STATE OF SOUTH CAROLINA
In The Court of Appeals

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2012-CP-20-03040

DEUTSCHE BANK NATIONAL TRUST COMPANY
as Trustee for J.P. Morgan Mortgage Acquisition Trust
2007-CH1, Asset Backed Pass Through Certificates,
Series 2007-CH1, ... Respondent,

vs.

CORA B. WILKS,
DAVID C. WILKS,
CHASE BANK, N.A., and
MIDLAND FUNDING, LLC,

Defendants,

of whom
CORA B. WILKS and
DAVID C. WILKS are . . . . . Appellants.

FINAL BRIEF OF APPELLANT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: SOUTH CAROLINA SUPREME COURT

CASES: SOUTH CAROLINA COURT OF APPEALS

RULES: SOUTH CAROLINA

CASES: FEDERAL DISTRICT COURT

OTHER AUTHORITY

STATEMENT OF ISSUES ON APPEAL

1. DOES EQUITY BAR ENFORCEMENT OF THE MORTGAGE OWING TO THE ACTIONS OF THE LENDER'S CLOSER?

STATEMENT OF THE CASE

On May 23, 2005, the Appellants WILKS executed a note and mortgage to Chase Bank USA, N.A. for $100,000.00, secured by their home. That note and mortgage are now held by Respondent as assignee. This action for foreclosure, for $89,483.68 plus allowable costs, was commenced on August 23, 2012. The Appellants filed their Answer and Counterclaim alleging, *inter alia*, that the execution was before a disbarred attorney, and in the presence of only one person as a witness. The Appellants' Counterclaim invoked the precedent of this State under which such actions are void and the foreclosing bank is barred from equitable relief.

The Respondent bank moved to dismiss the counterclaim, invoking the holding of *Matrix Financial Services Corp.* v. *Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011), as limiting such a defense to matters after that decision, which was rendered on August 8, 2011.

The Respondents motion was heard on May 16, 2013. The Honorable S. Jackson Kimball, as Master in Equity for York County, dismissed the Appellants' Counterclaim by Order dated June 6, 2013 and filed June 12, 2013. This appeal followed by mailing of July 15, 2013.

STATEMENT OF FACTS

On or about May 23, 2005, the two Appellants WILKS were told to come to a local Bojangles restaurant to sign their mortgage papers with Chase Bank for a refinance of their home at $100,000.00. They met there with one person. According to the mortgage, the witnesses to that document were "T. [illegible] Meetze" and "Matthew E. Davis".

No person with the name of "Meetze" is listed by the South Carolina Bar website as licensed to practice law in South Carolina.

The only person bearing a name comparable to that of "Matthew E. Davis" and having been licensed to practice law in South Carolina is one "Matthew Edward Davis". Mr. Davis was suspended from practice by Order of the Supreme Court dated February 4, 2005. By Order of

that Court dated May 5, 2011, Mr. Davis was disbarred for, among other actions, "sign[ing] as a witness to the borrower's signatures, even though [he] did not know whether an attorney facilitated the closing and did not witness the borrowers execute the documents."[1]

In response to the foreclosure action brought by the Respondent DEUTSCHE BANK NATIONAL TRUST COMPANY as assignee of Chase Bank, the Appellants WILKS raised the defenses set out in the precedent of this State under which such actions are void for unclean hands, and the foreclosing bank is barred from equitable relief.

The Respondent DEUTSCHE BANK moved to dismiss the counterclaim, invoking the holding of *Matrix Financial Services Corp.* v. *Frazer,* 394 S.C. 134, 714 S.E.2d 532 (2011), as limiting such a defense to matters after that decision, which was rendered on August 8, 2011.

DEUTSCHE BANK's motion was heard on May 16, 2013. In argument, counsel for Respondent disclaimed any admission of the Appellant's allegations, but acknowledged that the same must be treated as true for the purpose of a motion under Rule 12(b)(6), S.C.R.C.P. RECORD ON APPEAL, Transcript of Hearing, May 16, 2013, p.53, l.4 – 8.

The Honorable S. Jackson Kimball, as Master in Equity, dismissed the Appellants' Counterclaim by Order dated June 6, 2013 and filed June 12, 2013. This appeal followed by mailing of July 15, 2013.

ARGUMENTS

There is no argument as to the precedential background of this matter. In *Matrix Financial Services Corp.* v. *Frazer, supra,* the Supreme Court stated that the unauthorized practice of law (in that case, the closing of a mortgage transaction without supervision of an attorney), precluded the mortgage holder from the equitable relief of foreclosure. *Id.*, 394 S.C. ___, 714 S.E.2d 534-535. In the opinion issued on rehearing (and cited above), the Supreme Court applied this ruling to "all filing dates after the issuance of this opinion." *Id.*

In *BAC Home Loan Servicing, L.P.* v *Kinder,* 398 S.C. 619, 731 S.E.2d 547 (2012), the Supreme Court clarified the earlier case by holding that the reference in *Matrix* to "filing dates" referred to "the date a document a party seeks to enforce was filed." *Id.*, 398 S.C. 624, 731 S.E.2d 550.

The Appellants acknowledge that their mortgage was filed June 1, 2005, prior to the

1 *In the Matter of Matthew Edward Davis*, Opinion No. 27071, filed December 5, 2011, *Matter F.*

issuance and prospective application of *Matrix*, August 8, 2011.

The Appellants would point out that, in both the *Matrix* and *BAC Home Loan Servicing* cases, the deficiency detected was that of a failure to use an attorney. This is, of course, in accord with the long-standing rule of our jurisprudence:

> V . FIFTHLY, *ignorance* or *mistake* is another defect of will; when a man intending to do a lawful act, does that which is unlawful. For here the deed and the will acting separately, there is not the conjunction between them, which is necessary to form a criminal act. But this must be an ignorance or mistake of fact, and not an error in point of law. . . . . For a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defence. *Ignorantia juris, quod quisque tenetur scire, neminem excusat*, is as well the maxim of our own law, as it was of the Roman.
>
> [4 W. Blackstone, COMMENTARIES, *27 (1769); footnotes omitted.]

While the commentary above spoke to criminal responsibility, its application here is clear. The knowledge of the lending institutions in *Matrix* and *BAC Home Loan Servicing* are not discussed, because in light of the doctrine discussed above, their knowledge of South Carolina law must be presumed when they make mortgage loans in this State.

It is, however, not the case that equity takes no notice of the knowledge, or wilfulness, of the action complained of.

> The maxim that a person who comes into equity must come with clean hands necessarily gives wide range to the equity court's use of discretion . . . . [A]ny wilful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim.
>
> [7 AM.JUR.2D *Equity* § 129 (2002); footnotes omitted.]

The commentators of AMERICAN JURISPRUDENCE 2D go on to emphasize the point in question:

[T]he maxim does not apply to every unconscientious act or to all inequitable conduct. Equity does not demand that its suitors have led blameless lives, but does require them to have acted fairly and without fraud or deceit as to the controversy at issue. It has been said, moreover, that the maxim refers to wilful misconduct and not merely negligent misconduct.

[*Id.*, footnotes omitted.]

The same commentators note precedent holding that, even in cases with wrongdoing by both parties (*in pari delicto*, which is of course not present in this case), the equity Court will not balance the equities where the actions of one party have been wilful. 7 AM.JUR.2D *Equity* § 132, *citing United States EPA* v. *Environmental Waste Control, Inc.*, 917 F.2d 327 (7th Cir. 1990), *cert den*, 499 U.S. 975, 111 S.Ct. 1621, 113 L.Ed.2d 719 (1991).

In the cases entitled *Lane* v. *New York Life Ins. Co.*, 147 S.C. 333, 145 S.E. 196 (1928), the Supreme Court dealt with a wrongful attempt to cancel life insurance. This involved the Court in considering when equity will grant relief against a forfeiture. Quoting from Pomeroy's EQUITY JURISPRUDENCE, § 451, the *Lane* Court cited the following with approval:

"There are, as intimated above, special circumstances which will entitle a defaulting party to relief against a forfeiture in cases where otherwise it would not be granted. Although the agreement is not one measurable by a pecuniary compensation, still, if the party bound by it has been prevented from an exact fulfillment, so that a forfeiture is incurred, by *unavoidable accident*, by fraud, *by surprise*, or by *ignorance*, not *willful*, a court of equity will interpose and relieve him from the forfeiture so caused, upon his making compensation, if necessary, or doing everything else within his power." Under the editorial notes of this valuable work, this observation is made: "Many cases under this doctrine are those of covenants in leases but the doctrine, of course, extends to *all agreements.*"

[*Id.*, 147 S.C. 376-377, 145 S.E. 210; italics added in original; notes to that effect omitted.]

It is axiomatic that if equity will aid a Defendant faced with forfeiture of a contract, so long and she may demonstrate a lack of wilfullness in her default, it must also condemn a

Plaintiff guilty of, or chargeable with, willfulness in its wrongdoing.

In this case, the Appellants have alleged and presented *prima facie* proof, that the mortgage transaction in question was closed by – or with the connivance of – disbarred counsel. In short, the Respondent's closers were not simply ignorant of the laws of this State, but; they committed a deliberate violation of those laws.[2] As such, the facts of this case are distinguishable from those of *Matrix* and *BAC Home Loan Servicing*.

Deliberate violation of the law debars the Respondent from equitable relief, and specifically from the relief of foreclosure.

CONCLUSION

This Court is charged with applying the rules of law and equity. Obviously, it must also consider the practical, or policy, effect of its ruling. The holdings of neither *Matrix* or *BAC Home Loan Servicing, supra,* are concerned with willful violation of the law. In this case, proof of such willful violation exists. In the absence of proof to the contrary, the Appellants are entitled to pursue their counterclaim to bar the Respondent's foreclosure as tainted with dirty hands.

Respectfully submitted,

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

July 1, 2014

Rock Hill, South Carolina

2 RECORD ON APPEAL, Transcript of Hearing, May 16, 2013, p.53, l.4 – 8.

STATE OF SOUTH CAROLINA
In The Court of Appeals

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2012-CP-20-03040

DEUTSCHE BANK NATIONAL TRUST COMPANY
as Trustee for J.P. Morgan Mortgage Acquisition Trust
2007-CH1, Asset Backed Pass Through Certificates,
Series 2007-CH1, ... Respondent,

vs.

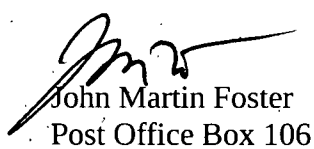
CORA B. WILKS,
DAVID C. WILKS,
CHASE BANK, N.A., and
MIDLAND FUNDING, LLC,

of whom
CORA B. WILKS and
DAVID C. WILKS are . . . . . Appellants.

CERTIFICATE OF COUNSEL

The undersigned certify that this Final Brief of Appellant complies with Rule 210(b), S.C.A.C.R.

July 1, 2014



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

STATE OF SOUTH CAROLINA
In The Court of Appeals

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2012-CP-20-03040

DEUTSCHE BANK NATIONAL TRUST COMPANY
as Trustee for J.P. Morgan Mortgage Acquisition Trust
2007-CH1, Asset Backed Pass Through Certificates,
Series 2007-CH1, ... Respondent,

vs.

CORA B. WILKS,
DAVID C. WILKS,
CHASE BANK, N.A., and
MIDLAND FUNDING, LLC,

of whom
CORA B. WILKS and
DAVID C. WILKS are . . . . . Appellants.

PROOF OF SERVICE

I certify that, on the date below, I have served the Final Brief of Appellants on the following counsel of record:

Michael J. Anzelmo
Benjamin Rush Smith, III
Nelson Mullins Riley &
Scarborough, LLP
Attorneys for Deutsche Bank
Post Office Box 11070
Columbia, S.C. 29211
803 255-9312

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 address(es) 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.

July 2, 2014

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