IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

The Honorable J. Michael Baxley, Circuit Court Judge

Case No. 2010-CP-13-0064

American Community Bank, a division of Yadkin Valley Bank and Trust, ... Respondent,

vs.

Michael R. Brown, C.W. Horne, Shortt Auction & Realty Co., Inc., Bank of America, N.A. and Jaguar Portfolio, LLC, ...Defendants,

Of which Michael R. Brown is the Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Respondent filed this action on May 4, 2010. After being served by publication in accordance with the Order for Service by Publication filed July 23, 2010, Appellant mailed his Answer, Counterclaims and Crossclaim (Answer) on August 12, 2010. Respondent filed its Reply to the Counterclaim on September 14, 2010.

On June 16, 2011, the Trial Court requested Appellant and Respondent brief their positions on whether the case was stayed by Administrative Order 2011-05-02-01. Respondent filed its Memorandum on Application of Administrative Order 2011-05-02-01 to This Case on July 18, 2011. The Trial Court entered a Form 4 Order Deeming Applicable C.J. Toal's Administrative Order to this Foreclosure Action and directed Respondent to comply with the Administrative Order; however, the Order did not rule on whether the loan evidenced by the Note secured by the Mortgage (each as defined herein below) was a consumer or commercial transaction. (R. p. 4)

Respondent served Appellant with the requisite Notice of Right to Foreclosure Intervention on October 21, 2011. As a result of Appellant's failure to provide Respondent with evidence that he had a sufficient stable or recurring income to repay the Note secured by the Mortgage, Respondent served Appellant with a Notice of Denial of Loan Modification on March 8, 2012. The Notice of Denial also served as a certification that Appellant failed to participate in the foreclosure intervention process, so that the stay imposed by Administrative Order 2011-05-02-01 was lifted. (R. p. 4) Appellant has not contested the lifting of the stay.

Respondent filed its motion for summary judgment against Appellant on May 11, 2012.[1] Respondent submitted a memorandum in support of its motion. Appellant submitted a memorandum in opposition to the summary judgment motion. The hearing was held on July 12, 2012, before the Honorable J. Michael Baxley.

At the hearing, Appellant consented to entry of summary judgment as to his counterclaims for civil conspiracy and fraud, as well as the affirmative defenses of failure to mitigate damages, equitable estoppel, unconscionability and breach of duty of good faith. (R. p. 2) Appellant's consent to summary judgment as to these counterclaims and affirmative defenses left only his counterclaims for Respondent's alleged failure to satisfy a mortgage in accordance with S.C. Code Ann. § 29-3-310, Respondent's alleged violation of the South Carolina Unfair Trade Practices Act (SC UTPA) and the affirmative defense of waiver (express and implied), as the subject of the summary judgment motion and this appeal.

The Trial Court entered the Order Granting Summary Judgment on Borrower's Affirmative Defenses and Counterclaims on August 6, 2012 (Order). Appellant served a motion to alter or amend judgment on August 20, 2012. The Trial Court denied Appellant's motion on November 7, 2012. Appellant filed his Notice of Appeal on December 11, 2012. On February 4, 2013, the appeal was administratively dismissed for Appellant's failure to provide information regarding the transcript and his failure to serve and file his initial brief. Appellant filed a motion to recall the remittur, which was granted on June 19, 2013.

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[1] Respondent's Motion did not seek a ruling on Appellant's Truth-in-Lending Act (TILA) cause of action, so that cause of action is not the subject of this appeal. (R. pp. 3, 12)

STATEMENT OF THE FACTS

On December 29, 2000, Appellant signed in favor of Respondent a promissory note in the amount of $150,000 (the "Note").[2] (R. p. 387) The Note defines default to include, among other things, Appellant's failure to make any payments when due, failure to perform any term, obligation, covenant or condition thereof, insolvency, or a material adverse change in his financial condition. (R. p. 290) Upon default, Respondent may declare the entire unpaid principal balance of the Note and all accrued, unpaid interest immediately due and payable. (R. p. 290)

As security for the Note, Appellant executed in favor of Respondent a mortgage dated December 29, 2000, recorded January 2, 2001 in Book 346 at Page 431, with the Clerk of Court, Chesterfield County, South Carolina, (Mortgage) encumbering real property there, together with appurtenances and other property located thereon, along with other rights and interests as set forth therein (collectively, the "Subject Property"). (R. p. 388) The Mortgage also states that upon default by Appellant, Respondent may "declare all sums secured by this mortgage immediately due and payable and proceed with foreclosure thereof." (R. p. 294)

Appellant admits he has not paid the principal amount owed under the Note upon demand by Respondent. (R. pp. 388, 393, 399, 404) Respondent never informed Appellant it did not intend to collect the principal amount due and owing on the Note. (R. pp. 235, 393-94) The amount of $150,000 remains due and payable on the Note. (R. p. 388)

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[2] Although there are nine modifications to the Note that Appellant denies signing, such modifications are not at issue in this appeal, because Respondent seeks only to recover the original principal amount of $150,000, plus interest accruing after demand was made upon Appellant on February 23, 2010, based upon the original or unmodified note. (R. pp. 23, 223, 236)

ARGUMENT

Standard of Review

When reviewing the trial court's decision to grant summary judgment, an appellate court applies the same standard of review applied by the trial court. *Boyd v. Liberty Life Ins. Co.*, 399 S.C. 401, 406, 732 S.E.2d 180, 183 (Ct. App. 2012). Summary judgment "is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Cherry v. Myers Timber Co., Inc.*, 2013 WL 3361275 (S.C. Ct. App. July 3, 2013) (Affirming order granting summary judgment on the basis that the only evidence supported movant's position.)

I. Appellant offered no evidence of a voluntary and intentional abandonment by Respondent of its right to collect the outstanding debt on the Note and Mortgage.

"A waiver is a voluntary and intentional abandonment or relinquishment of a known right." *King v. James*, 388 S.C. 16, 694 S.E.2d 35 (Ct. App. 2010), *citing Eason v. Eason,* 384 S.C. 473, 480, 682 S.E.2d 804, 807 (2009). "In order for a party to waive a right, the party must have known of the right and known that the right was being abandoned." *Id.*

Financial institutions commonly issue at year end Form 1098 Mortgage Interest Statements so that borrowers and the Internal Revenue Service know the amount of deductible mortgage interest that may be claimed on Schedule A of an individual's tax return. When a financial institution forgives a debt, a Form 1099 is issued at year end setting forth the amount of ordinary income which must be included for tax purposes on an individual's tax return.

Appellant's affirmative defense of waiver is based solely on a 2007 Form 1098 Mortgage Interest Statement (the "Form"), which shows only that $87,400 in interest was received by Respondent. (R. p. 331) When Respondent modified the Note (whether or not Appellant signed the modification), the Note was considered current in interest payments, and Appellant received the benefit of the mortgage interest deduction as if he had made payments, which he had not. The Form is silent as it should be with respect to the status of outstanding principal due.

The Form does not contain any language regarding Respondent's waiver of any of its rights to collect on the Note and foreclose the Mortgage. (*Id.*) It does not reference the principal amount due on the Note, which remains unpaid to date. If the Note had been forgiven, Respondent would have issued a Form 1099 and Appellant would have had ordinary income on which to pay taxes. Appellant has no evidence that Respondent ever issued a Form 1099, or that the Form which was issued constituted a Form 1099 debt forgiveness.

Appellant admitted that the Form did not show the Note had been paid in full, but instead showed the payment of interest. (R. pp. 393-94) He knew the Form 1098 was an interest statement for the Note, not a statement marking the Note paid in full. (*Id.*) Appellant knew he had not paid Plaintiff $87,400[3] in interest on the Note, nor had he paid any of the principal of $150,000. (R. pp. 388, 393-94, 399, 404) He admitted he never

[3] Appellant's reference to a separate promissory note in the amount of $87,400 is an attempt to distract the Court from the fact that Appellant never paid the original principal balance of $150,000 due and owing on the Note. Any other loan made to cover interest on the original Note (R. p. 225) is irrelevant to whether the original Note for $150,000 was paid. Respondent is not suing for collection of the interest note in the amount of $87,400. Respondent never waived its right to require payment of the Note for $150,000, failing which it would foreclose on the Mortgage.

received anything in writing from Respondent that if he failed to repay the $150,000, Respondent would waive its right to foreclose the Mortgage. (R. p. 393-94) Nothing in the record supports the affirmative defense of waiver, because there was no waiver by Respondent.

Appellant's argument is a self-serving attempt to transform a Form 1098 into a Form 1099 in order to avoid ever paying the Note, thus rendering the winery where he lives free and clear of liens. *See National Enterprises, Inc. v. Barnes*, 201 F.3d 331 (4th Cir. 2000) (Self-serving affidavit describing the content of written agreements is not enough to defeat motion for summary judgment.) There was no waiver, either express or implied, by Respondent. The Order eliminating the affirmative defense of waiver should be affirmed.

II. Appellant did not pay the Note, so Respondent had no duty to satisfy the Mortgage under S.C. Code Ann. § 29-3-310 (Cum. Supp. 1999).

Under S.C. Code Ann. § 29-3-310 (Cum. Supp. 1999) (emphasis added),

> [a]ny holder of record of a mortgage who has *received full payment or satisfaction* . . . 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 his legal representative . . . within three months after . . . the request is made, enter satisfaction in the proper office on the mortgage which shall forever thereafter discharge and satisfy the mortgage.

The first step in the process set forth under S.C. Code Ann. § 29-3-310 is actual payment of the mortgage. *See Dykeman v. Wells Fargo Home Mortg., Inc.*, 381 S.C. 333, 673 S.E.2d 804 (Ct. App. 2009). For the Statute to apply, the debt must first be actually paid.

Appellant has not repaid the principal of $150,000 which he borrowed from Respondent. He admitted repeatedly in his deposition that he never repaid the principal

amount of $150,000. (R. pp. 388, 393, 399, 404) He also admitted that he had nothing from Respondent showing that the Note had been paid in full. (R. p. 393) Testimony from a representative of Respondent confirmed that Respondent never received payment in full on the Note. (R. p. 231, 234) All of the evidence shows that the principal amount of the Note is still due and owing by Appellant and that, for over a decade, he has not made any attempt to pay the Note. There is not a scintilla of evidence to suggest Appellant has paid the Note. Absent payment in full, Respondent has no obligation under S.C. Code Ann. § 29-3-310 to satisfy the Mortgage. The Order dismissing the counterclaim for failure to satisfy a mortgage should be affirmed.

III. Appellant failed to present any evidence of an impact on the public interest, as is required for a claim under the South Carolina Unfair Trade Practices Act.

To succeed on a claim under the SC UTPA, a claimant must show that the actions at issue "impact the public interest." *Schnellmann v. Roettger*, 368 S.C. 17, 23, 627 S.E.2d 724, 746 (Ct. App. 2006), *aff'd as modified* 373 S.C. 379, 645 S.E.2d 239 (2007). Such an impact "may be shown if the acts or practices have the potential for repetition." *Id.* (Citations omitted.). A "potential for repetition may be shown by proving that the same kind of actions occurred in the past or by showing that the procedures employed by the defendant create a potential for repetition of the deceptive practices." *Id. See also Regions Bank v. College Ave. Development, L.L.C.*, 2010 WL 973480, *5 (D.S.C. 2010) (No UTPA cause of action for borrower where it "complained of acts only relating to the individual loan transaction involved in [that] case."). A "simple contract dispute between two parties to a commercial transaction" is not what "the SC UTPA was created to protect against." *Id.*

"The act is not available to redress a private wrong where the public interest is unaffected." *Noack Enterprise, Inc. v. Country Corner Interiors of Hilton Head Island, Inc.*, 290 S.C. 475, 479, 351 S.E.2d 347, 350 (Ct. App. 1986). "An unfair or deceptive act or practice that affects only the parties to a trade or a commercial transaction is beyond the act's embrace." *Id.*

Although Appellant argues that the actions of Respondent "are plead as showing a pattern of behavior by [Respondent] consistent with a deliberate pattern of such actions both in the past and planned in the future", Appellant failed to submit any evidence to support his allegations.[4] (Initial Brief of Appellant, p.6.) Appellant is just resting on his pleadings, which he is not allowed to do under Rule 56(e), SCRCP. He is required under this Rule to set forth by evidence specific facts showing that there is a genuine issue for trial. As in *College Ave*, Appellant failed to set forth any evidence of Respondent committing these same alleged acts in transactions with other parties, nor is there any evidence that tends to show Respondent will commit the alleged acts in any future transactions (assuming any unfair or

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[4] On pages 5-6 of his Initial Brief, Appellant detailed as i. through viii. his factual bases for alleging that Respondent violated the SC UTPA. There is no evidentiary support for any of these assertions. Further, even if there were support, there is no evidence of a pattern or possibility of repetition of any of Appellant's unfounded allegations. Each of these unsupported allegations if provable still represents a private grievance between Appellant and Respondent, which is not subject to the SC UTPA.

His averments vi., vii. and viii., which relate to satisfaction of the debt, were resolved by the Trial Court's ruling that it is indisputable the principal amount of the Note is still due and owing by Appellant, which is addressed in Sections I and II hereof.

Finally, as to his averments iv. and v, which pertain to allegations of forged extensions and modifications of the Note, even if these allegations are true, these forgeries do not make the original Note and Mortgage unenforceable. Respondent is only suing for the original principal amount, plus interest accruing after demand was made upon Appellant on February 23, 2010. (R. pp. 23, 233, 236) Even if Respondent did accept the alleged forgeries, there is no evidence of damage to Appellant. If anything it allowed him more time to repay the original $150,000 (without interest accrual for a decade), which remains outstanding.

deceptive acts occurred on the Note, which they did not). Nor did counsel for Appellant make any argument at the hearing about any other similar loan transactions of Respondent. Instead, Appellant has complained of acts only relating to the individual loan transaction involved in this case.[5] Without an impact on the public interest, this is a mere private grievance between Appellant and Respondent, so the SC UTPA does not apply.[6] The Order dismissing the counterclaim for violation of the SC UTPA should be affirmed.

CONCLUSION

Respondent was awarded summary judgment as to Appellant's counterclaims and affirmative defenses, because Appellant had no evidence to support these claims and defenses. The evidence before the Trial Court was incontrovertible. Appellant admits he never paid the $150,000 due and owing under the Note and that he understood the Form 1098 was only a statement of mortgage interest paid. He knew it was not a Form 1099 debt forgiveness statement of ordinary income to declare on his tax return. He knew it was not a waiver of any of Respondent's rights to collect the original $150,000. He knew he was not entitled to satisfaction of the Mortgage, because the indebtedness evidenced by the Note was unpaid. Finally, he provided no evidence of any impact on the public interest as a result of this individual loan transaction between Respondent and Appellant. This case is a mere

[5] Appellant also makes reference to his counterclaim under TILA, which was not the subject of the Motion, nor was it ruled upon by the Trial Court. (R. pp. 3, 12) As a result, Appellant's counterclaim grounded in TILA is not at issue in this appeal.

[6] Appellant's assertion that Respondent's defense is based in any way on *Anderson v. Citizens Bank*, 294 S.C. 387, 365 S.E.2d 26 (Ct. App. 1987), is untrue. Respondent did not cite to *Anderson* in either the summary judgment motion or the memorandum in support thereof, or any other paper submitted to the Trial Court. Respondent's position is rooted firmly in well-established South Carolina law that the SC UTPA does not apply to a private grievance between two parties. *See Schnellmann* and *College Ave, supra.*

private grievance resulting from Appellant's failure to repay his loan from Respondent. Because Appellant has no evidence to support his claims and defenses that were at issue in the summary judgment motion, the entire Order awarding summary judgment to Respondent should be affirmed.

Respectfully submitted,

Date: 6/5/14

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Of which Michael R. Brown is the Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the *Final Brief of Respondent* complies with Rule 211(b), SCACR.

Date: 6/5/14

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below he served counsel for Appellant with a copy of the *Final Brief of Respondent* by mailing a copy of the same via First Class, U.S. Mail, postage-paid on the date set forth below.

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