

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

S.C. Supreme Court

R. Lawton McIntosh, Circuit Court Judge

On Certiorari to the Court of Appeal 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-0400770

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I THE TRIAL COURT PROPERLY FOUND THAT THE CLOSING ATTORNEY HAD THE AUTHORITY TO REQUEST THAT THE OPEN END MORTGAGE BE SATISFIED ON BEHALF OF ITS GRANTOR UNDER §29-3-310.
- II THE TRIAL COURT PROPERLY FOUND THE CLOSING ATTORNEY'S REQUEST TO THE BANK TO SATISFY THE MORTGAGE COMPLIED WITH SECTION 29-3-320.
- III THE TRIAL COURT PROPERLY FOUND THAT THE BANK'S FAILURE TO TIMELY SATISFY THE MORTGAGE SUBJECTED IT TO THE SANCTION PROVISIONS SET FORTH IN SECTION 29-3-320.
- IV THE TRIAL COURT PROPERLY FOUND THAT THE CLOSING ATTORNEY'S AUTHORITY TO SATISFY THE MORTGAGE DID NOT RELIEVE THE BANK FROM ITS RESPONSIBILITY TO COMPLY WITH SECTION 29-3-310 AND 320.

STATEMENT OF FACTS

Richard Strawn gave Regions Bank an open end mortgage on a credit line of \$50,000 on or about October 12, 2001 (R.p. 180, line 11-13, R.p. 226, line 18- 22, R.p. 229, line 5-6) when Strawn was still the titled owner of real property located at 105 Park Way in Anderson, South Carolina ("the Property"). Sometime in 2001, Strawn deeded all of his interest in the Property to his then ex-wife, Cammie Strawn (R.p. 226, line 14-17), pursuant to divorce proceedings. In 2003, Cammie Strawn sold the Property to Marie Borchers for \$136,000 (R.p. 169, line 3-4). Marie Borchers purchased the property for cash and the closing occurred on October 31, 2003. James Belk was the closing attorney. (R.p. 168, line 14-25)

In preparation for the closing on the sale from Cammie Strawn to Marie Borchers, Belk requested and received from the Bank a mortgage payoff amount on the open end mortgage for

the day of closing. (R.p. 170, line 2-3 and R.p. 136) On October 31, 2003, immediately after the closing, Cathy Slaton Curtis, one of Belk's employees, hand delivered one of Belk's trust account checks to the Bank for the full payoff amount along with a transmittal letter dated October 31, 2003 (R.p. 137 and 183 line 10 -184, line 25). This transmittal letter directed, among other things, that the Bank satisfy the mortgage and return it to Belk for filing. (R.p. 104, line 8 - p. 176, line 10 and R.p. 137, R.p. 183, line 7- p. 184, line 25)

The check delivered to the bank was for \$32,256.41; this amount brought the mortgage balance to zero. (R.p. 217, line 1-6) Belk's trust check had the words, "*Payoff of First Mortgage*" typed on its face. (R.p. 138) The Bank admits receiving and processing this check but denies ever receiving the transmittal letter. (R.p. 117-118, R.p. 217, line 1-6, and R.p. 211, line 8-9)

Sometime after the closing and the payoff of the mortgage, the Bank mailed a letter and a new set of checks to Strawn for use on the credit line of \$50,000.00. (R.p. 225, line 4-7 and R.p. 226, line 18 -22) Despite knowing that he no longer owned the property which had secured the mortgage, Strawn accessed the funds in the account up to the credit limit of \$50,000. (R.p. 225, line 8-14) Strawn made payments on the equity line until October of 2005 at which time Strawn made no further payments. (R.p. 75, paragraph 9) Strawn acknowledged at trial that he knew that he should not have used the equity line. (R.p. 224, line 23 - 225, line 9)

Marie Borchers died testate on December 5, 2005 appointing Robert Borchers as her Personal Representative. Her devisees are Robert Borchers and Nancy Borchers Davidson. (R.p. 76)

Belk testified that it is his standard practice and his specific recollection that he reviewed

the documents for this closing, including the payoff statement from the Bank, the transmittal letter demanding that the mortgage be marked satisfied and returned to his office for recording and the payoff check. (R.p. 174, line 8 - p. 176, line 25, R.p. 136-138) Belk's employee, Cathy Slaton Curtis, also testified as to the office procedures for delivery of documents and the payoff checks as well as her involvement in the delivery of the transmittal letter and the payoff check on the day of the closing. (R.p. 182, line 24 - R.p. 184, line 25, R.p. 134)

Pamela Harbin, testified that as an employee of the Bank, she did not have personal knowledge of the handling of the actual transaction involving the Bank's receipt of closing check (R.p. 208, line 22 - p. 209, line 3 and R.p. 214, line 8 - 16), but that she became familiar with this matter through her position as executive assistant to the bank president (R.p. 206, line 13-14) and subsequent research of the Bank's documents in preparation for this litigation although she could not recall when she did her research . (R.p. 215, line 1 - 19)

On December 22, 2005, Belk filed a Mortgage Lien Satisfaction affidavit pursuant to §29-3-330 of SC Code of Laws for Book 4413 at Page 319. (R.p. 177, line 13 -20) Despite its knowledge that the mortgage had been satisfied by Belk, the Petitioner filed suit against Strawn and the Respondent's on March 1, 2006 seeking to set aside the mortgage satisfaction filed by Belk and to be allowed to proceed with its foreclose of the open end mortgage executed by Strawn against the Borcher's property. (R.p. 74)

The Respondents filed an Answer, Counterclaim, Cross claim and Third Party Complaint on June 1, 2006. Specifically, the Respondents' sought the statutory penalties and damages set forth in § 29-3-320 against the Petitioner.

On August 20, 2008, the Honorable J. C. Nicholson, Jr. issued an Order for Summary

Judgment in favor of the Respondents' dismissing the Petitioner's Complaint to set aside the mortgage satisfaction and to foreclose on the mortgage. This Order held that

*“With these admissions by the Bank it is clear that the closing day payoff should have been processed as a payoff instead of a paydown and that **the bank should have had the mortgage satisfied of record.** As a matter of equity, the Bank should be estopped from foreclosing on the property as it was the bank which failed to satisfy the mortgage after receiving notice of the payoff.*

Marie Borchers was a bona fide purchaser for value of the subject property. Advances made erroneously by the Bank to a former owner of the property despite actual and constructive notice to the Bank that the mortgage had been paid off and was to be satisfied.” (Emphasis added) (R.p. 114)

This Order was never appealed.

On May 26, 2010, trial court found that Belk had delivered the transmittal letter to the Bank requesting that the open end mortgage be satisfied, that the three (3) months had passed without satisfaction and that the Bank was subject to the penalty provision of S.C. Code Ann. § 29-3-330. The trial court issued its Order granting damages of \$25,000 for the Bank's failure to satisfy the mortgage in accordance with S.C. Code Ann. § 29-3-310. The Petitioner timely filed an appeal of the trial court's opinion.

On August 22, 2012, the Court of Appeals issued its opinion affirming the trial court's decision. On September 25, 2012, the Court of Appeals issued an Order denying the Petitioner's Petition for Rehearing and the Petitioner timely filed its Petition for Writ of Certiorari.

ARGUMENTS

I THE TRIAL COURT PROPERLY FOUND THAT THE CLOSING ATTORNEY HAD THE AUTHORITY TO REQUEST THAT THE OPEN End MORTGAGE BE SATISFIED ON BEHALF OF ITS GRANTOR UNDER §29-3-310.

The Petitioner's primary argument is that only the grantor of a mortgage can be the one to request that an open end mortgage be satisfied. The Petitioner cites Central Production Credit Ass'n v. Page, 268 S.C. 1, 231 S.E.2d 210 (1977) in support of this contention. Under Central Production Credit Ass'n it is clearly established that payment in full of monies owed which are secured by an open end mortgage does not cancel the open end mortgage, there must be a request to cancel the open end mortgage. While the law of Central Production has not changed, it does not support the Petitioner's argument in this matter as the Petitioner for several reasons.

First, to the extent that the Petitioner continues to argue that in the instant case Belk did not have the right to request that the mortgage be satisfied, this argument is improper. The Bank did not appeal the 2008 Order granting Respondent's summary judgment on its action to foreclose on its open end mortgage and is therefore the law of this case. By finding that the Bank had "*actual and constructive notice to the Bank that the mortgage had been paid off and was to be satisfied*" the Bank should be precluded from arguing that Belk did not have the authority to request that the mortgage be satisfied.

Second, assuming that the grantor, Strawn, is not the only person that can request that the mortgage be cancelled, then a distinction can be made between the instant case and that of Central Production Credit Ass'n v. Page. In Central Production, there was no request by anyone, the grantor or anyone else, that the open end mortgage be cancelled. In the instant case, Belk requested that the mortgage be cancelled. The language contained in S. C. Code Ann. §29-3-310

allows for individuals other than the grantor of a mortgage to be able to request the satisfaction of the mortgage at the sale of property. S. C. Code Ann. §29-3-310 states as follows:

“Any holder of record of a mortgage who has received full payment or satisfaction or to whom a legal tender has been made of his debts, damages, costs and charges secured by mortgage of real estate shall, **at the request** by certified mail or other form of delivery with a 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 or 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.” (emphasis added)

A plain reading of the emphasized language above specifically allows for another individual to request that the mortgage be satisfied. In fact, in the Court of Appeals decision, the dissent acknowledges that the grantor is not the only one that may cancel a mortgage, only that “*the mortgage may not be cancelled unless the proper person requests it*”. (R.p. 22) For the Petitioner’s argument to prevail, this court has to find that the language of Section 29-3-310 is not applicable to open end mortgages and that only the grantor of an open end mortgage at a sale of real property may ask that it be satisfied. Central Production does not state this, only that a request by must be made.

In the instant case, either the ex-wife, Cammie Strawn, or Jim Belk, the closing attorney, or arguably Marie Borchers would appear to qualify under the definition provided in the statute as a ‘proper person’ to request that the mortgage be satisfied. Strawn transferred his interest to his ex-wife, Cammie Strawn, in 2001. As of 2003, at the time of the closing, Cammie Strawn was the sole legal owner of the property. Out of her sales proceeds, the entire balance of the open end mortgage was paid off. Marie Borchers was a purchaser of the property, she paid cash

and expected to received title to the real estate free and clear from any encumbrances. Belk was the legal representative of both to the extent that both intended for legal title to the property to be transferred from Cammie Strawn to Marie Borchers free from any encumbrances. Therefore, Belk was a proper party to request that the mortgage be cancelled.

There is a further implication from Strawn's trial testimony that he expected that his open end mortgage would be closed. Strawn's testimony appears to show some surprise on his part of receiving new checks on the equity line of credit after he had sold the home and had moved away. He goes on to acknowledge that ". . . I made some bad choices, bad decisions, and started using the equity line . . ." effectively admitting that he knew that he was not supposed to use the equity line checks. (R.p. 224, line 23 - 225, line 9) While Strawn was not actually present at this closing to instruct Belk to close the open end mortgage, Strawn's admission negates the Petitioner's contention that it was not the grantor's intent to terminate the open end mortgage upon the sale of the real estate and appears to support the inference that he thought Belk would have done it on his behalf. (R.p. 224, line 23 - 25)

Another distinction that can be made is that the transfer of the real estate in Central Production was between a husband and wife and not to a third party cash purchaser. In Central Production, the husband had used certain real property as security for an open end mortgage. After the mortgage was in place, husband transferred the property to his wife. The wife subsequently sought to avoid payment on a new loan made by the husband purported to be secured by the original open end mortgage by saying it [the mortgage] had been satisfied when the balance due on the original note had been paid down to zero. The husband and wife were together throughout that action. In our case, Cammie Strawn was the ex-wife of Strawn and had

received the property as part of their divorce proceedings. Marie Borchers was a bona fide purchaser for value, this was an arms length transaction and Borchers paid cash for the property with the expectation that she was receiving the property free of any encumbrances. Not so with Mr. and Mrs. Page in the Central Production case.

Finally, the Petitioner argues that the terms of the mortgage itself limit the Bank to only accepting the instructions of Strawn to close the mortgage and that the Petitioner was contractually bound to disregard any request to cancel the mortgage made by anyone except the grantor, Strawn. If this argument is accepted, then this Court would be granting the Bank the ability to contractually relieve itself from its obligations under S. C. Code Ann. §29-3-310 and potentially other regulatory statutes that may conflict with their customer's wishes. This does not make sense and should not be allowed.

II THE TRIAL COURT PROPERLY FOUND THE CLOSING ATTORNEY'S REQUEST TO THE BANK TO SATISFY THE OPEN END MORTGAGE ON BEHALF OF THE GRANTOR COMPLIED WITH SECTION 29-3-310.

The Petitioner essentially argues that S. C. Code Ann. §29-3-310 does not apply to open end mortgages and cites Central Production Ass'n v. Page and §29-3-50 in support of this premise as 'well settled law'. The Petitioner would explain away the alleged 'contradiction' between §29-3-50 and that portion of §29-3-310 that provides for the mortgage to be canceled upon request of a proper party by arguing that allowing anyone other than the grantor to cancel an open end mortgage "would place an undue risk and burden on the lender and minimize the utility of the open-end mortgage". This explanation is convoluted and does not make sense.

What makes more sense is that the well settled law of Central Production is only that an open end mortgage is not satisfied simply upon payment of any note owed by the grantor of the

mortgage to zero; a request to satisfy the mortgage must be made as well. There is no language in the S. C. Code Ann. §29-3-50 that precludes someone besides the grantor of an open end mortgage from requesting that it be cancelled or that allows the Petitioner to create a contractual exception for itself to refuse to satisfy an open end mortgage except upon request of only the original obligee, nor should this be allowed. The Petitioner would have this Court ignore the plain language of the statute and allow the Petitioner to limit its obligations through its contract. A lender should not be allowed to avoid its statutory obligation under S. C. Code Ann. §29-3-310 by saying its own customer has authorized it to do so to the detriment of other parties.

Further, §29-3-310 does not make a distinction between an open end mortgage and §29-3-50 does not say that §29-3-310 does not apply in any way. There is no contradiction except for the one that the Petitioner is attempting to create for open end mortgage. Under this argument, the ‘undue risk and burden’ should be shifted to the real estate purchasers.

This argument is also not persuasive when you consider that actual facts of this case: the Bank had actual or constructive knowledge that the property had been sold and the open end mortgage was to be satisfied. The Bank’s own witness at trial, Pamela Harbin, testified that upon receipt of Belk’s transmittal letter and the payoff of the balance due on the open end mortgage she would have called Strawn; and that if Strawn had said it was a ‘pay down’ instead of a ‘payoff’ she would have called Belk for “further instructions”. (R.p. 219, line 15 - 220, line 11). So the Petitioner’s argument that it was duty bound by its own contractual obligation to follow the grantor’s instructions, is not actually true. The Petitioner’s employee would have called the closing attorney, Belk, for “further instructions”.

Also, the Petitioner again argues it was undisputed that no request was made by the

mortgagor or his legal representative to cancel the open end mortgage. For the reasons set forth in the first argument, the Respondent does not concede this to be true.

III THE TRIAL COURT PROPERLY FOUND THAT THE BANK'S FAILURE TO TIMELY SATISFY THE MORTGAGE SUBJECTED IT TO THE SANCTION PROVISIONS SET FORTH IN SECTION 29-3-320.

The trial court did not err in finding that Belk's transmittal letter contained a proper request that the Petitioner satisfy the mortgage and the Bank failed to do so within the time limitation set forth in §29-3-310. Accordingly, the trial court correctly found that the Petitioner violated the mandates of §29-3-310 and is subject to the penalty provision contained in §29-3-320. Since the Petitioner's sole argument is that it had no obligation to satisfy the mortgage absent a direction of the grantor to do so, the Respondent contends that the Petitioner thereby concedes that the other elements needed to be met to recover under §29-3-320 and delineated in Bostic v. Am. Home Mortg. Servicing, Inc., 375 S.C. 143, 650 S.E.2d 479 (Ct.App. 2007) and Dykeman v. Wells Fargo Home Mortg., Inc., 673 S.E.2d 804 (2009) have been satisfied by the Respondent as these were not argued on appeal.

IV THE TRIAL COURT PROPERLY FOUND THAT THE CLOSING ATTORNEY'S AUTHORITY TO SATISFY THE MORTGAGE DID NOT RELIEVE THE BANK FROM ITS RESPONSIBILITY TO COMPLY WITH SECTION 29-3-310 AND 320.

As found by the 2008 Order, the Petitioner had actual or constructive notice as of October 31, 2003 that the mortgage was to be satisfied. The Petitioner was obligated by S. C. Code Ann. §29-3-310 to satisfy the mortgage within a three month period after the request to do so is made, which it did not do. Petitioner cites no authority or valid reason it should be allowed to shift its obligation to the closing attorney and to avoid liability.

The Petitioner's argument that since the closing attorney 'could' have satisfied the

mortgage within the three (3) months and did not so they should be relieved of their responsibility to do so is untenable and would render §29-3-320 moot; in every instance, the Petitioner could shift its statutory obligation under S. C. Code Ann. §29-3-310 to the closing attorney and thereby avoid the penalties of §29-3-320. In fact, S. C. Code Ann. §29-3-330 (2)(5) seems to preclude this argument; it states, in pertinent part, *“This section may not be construed to require an attorney to record an affidavit pursuant to this item or to create liability for failure to file such affidavit.”* Taking the Petitioner’s argument to the next logical step, then the Petitioner would never have to satisfy the mortgage and the obligation to do so could become required of the closing attorney, which would definitely contradict S. C. Code Ann. §29-3-330 (2)(5).

The Petitioner’s discussion of the dates of enactment of the cited statutes have no apparent relevance to the present case.

Even if the Petitioner’s contention is correct and Belk did have a duty to satisfy the mortgage on the Petitioner’s behalf and was under an obligation to satisfy the mortgage within three months of the request, the Petitioner would still be liable as Belk’s satisfaction was not done within three (3) months of a request to do so as was required by the statute.

Therefore, the court of appeals did not err in holding that the Petitioner’s obligation to satisfy the mortgage is not abrogated by the closing attorney’s contemporaneous authority to do the same.

CONCLUSION

I ask this court to keep in mind the fact that we are here because the Petitioner, mistakenly lost a request to close a mortgage made by a closing attorney and approximately two

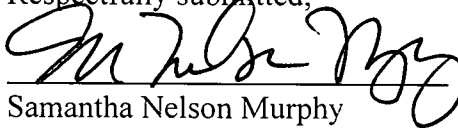
years after the request to satisfy the mortgage was made, realized its error. Upon realizing its error, the Petitioner did not then satisfy the mortgage, it demanded payment for the monies Strawn had taken on the equity line thus prompting the closing attorney to satisfy the mortgage under §29-3-330 (B)(5) (formerly §29-3-330(e)). To compound its original error, the Petitioner promptly instituted a lawsuit against the Respondent to have the satisfaction set aside and to be allowed to foreclose on its mortgage and require the Respondent's to pay Strawn's debt.

While there are legitimate legal questions that are before this court, the wrongdoing here began with Strawn's conduct, but was exacerbated by the Petitioner's conduct. They chose to file suit to set aside a mortgage satisfaction and foreclose on a mortgage knowing full well that the property had been sold at an arms length transaction to a legitimate purchaser. The underlying case is not factually similar to any of the reported opinions that discuss the continued validity of an open end mortgage after a subsequent transfer – this transfer was not done to avoid judgment creditors or payment of another debt owed by a spouse. In this case, we have an arms length transaction with an innocent real estate purchaser and the Petitioner made a conscience decision to pursue the innocent purchaser to attempt to collect monies from this purchaser to correct its own error. The Petitioner has its judgment against Strawn for over \$72,000, but it would have had the Respondents pay this money on Strawn's behalf.

The facts of this case are that all interested persons were at the closing table and the bank was properly instructed to close the open end mortgage. Strawn had no fee interest in the property and had not had any fee interest in the property for years prior to this sale. The bank had actual or constructive knowledge that they should satisfy the mortgage and failed to do so. Ultimately, the Respondents are before this court because the Petitioner sued them to foreclose

on a mortgage that the Petitioner wrongfully failed to satisfy. The Respondent's have embroiled in litigation that they did not begin. They are seeking the penalties that they are entitled to under the law and for the reasons stated, Respondent asks that the Court affirm the decision of the trial court.

Respectfully submitted,



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June 26, 2014
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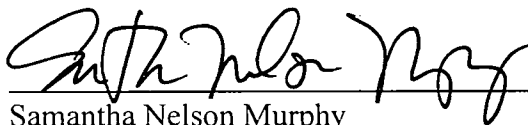
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Appellate Case No.: 2012-213178
Lower Court Case No.: 2006-CP-04-00770

PROOF OF SERVICE

I certify that I have served the three (3) copies of the Brief of Respondents on the
Petitioner, by depositing a copy of it in the United States Mail, postage prepaid, on June 27,
2014 addressed their attorney of record, Harold P. Threlkeld, Esquire, Post Office Box 1385,
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