STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2010-CP-13-0064

AMERICAN COMMUNITY BANK, ... Respondent,

vs.

MICHAEL R. BROWN,
C.W. HORNE,
SHORTT AUCTION & REALTY CO., INC.,
BANK OF AMERICA, N.A., and
JAGUAR PORTFOLIO, LLC

of whom
MICHAEL R. BROWN is the . . . . . Appellant.

BRIEF OF APPELLANT

John Martin Foster
Post Office Box 106
Rock Hill, South Carolina 29731-6106
(803) 324-8100
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: SOUTH CAROLINA: SUPREME COURT

CASES: SOUTH CAROLINA: COURT OF APPEALS

STATUTES: SOUTH CAROLINA

STATUTES: FEDERAL

OTHER AUTHORITIES

STATEMENT OF THE ISSUES ON APPEAL

1. SUMMARY JUDGMENT DEMANDS THERE BE NO ISSUE OF GENUINE FACT.
2. EVIDENCE OF WAIVER OR IMPLIED WAIVER HAS BEEN SHOWN.
3. EVIDENCE OF A FAILURE TO SATISFY THE MORTGAGE HAS BEEN SHOWN.
4. EVIDENCE OF UNFAIR AND DECEPTIVE TRADE PRACTICES HAS BEEN SHOWN.

FACTS

Appellant BROWN borrowed $150,000.00 from the predecessor of Respondent AMERICAN COMMUNITY BANK, secured by a Note and Mortgage on 106.85 acres in Chesterfield County, dated December 29, 2000. The Note was guaranteed by Defendant HORNE.

Respondent AMERICAN COMMUNITY BANK, as holder of the Note and Mortgage instituted foreclosure proceedings on the loan against Appellant BROWN, naming HORNE as guarantor and other persons holding judgments against BROWN.

Appellant responded with an Answer, Counterclaims and Crossclaim against the Respondent Bank and HORNE. This pleading set out defenses and counterclaims for Truth-in-Lending violations, unfair and deceptive trade practices, waiver, and failure to satisfy the mortgage.

The Circuit Court granted summary judgment as to unfair and deceptive trade practices, waiver, and failure to satisfy the mortgage by its Order dated July 27, 2012. This was confirmed by its Order disposing of the Appellant's Motion under Rule 59, S.C.R.C.P.

After receipt of the later Order on November 27, 2012, this appeal was filed by Notice mailed December 11, 2012.

STATEMENT OF THE CASE

Appellant BROWN borrowed $150,000.00 from the predecessor of Respondent AMERICAN COMMUNITY BANK, secured by a Note and Mortgage on 106.85 acres in Chesterfield County, dated December 29, 2000. The Note was guaranteed by Defendant HORNE. By an Assignment of the same date, HORNE's wife assigned a CD account as security.

A "Disbursement Request and Authorization" purportedly signed by BROWN lists the "primary purpose" of the loan as "Business". The Lender's Title Insurance binder on the loan contained language identifying it as for residential property. No attorney preference was given or received. No three day waiting period was observed before disbursement of the loan proceeds.

Both BROWN and HORNE executed a "Modification and Extension Agreement" as to the Note and Mortgage dated January 23, 2012. There follows a series of such agreements ranging (on their faces) from August 28. 2003 through October 20, 2007, bearing what purport to be the signatures of BROWN and HORNE. Both BROWN and HORNE deny the authenticity of those later signatures.

Each of the "Modification and Extension Agreements" lack any description of further collateral. There exist, however, a contemporary documents to the "Agreements" designated as "Assignment of Deposit Account" or "Additions or Substitution to Collateral", purportedly executed by HORNE or his wife, and listing bank accounts with Respondent's predecessor as collateral.

In addition, there exists a 2007 Form 1098, reciting a debt opened in "12/00", a high balance of "150,000", a payment of $87,400.00 and a reported balance of "-0-".

Respondent AMERICAN COMMUNITY BANK, as holder of the Note and Mortgage instituted foreclosure proceedings on the loan against Appellant BROWN, naming HORNE as guarantor and other persons holding judgments against BROWN.

Appellant responded with an Answer, Counterclaims and Crossclaim against the Respondent Bank and HORNE. This pleading set out a number of claims resulting from the environmental condition of the subject property: those are abandoned. It also set out defenses and counterclaims for Truth-in-Lending violations, unfair and deceptive trade practices, waiver, and failure to satisfy the mortgage.

Respondent Bank moved, and the Court granted summary judgment as to unfair and deceptive trade practices, waiver, and failure to satisfy the mortgage by its Order dated July 27, 2012. This was confirmed by its Order disposing of the Appellant's Motion under Rule 59, S.C.R.C.P.

After receipt of the later Order on November 27, 2012, this appeal was filed by Notice mailed December 11, 2012.

ARGUMENT

1. SUMMARY JUDGMENT DEMANDS THERE BE NO ISSUE OF GENUINE FACT.

The Court of Appeals has stated the general principles surrounding the Court's decision on a Motion for Summary Judgment. To cite the usual language:

> "In reviewing the grant of a summary judgment motion, the appellate court applies

the same standard that governs the trial court under Rule 56(c), S.C.R.C.P." *Boyd v. BellSouth Tel. & Tel. Co.*, 369 S.C. 410, 415, 633 S.E.2d 136, 138 (2006).

"Under Rule 56, S.C.R.C.P., a party is entitled to a judgment as a matter of law if the pleadings, depositions, 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." *Id.*

"In determining whether any triable issues of fact exist for summary judgment purposes, 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." *Id.*

"[I]n cases applying a preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)."

[*Stiltner* v. *USAA Cas. Ins. Co.*, 395 S.C. 183, 188-89, 717 S.E.2d 74, 77 (Ct.App. 2011); *paragraphing and punctuation added.*]

2. EVIDENCE OF WAIVER OR IMPLIED WAIVER HAS BEEN SHOWN.

In his Tenth and Eleventh Defenses, Appellant BROWN has alleged Express Waiver and Implied Waiver. These defenses rest on the following facts:

In or about October, 2007 or thereafter, the Bank furnished Mr. BROWN and (on knowledge and information) the Internal Revenue Service and its Bank Examiners a Federal Form 1098 or comparable documents, bearing BROWN's address and the account number of the mortgage debt which forms the basis of its present foreclosure action. (RECORD ON APPEAL, Deposition of Clewis, Exhibit 26, p.331.) As stated above, the Form 1098 clearly references the original mortgage debt: it shows the date and amount of that loan.

The Form 1098 also states that the balance on the designated, mortgage account is "**-0-**".

There is a Promissory Note (RECORD ON APPEAL, Deposition of Clewis, Exhibit 17, p.279) in the amount of $87,400.00. It is among the documents whose execution has been denied by both BROWN and HORNE. Counsel for Respondent Bank did not seek to have it identified by the Appellant BROWN in his deposition (Record on Appeal, Deposition of BROWN, p.384 *et seq.*); equally, he failed to have it identified by Clewis as a part of the Bank's regularly kept records. Even should the finder of fact conclude that this "Note" is genuine, there would remain the question of the language on the Form 1098 which clearly references the original loan.

The Mortgage signed by Mr. BROWN (RECORD ON APPEAL, Deposition of Clewis,

Exhibit 23, p.292) contains no language extending its effect past a payoff.

In order to maintain that a Mortgage Lien still exists on the subject real property, the Bank must rely on the last of the Modification and Extension Agreements, dated October 29, 2007, copies of which are attached to its unverified Complaint. (RECORD ON APPEAL, p.19 and 29 *et seq.*)

Both Mr. BROWN (RECORD ON APPEAL, Deposition of BROWN, page 79, line 2 thru 16, p.403 of Record) and Mr. HORNE (RECORD ON APPEAL, Deposition of HORNE, page 46, line 20 thru page 47, line 11, p.135 of Record) have denied the signatures on the Modification and Extension Agreements after 2001 to be theirs.

Mr. Clewis has testified that he cannot testify as to the validity of the signatures on the Modification following the 1098 Tax Form.(RECORD ON APPEAL, Deposition of Clewis, page 68, l.17, p.232 of Record – page 69, l.6, p.233 of Record)

Mr. BROWN has specifically denied his signature on the relevant Modification and Extension Agreements in his pleading. (RECORD ON APPEAL, Para. 70(e) and (f) of the Answer, Counterclaims and Crossclaim, p.12.)

No other proof of the the October 29, 2007 Modification and Extension Agreement has been made, even as to its existence as a part of the Plaintiff's regularly kept business records.

The facts above set out grounds for a defense of waiver, actual or implied. A waiver, according to the generally accepted definition, is the voluntary and intentional relinquishment of a known right, claim or privilege. *Stubbs* v. *Philadelphia L. Ins. Co.*, 151 S.C. 326, 149 S.E. 2 (1929); *Davis* v. *Milady*, 92 S.C. 135, 75 S.E. 363 (1912); 28 AM.JUR.2D *Estoppel and Waiver* § 197 (2002).

Waiver, unlike estoppel, is unilateral in character, and one party acting alone who abandons its rights is sufficient to create a waiver. *Stubbs* v. *Philadelphia L. Ins. Co., supra;* 28 AM.JUR.2D *Estoppel and Waiver* § 197 (2002).

In the case at hand, the mortgage lien and its attendant rights existed in 2007. The 1098 Tax Form was issued by the predecessor to AMERICAN COMMUNITY BANK, the holder of the Mortgage. (RECORD ON APPEAL, Deposition of Clewis, p.66, line 20 thru p. 67, l.3, p.232 of Record) That form, which was delivered to Mr. BROWN, recites a "**-0-**" balance. It clearly references the original loan, not any extension or later amount. Barring proof that the Defendants BROWN and HORNE executed the Modification and Extension Agreement in 2007, there was a clear waiver of the Plaintiff's mortgage and collection rights.

The question of the authenticity of the Defendant's signatures is one of fact.

3. EVIDENCE OF A FAILURE TO SATISFY THE MORTGAGE HAS BEEN SHOWN.

The Appellant's Thirteenth Defense and Counterclaim deals with the Bank's failure to satisfy the mortgage.

This Defense and Counterclaim again deal with the existence and circulation of the 1098 Tax Form. In the absence of proof of the validity of HORNE and BROWN's signatures to the Modification and Extension Agreement of October, 2007, or of any other 2007 document, there is a dispute as to whether the Mortgage lien on the subject real property continues.

By communications with the Respondent Bank, the Appellant has stated that the Bank has an obligation to satisfy the mortgage and his desire that it do so. BROWN maintains, and has alleged, that by its actions, the Plaintiff has waived the requirements of S.C. Code Ann. §§ 29-3-310 and -320 (West) as to earlier or formal written demand for a satisfaction of the mortgage.

In the alternative to the argument above, Appellant BROWN has demanded that the Respondent Bank deliver a satisfaction or certificate of the discharge of the subject mortgage to BROWN for recordation. The Respondent Bank has not delivered a satisfaction to the Appellant or entered or caused such satisfaction to be made of record.

The question of the duty of the Bank to satisfy the mortgage is one of fact.

4. EVIDENCE OF UNFAIR AND DECEPTIVE TRADE PRACTICES HAS BEEN SHOWN.

The Appellant has plead, as an Eighth Defense and Set-Off, Unfair and Deceptive Trade Practices in violation of Title 39, Chapter 5 of the South Carolina Code of Laws. His pleading cites the following actions and inaction, among others:

> b. Treating the transaction as commercial in nature, despite its knowledge that the subject real property had been, and would be, used by BROWN for his personal, family and household use;
>
> c. Failing to ascertain prior to closing the preference of BROWN as the borrower as to the legal counsel that was to be employed to represent the debtor in all matters of the transaction relating to the closing of the transaction, in violation of S.C. Code § 37-10-102(a) (West);
>
> d. Failing to insure that BROWN was offered the opportunity to obtain owner's title insurance in connection with the transaction;
>
> e. Forging or negligently accepting as authentic forged Extension Agreements or

other documents in connection with the transaction;

f. Forging, negligently accepting, or representing as authentic additional documents purporting to evidence other loans of the Defendant BROWN owed to the Plaintiff;

. . .

l. Attempting to enforce its claim against BROWN after notification to him that the debt in question had been satisfied;

m. Attempting to foreclose its mortgage lien against BROWN after notification to him that the debt in question had been satisfied; and

n. Failing to satisfy its mortgage lien of record after notification to BROWN that the debt in question had been satisfied.

[RECORD ON APPEAL, Answer, Counterclaims and Crossclaim, p.78-79.)

The actions and inaction of Respondent Bank are plead as having an impact, either direct or indirect, on the public interest as defined by S.C. Code Ann. § 39-5-10(b) (West) and by the holding of the South Carolina Court of Appeals in *Noack Enterprises, Inc.* v. *Country Corner Interiors*, 290 S.C. 475, 351 S.E.2d 347 (Ct.App. 1986) and of subsequent appellate precedent.

The actions and inaction of Respondent Bank (as referenced above) are plead as showing a pattern of behavior by Plaintiff consistent with a deliberate pattern of such actions both in the past and planned in the future.

The Appellant contends that the Bank's actions have, and its inaction has, (as stated above) the potential for repetition within the meaning of *Noack, supra*, and of the Supreme Court of Washington cited in that case, *Anhold* v. *Daniels*, 94 Wash.2d 40, 614 P.2d 184 (1980).

The Respondent Bank's actions and inaction are plead as constituting unfair or deceptive methods, acts or practices in the conduct of a trade or commerce as defined by S.C. Code Ann. 39-5-20 (West).

Appellant BROWN has attempted, in his pleading and by deposition, to set out or cite the factual basis for the majority of the alleged actions of the Bank. The Bank's representative, Mr. Clewis, stated:

Q Sir, does the bank have any knowledge or any documentation that would explain the fact that on the page marked ACB-22, in this paragraph that I'm indicating - - - And I'm going to read it for the record. It states, the insurance afforded by this endorsement is only effective if the land is used or to be used primarily for residential purposes.

A That is a true statement, yes.

Q Does the bank have any knowledge or documents as to why that document exists in this case?

A No.

Q Does the bank have any knowledge, sir, or documentation to indicate whether or not the property in question was residential for Mr. Brown?

A I've not seen any documentation referencing that.

Deposition of William Clewis

[RECORD ON APPEAL, Deposition of CLEWIS, page 25, p.222 of Record.]

No evidence exists showing BROWN's acquiescence in the attorney used to close the loan or of any offer of choice as to counsel. That duty of the Lender under S.C. Code § 37-10-102(a) (West) exists when the loan purpose is for a personal, family or household use. That use is confirmed here by the language of the Atlantic Title Commitment stating the land had a residential use. (RECORD ON APPEAL, Deposition of Clewis, Exhibit 10, p.260 *et seq.*). In response to questioning on this point, Mr. Clewis, for the bank, stated (RECORD ON APPEAL, Deposition of Clewis, page 26, p.222 of Record):

Q Do you and the bank have any knowledge or any documentation indicating why Mr. Brown was or was not given a three-day notice of right to rescind?

A I don't know the answer to that.

Again, the Appellant BROWN has testified of his intention to use the loan proceeds for

residential purposes. (Record on Appeal, Deposition of Brown, p.17, l.18 thru p.18,l.16, p.388 of Record). The only contrary evidence on this point is his signature on the .

In response to questioning on attorney preference, Mr. Clewis testified (RECORD ON APPEAL, Deposition of Clewis, page 26, l.1 – 15, p.222 of Record):

> Q Do you and the bank have any knowledge or any documentation indicating why Mr. Brown was or was not given a three-day notice of right to rescind?
>
> A I don't know the answer to that.

By almost every indication available as evidence, the transaction in question was residential in nature. The Bank did not provide a form for choice of attorney. It did not furnish the required TILA disclosures. It did not furnish a three-day notice of right to rescind.

On the basis of its Reply, BROWN understands that it is the intent of the Bank to invoke, as a defense, the doctrine of preemption. It is true that the FTC Act (15 U.S.C. § 44 *et seq.*) does not apply to banks. It is also true that State Courts are to be guided by the FTC Act in interpreting state UDAP Statutes. S.C. Code § 39-5-20(b) (West).

Among the matters exempted from the UDAP Statutes are "[a]ctions or transactions permitted under laws administered by any regulatory body . . . " (S.C. Code § 39-5-40(a) (West)). In *State ex rel McLeod* v. *Rhodes*, 275 S.C. 104, 267 S.E.2d 539 (1980) involving securities transactions, our Supreme Court held that the exemption for "permitted" practices exempted all regulated transactions. In *Anderson* v. *Citizens Bank*, 294 S.C. 387, 365 S.E.2d 26 (Ct.App. 1987), the Court of Appeals applied this holding, and this reasoning, to exclude banking practices from UDAP.

However, in *Ward* v. *Dick Dyer & Assocs., Inc.*, 304 S.C. 153, 403 S.E.2d 310 (1991), our Supreme Court faced the fact that its reading of "permitted" as the equivalent of "regulated" would exclude many consumer transactions that were obviously intended to be within the scope of the UDAP Statutes. It specifically held:

> We believe the exemption is intended to exclude those actions or transactions which are allowed or authorized by regulatory agencies or other statutes. . . . While our statutory exemption used the word "permitted", we believe the intent of our legislature was to exclude activities which would otherwise be allowed or authorized.
>
> . . .

> The purpose of the exemption is to insure that a business is not subjected to a lawsuit under the [UDPA] Act when it does something required by law, or does something that would otherwise be a violation of the Act, but which is allowed under other statutes of regulations. It is intended to avoid conflict between laws, not to exclude from the Act's coverage every activity that is authorized or regulated by another statute or agency. [*Id.*, 304 S.C. at 155-156; 403 S.E.2d at 312.]

Thus, while the Respondent may argue the holding of *Anderson, supra*, the fact is that the precedent for that holding no longer exists. The standard for preemption, or exclusion, is that of *Ward*, cited and quoted above. The actions and inaction attributed to the Bank are not required by any law, nor are they allowed by other statutes or regulations. They are subject to the South Carolina Statutes forbidding unfair or deceptive trade practices. Testimony and documentary evidence exists for each point referenced above as violating the UDAP Statutes. Mr. BROWN is entitled to go to trial on this issue.

CONCLUSION

Evidence clearly exists to back the Appellant's Defenses and Counterclaims of waiver or implied waiver, of a failure to satisfy the mortgage, and of unfair or deceptive trade practices. The Appellant is entitled to an Order setting aside the grant of summary judgment on those matters, and to present his evidence to a jury as the finder of fact.

Respectfully submitted,

John Martin Foster
Post Office Box 106
Rock Hill, S. C. 29731-6106
803 324-8100
Attorney for Appellant

June 4, 2014

Rock Hill, South Carolina

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2010-CP-13-0064

AMERICAN COMMUNITY BANK, ... Respondent,

vs.

MICHAEL R. BROWN,
C.W. HORNE,
SHORTT AUCTION & REALTY CO., INC.,
BANK OF AMERICA, N.A., and
JAGUAR PORTFOLIO, LLC

of whom
MICHAEL R. BROWN is the . . . . . Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this final Brief of Appellant complies with Rule 211(b), S.C.A.C.R.

June 4, 2014

John Martin Foster
Post Office Box 106
Rock Hill, South Carolina 29731-6106
(803) 324-8100
Attorney for Appellant

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2010-CP-13-0064

AMERICAN COMMUNITY BANK, ... Respondent,

vs.

MICHAEL R. BROWN,
C.W. HORNE,
SHORTT AUCTION & REALTY CO., INC.,
BANK OF AMERICA, N.A., and
JAGUAR PORTFOLIO, LLC

of whom
MICHAEL R. BROWN is the . . . . . Appellant.

PROOF OF SERVICE

I certify that I have served the Brief of Appellant, dated June 4, 2014, on the following counsel of record:

James W. Sheedy
Susan E. Driscoll
Driscoll Sheedy, P.A.
11520 North Community House Road, Suite 200
Charlotte, N.C. 28277

Harry R. Easterling
Goldberg & Easterling, P.A.
Post Office Drawer 655
Bennettsville, SC 29512-0655

by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known addressees) of those attorney(s) and/or persons set out below; or

by hand delivering copies of the same to the following persons, or by leaving the same at that person's office with that person's clerk or some other person in charge thereof, or by leaving it in a conspicuous place therein; of if the office was closed or the person to be served has no

office, by leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein, all pursuant to Rule 233(b), S.C.A.C.R.

June 5, 2014

John Martin Foster
Post Office Box 106
Rock Hill, South Carolina 29731-6106
(803) 324-8100
Attorney for Appellant