whether lien, contractors or simple contract creditors, or purchasers for valuable consideration without notice to the same extent as if the advances were made as of the date of execution of the Mortgage... for the total amount of advances made thereunder, together with all other indebtedness and sums secured thereby, the total amount of existing indebtedness and future advances outstanding at any one time may not exceed the maximum principal amount stated therein, plus interest thereon, attorney’s fees and court costs...”

The foregoing statute provides that an “Open-End Mortgage” remains viable until mortgagor requests cancellation (emphasis added). *Central Production Credit Ass’n v. Page*, 268 S.C. 2, 231 S.E.2d 210 (S.C., 1977). When there is no debt and no commitment for a loan, the mortgagee must cancel an open-end mortgage when the mortgagor so requests (emphasis added). *Central Production Credit Ass’n id.*

The Equity Assetline Agreement between the bank and Strawn dated September 9, 2003 (R. p. 80) provided for a five-year term. The said Equity Assetline Agreement provided for termination only upon certain conditions specified under lender’s rights. The Petitioner contends that it had no right to

terminate the Equity Assetline Agreement or satisfy and cancel the mortgage without a request from Strawn as Grantor. Terminating the Equity Assetline Agreement without the request of the Grantor would violate the bank's duty to the Grantor. Since the Grantor never requested release or cancellation of the Mortgage, the Petitioner was neither obligated to nor authorized to satisfy or cancel the same.

Petitioner had a right and a duty to keep the Credit Line and the Mortgage open until Strawn requested the Petitioner to cancel the same as provided for in the Mortgage. It is undisputed that the debtor, Richard Strawn, never requested the Petitioner to cancel the Credit Line and the Mortgage. If the procedure required by the Mortgage had been followed by the grantor requesting cancellation of the Credit Line and the Mortgage, this dispute would not have occurred. Presumably, the reason the procedure was not followed, was because the closing attorney failed to recognize the mortgage to be an open-end credit line. (R. p. 180, l. 11-13)

The Petitioner asserts there is no evidence that sustains any reasonable inference that any person or party made any request upon the Petitioner to cancel the mortgage. However, assuming, arguendo, that a request to cancel the mortgage was made by a person other than the grantor, the Petitioner was contractually bound to disregard that request and to keep the credit line open and viable until the request was made by the grantor to cancel the mortgage. It is undisputed no request was made by the grantor to cancel the mortgage, therefore, the Petitioner never had any duty to anyone to cancel the mortgage.

II. BECAUSE THE GRANTOR NEVER REQUESTED CANCELLATION OF THE SUBJECT MORTGAGE AS REQUIRED IN THE MORTGAGE AND IN §29-3-50 OF THE SOUTH CAROLINA CODE (2007), THE HOLDER THEREOF WAS NEVER REQUIRED BY §29-3-310 OF THE SOUTH CAROLINA CODE (2007) TO CANCEL THE MORTGAGE.

Section 29-3-310 of the South Carolina Code (2007) provides in pertinent part that: “[A]ny holder of record of a mortgage who has received full payment... of his debts,... costs, and charges secured by the mortgage of real estate shall, at the request by certified mail or other form of delivery with proof of delivery of the mortgagor or of his legal representative or any other person being a creditor of the debtor or a purchaser under him having an interest in any estate bound by the mortgage and on tender of the fees of office for entering satisfaction, within three months after the certified mail, or other form of delivery, with a proof of delivery, request is made, enter satisfaction in the proper office on the mortgage which shall forever thereafter discharge and satisfy the mortgage.”

It is undisputed that no request was made by the mortgagor or his legal representative to the Petitioner requesting cancellation of the mortgage. Pursuant to §29-3-50 of the South Carolina Code (2007) and the pertinent provisions of the mortgage, the Petitioner bank was duty bound to keep the mortgage open and maintain the viability of the same until a request was made by the grantor to cancel the same. While the provisions of §29-3-310 of the South Carolina Code (2007) requiring the holder of a mortgage to cancel the mortgage upon the request of “... the mortgagor or his legal representative or any other person being a creditor of the debtor or a purchaser under him or having an interest in any estate bound by the mortgage...” apply to a “Closed-End

Mortgage”, the provisions thereof requiring the holder of the mortgage to cancel the mortgage upon the request of “...any other person being a creditor of the debtor or a purchaser under him or having an interest in any estate bound by the mortgage...” do not apply to an open-end mortgage. See §29-3-50, Code of Laws of South Carolina, (2007); *Central Production Credit Ass’n v. Page*, 268 S.C. 1, 231 S.E.2d 210 (S.C. 1977). The vast utility of the open-end mortgage in the marketplace depends upon the concept of maintaining the viability of the open-end mortgage until cancellation is requested by the grantor. The wisdom of applicable law holds that imposition of a duty upon the holder of an open-end mortgage to cancel the same upon the request of anyone other than the grantor would place an undue risk and burden on the lender and minimize the utility of the open-end mortgage.

Settled law provides that an open-end mortgage will remain viable until the grantor requests cancellation of the same, therefore the contradictory provisions of §29-3-310 of the South Carolina Code (2007) that requires the mortgagee to cancel and open-end mortgage upon request of any party other than the grantor are inapplicable to open-end mortgages.

While the Petitioner bank denies it received any request from anyone to cancel the mortgage, even if it is assumed, *arguendo*, that the Petitioner bank failed to cancel the mortgage upon request of anyone other than the grantor, such failure or refusal does not constitute a violation of the requirements of §29-3-310 of the South Carolina Code (2007) because the Petitioner bank had a right and duty to cancel the mortgage only (emphasis added) upon request of the grantor.

III. BECAUSE THERE WAS NEVER A REQUIREMENT TO CANCEL THE MORTGAGE, THE HOLDER THEREOF WAS NEVER SUBJECT TO THE PENALTY ASSESSABLE PURSUANT TO §29-3-320 OF THE SOUTH CAROLINA CODE (2007).

Section 29-3-320 of the South Carolina Code (2007) provides in pertinent part that: “[A]ny holder of record of a mortgage having received such payment, satisfaction, or tender as aforesaid who shall not, by himself or his attorney, within three months after such certified mail, or other form of delivery, with a proof of delivery, request and tender of fees of office, repair to the proper office and enter satisfaction as aforesaid shall forfeit and pay to the person aggrieved a sum of money not exceeding one-half of the amount of the debt secured by the mortgage, or \$25,000.00, whichever is less...” Section 29-3-320 of the South Carolina Code (2007) in essence holds that a violation of §29-3-310 of the South Carolina Code (2007) is subject to a penalty as prescribed therein.

The Petitioner, as holder of the open-end mortgage, never violated the provisions of §29-3-310 of the South Carolina Code (2007) by failing or refusing to cancel the mortgage upon request of the grantor. In substance, having received no request from the grantor to cancel the mortgage, the Petitioner as holder of the subject mortgage never received such payment, satisfaction or tender as provided in §29-3-310 of the South Carolina Code (2007), therefore §29-3-320 of the South Carolina Code (2007) is inapplicable to this case.

IV. BECAUSE THE ATTORNEY FOR THE RESPONDENTS HAD THE AUTHORITY UNDER §29-3-330(E) OF THE SOUTH CAROLINA CODE (2007) TO TIMELY CANCEL THE MORTGAGE, THE RESPONDENTS CANNOT ASSERT A VIOLATION BY THE MORTGAGE HOLDER OF §29-3-310 AND 320 OF THE SOUTH CAROLINA CODE (2007).

Borchers' attorney, as closing attorney, possessed the right and authority to satisfy and cancel the mortgage pursuant to the provisions of §29-3-330(e) of the South Carolina Code (2007). Assuming, arguendo, the Petitioner bank as holder of the mortgage had any duty to cancel the mortgage pursuant to the request of Respondents, which the Petitioner denies, Borchers' attorney possessed the right and authority to cancel the mortgage prior to the expiration of three months after the closing date. Borchers' attorney did exercise the right to cancel the mortgage pursuant to §29-3-330(e) (2007) on December 21st, 2005. Where the closing attorney has the right, power and authority to file a cancellation of mortgage and elects not to do so, it is inequitable to permit the client of the closing attorney to claim a penalty against the holder of the mortgage because of the client's attorney's failure to timely cancel or satisfy the mortgage.

The provisions of §29-3-330 were enacted subsequent to the date of all cases construing the provisions of §29-3-310 and 320 of the South Carolina Code (2007) and never contemplated the existence of the right and power of the party making payment of the secured debt, through its own attorney, to cancel and satisfy the debt pursuant to the right and authority granted therein.

The penalty provisions provided in §29-3-310 and 320 for failure to timely satisfy a mortgage on request of an interested person, should not be applied to situations where the interested person has the power and authority through his

own attorney to timely satisfy or cancel the mortgage pursuant to provisions of §29-3-330(e) of the South Carolina Code (2007).

CONCLUSION

For the foregoing reasons, as well as though stated by Chief Justice Few in his descending opinion in this case, the Petitioner respectfully submits that the Court should reverse the judgment of the Court of Appeals and nullify and abate the penalty, attorney's fees and costs assessed in this matter.

Respectfully submitted,



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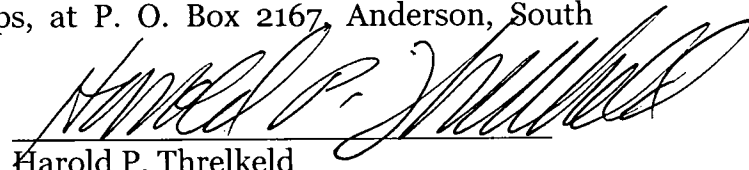
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PROOF OF SERVICE

I certify that I have served the three (3) copies of Brief of Petitioner and a copy of Appendix on the Respondents, Robert K. Borchers, individually and as Personal Representative of Estate of Marie Borchers and Nancy Davidson Borchers, by depositing a copy of it in the United States Mail, postage prepaid, on May 27th, 2014 addressed to their attorney of record, Samantha Nelson Murphy, Esquire, Epps, Nelson & Epps, at P. O. Box 2167, Anderson, South Carolina, 29622-2167.



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