

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Honorable Marvin H Dukes, III, Master-In-Equity for Beaufort County, South Carolina

Case No 2009-CP-07-03945

ORIGINAL

Harbourside Community Bank, As Servicing
Agent for The Savannah Bank, N A ,

Respondent,

v

Alphonse Stalliard, Oldfield Club, and
Oldfield Community Association, Inc ,

Defendants,

Of Whom Alphonse Stalliard is the,

Appellant

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1 DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT

2 DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION FOR
A CONTINUANCE

STATEMENT OF THE CASE

Harbourside Community Bank, as servicing agent for The Savannah Bank, N A (hereinafter "Harbourside" or "Respondent") commenced this case on August 24, 2009 seeking to foreclose on a mortgage secured by real property titled in the name of the Appellant, Alphonse Stalliard, and seeking a deficiency judgment against Stalliard on its promissory note. The case was bifurcated by Consent Order entered May 14, 2010 wherein the parties agreed that the mortgage foreclosure would be tried first and any issues relating to the deficiency judgment and related claims or defenses would be tried separately (R pp 108-110). The mortgage foreclosure resulted in an Order of Judgment and Foreclosure in favor of the Plaintiff/Respondent in amount of \$1,834,504.48. Thereafter, on August 2, 2010 the subject property was sold at foreclosure sale, and the Respondent was the high bidder at \$ 650,000.

The parties entered into a Consent Order Scheduling Order dated November 10, 2010 and the case proceeded with additional discovery (R pp 21-23). Respondent filed a motion for summary judgment which was argued on May 16, 2011 (R pp 25-32). Prior to the hearing, Appellant filed a Motion to Enlarge seeking time for additional discovery and requesting a continuance of the hearing based on newly obtained evidence and basis for conducting additional discovery as a result thereof (R pp 105-107). Specifically, Counsel for the appellant had located and talked to a material witness, who

was then a criminal defendant in a pending case before the United States District Court (R pp 105-106) As a result of the information obtained from the witness, counsel sought to conduct additional discovery of witnesses and information which had not been noticed by counsel before the discovery cut off (R pp 106-107) The trial court denied the Motion to Enlarge and for a continuance and the hearing proceeded

After the hearing, the trial court granted summary judgment in favor of the Respondent bank (R pp 3-20) The Appellant herein on appeal contends that summary judgment was not proper because deposition testimony solicited in the case¹ together with documents produced by the Respondent reflected that Respondent may not have taken proper of sufficient steps to verify the income demonstrated by Appellant's loan application, or to otherwise conduct full due diligence for the loan Appellant argues there exist material issues of fact which if proven at trial would support a defense of contributory negligence, or common law negligence, to the enforce ability of the note and loan Thus, Appellant argues that summary judgment was premature, and that the trial court should have permitted additional discovery on those facts and defenses

STATEMENT OF THE FACTS

Alphonse Stalliard was a 26 year old resident of New Jersey in 2007 when his name, social security number, and credit profile were used by third parties to secure a loan to purchase a lot at 10 Indigo Plantation Drive in Oldfield Plantation, Beaufort

¹ The deposition of Susan Keiffer was taken by consent just two business days prior to the summary judgment hearing and the transcript was not yet available at the time of hearing but the trial court permitted Appellant to proffer the relevant portions of Ms Keiffer s testimony

County for \$ 215,000 with a construction loan feature which resulted in a total loan of \$ 1,600,000 At least one of those third parties, B W, has plead guilty to federal loan fraud charges in South Carolina relating to charges for using “straw men” borrowers to obtain purchase money and construction loans A second person whom Mr Stalliard identified in his deposition as S C is believed to be the additional defendant named in a recent indictment filed in New Jersey (R p 49)

At the time of the loan was made in 2007, Mr Stalliard had worked in the United States in New York City for two years and according to his testimony, had never earned in excess of \$ 100,000 in one year (R p 50) Further, until his deposition in this case in February, 2011, Mr Stalliard had never been to Beaufort County, South Carolina The subject loan was a “straw man” loan similar to loans the media and federal indictments have described in similar Beaufort County transactions involving the same person(s) involved in Stalliard’s loan To wit, according to his deposition testimony and affidavit, Mr Stalliard’s loan application was submitted by individuals named S C , a resident of New Jersey, and B W , a resident of South Carolina (R p 50, pp 129-135)² Further, the loan application was managed by S C and Stalliard testified that B W made all payments due under the loan, directly to Harbourside, with funds that were not attributable to Mr Stalliard

The loan itself was closed with a power of attorney granted to a Hilton Head

² Due to the fact that S C and B W are known to be the subject of ongoing federal criminal cases and investigations their full names are not used here and counsel will not use their full names pending further instruction from this Court

Island attorney, Ms Sally Gardocki (R pp 53-54) Mr Stalliard did not allege or testify that Ms Gardocki breached any duty of care or was involved in any way with the wrongdoing by S C or B W Mr Stalliard did not deny that he was aware that S C and B W were securing a loan to purchase property in his name and construct a residence, and he did not deny that he executed a power of attorney giving his settlement agent the authority to close the transaction (R p 90) Mr Stalliard denied that he had any knowledge that the loan application prepared by Harbourside that S C allegedly executed for Mr Stalliard stated a monthly income of \$ 35,000 per month, and Mr Stalliard further denied that he was aware that false tax returns, showing 2005 and 2006 gross income in excess of \$ 350,000 per year, were submitted on his behalf (R pp 49-50)

Ultimately construction was completed on the home using Harbourside's funds in the form of loan draws made directly to the builder(s), and the home was listed for sale Mr Stalliard defaulted on the Note, and the loan came due before the property could be sold

Mr Stalliard's asserted as a defense to the deficiency judgment in excess of one million two hundred thousand (\$ 1,200,000) dollars that Harbourside itself was negligent in making the loan to him because the bank failed to verify the information stated on the false loan application submitted to it by third party(s) and further failed to verify the data stated on the false tax returns submitted in support of that application (R pp 91-92) Mr Stalliard also asserted at the summary judgment hearing that Harbourside should be barred from obtaining a judgment against him because its actions were unconscionable He was not qualified for a \$ 1.6 million loan and the loan should not

have been made based on the communications between the bank and third parties Mr Stalliard testified that he gave S C a power of attorney, but a copy of that document is not in the bank file or closing file, and it is believed the power of attorney was for another property in New Jersey ³

ARGUMENT

I STANDARD OF REVIEW FOR SUMMARY JUDGMENT

When reviewing a grant of summary judgment, the Court of Appeals applies the same standard that governs the Court of Common Pleas, namely, that summary judgment is proper as a matter of law only when there is no genuine issue as to any material fact Fleming v Rose, 350 S C 488, 493, 567 S E 2d 857, 860 (2002), see also Rule 56 (c) S C R C P On review, the appellant court will review “all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the appellant ” Willis v Wu, 362 S C 146, 151, 607 S E 2d 63, 65 (2004) Thus, summary judgment is only appropriate when “plain, palpable, and indisputable facts exist on which reasonable minds cannot differ ” Byer v Connor, 307 S C 441, 445 415 S E 2d 796, 799 (1992) Conversely, summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law, and summary judgment should not be granted even where there is no dispute as to evidentiary facts if there is disagreement as to the conclusion to be draw from those facts Mulherin-Howell v

³ Stalliard did not produce the Power of Attorney during discovery but rather testified that he had given a power of attorney and thus the trial record does not reflect that it actually exists or for what purpose it was given

Cobb, 362 S C 588, 608 S E 2d 587 (Ct App 2004), *citing*, Medical University of South Carolina v Arnaud, 360 S C 615, 602 S E 2d 747 (2004)

As set forth below, Appellant believes that based on the fact record before the trial court, trier of fact could determine that Respondent failed to exercise due diligence when underwriting and making the subject loan, and acted unconscionably. Thus, Appellant requests this court set aside the Order of Summary Judgment herein, and remand the case for further proceedings.

II THE TRIAL COURT IMPROPERLY GRANTED SUMMARY JUDGMENT BECAUSE A TRIER OF FACT COULD DETERMINE THAT THE FACT THAT THE LOAN WAS APPLIED FOR BY THIRD PARTIES, TOGETHER WITH SUSAN KEIFFER'S TESTIMONY AND THE UNDERWRITING DOCUMENTS PRODUCED BY THE BANK ALL REFLECT THAT THE BANK DID NOT CONDUCT REASONABLE DUE DILIGENCE AND DID NOT VERIFY APPELLANT'S INCOME OR ABILITY TO PAY WHEN MAKING THE SUBJECT LOAN

The Dodd-Frank Wall Street Reform and Consumer Protection Act signed into law on July 21, 2010 (the "Dodd Frank Act") codified what has long been the common law duty of lenders to verify the income data and supporting documents given to them in connection with a federally insured loan. Similarly, the Federal Reserve Board's Revised Regulation Z, 2008, imposes a firm duty on lenders to verify data in FHA loans. The subject loan given to Stalliard was, by the bank's documentation, a "conventional loan" (R p 45). Thus common law underwriting duties and industry standards of care apply to this loan.

In fact, the record at the time of the summary judgment hearing reflected that no meaningful verification of the data provided by S C and B W to Harbourside took place. Susan Keiffer, the former Harbourside loan processor responsible for the Stalliard file

testified at deposition that she did not have strong recollection of the detail of what she or her superiors did to verify the information on Stalliard's loan application (R pp 179-180) Further, it was noted on the Underwriting Approval Sheet checklist for the loan that where verbal verification of income ("VOE") was instructed, someone at the bank wrote in "stated income" in its place (R pp 215-216)

Further, where the checklist designated that the processor function was "Compliance to be reviewed and confirm accurate", Ms Keiffer could not explain why this one item on the page did not bear her initials, as did all of the other functions designated to the processor (R p 206) A trier of fact could reasonably conclude, for the purpose of a summary judgment motion, that the lender compliance and underwriting was not reviewed and confirmed as accurate in this case and that no income or data were verified This failure would be and is lender negligence, which Stalliard argues should have defeated summary judgment in the trial court

Harbourside argued at hearing that independent of whether it had any duty to verify the income and loan application data, Stalliard expressly ratified the loan by executing a loan modification agreement tendered to him in 2008 towards the end of the construction In fact, Stalliard testified that the loan modification document was tendered to him not by the bank, but through B W , with whom the bank was corresponding, and that he was led by B W to believe he had to sign the modification document to ensure that the construction would be finished

The South Carolina Court of Appeals has found that where a lender has engaged in conduct with unclean hands, that conduct can sustain a cause of action for lender

liability even where the subsequent acts of the borrower are wrongful or negligent Wachovia Bank v Coffey, 389 S C 68, 698 S E 2d 244 (S C App 2010) Stalliard argued that Harbourside acted with unclean hands—to wit, the loan to Stalliard was negligently underwritten because Harbourside did not communicate directly with him at any point prior to the loan, because Harbourside did not verify his income or tax return date, and given that he had no ability to repay the loan, the loan was unconscionable There is recent precedent, albeit under New York State Law, that a lender making a loan to a borrower who cannot support the loan with his income can be found to be engaging in unconscionable conduct Emigrant Mortgage Company v Fitzpatrick, (Opinion No 09-10577, Supreme Court of New York, August 11, 2010) In the subject case, the loan underwriting documents in the lender’s file reflected that the loan given to Stalliard required a monthly borrower contribution, described as a “negative cash flow” of \$10,241 63 (R p 45) The requirement to fund an outflow of \$10,241 63 required far more income than Stalliard had ever made

In sum, Respondent argues that Harbourside owed him a duty of care to properly underwrite his loan, verify the information on his loan application including his income, and to make the loan according to the conventional loan underwriting guidelines in force at the time This duty is particularly relevant and important in this case, where the person submitting the loan application was not the actual borrower, a fact unknown to the borrower and probably unknown to the bank ⁴

⁴ The loan originator who worked the bank Judd Tracy testified that he had never met Stalliard, but that he believed he or his superior had talked with Stalliard However Stalliard testified that had no verbal or

III THE MOTION TO ENLARGE AND REQUEST FOR CONTINUANCE SHOULD HAVE BEEN GRANTED BECAUSE IT WOULD HAVE ENABLED FULL AND COMPLETE DISCOVERY TRIGGERED BY NEWLY OBTAINED FACTS, AND WITHOUT UNNECESSARY PREJUDICE TO THE RESPONDENT BANK

In or about late April, 2011, the undersigned counsel [for Appellant in the trial proceedings] read a local newspaper article which described the ongoing federal criminal case against B W and noted that B W had been interviewed. Counsel had previously believed that B W was incarcerated and unable to meaningfully testify due to the pending criminal matters. Counsel contacted B W's defense counsel, whom gave him permission to contact B W directly, which counsel did by telephone. Based on the telephonic interview, counsel learned of additional information and potential witnesses which might be useful to Appellant's defense. As the agreed upon and court ordered discovery deadline had passed, and Respondent's Motion for Summary Judgment had already been filed, Appellant moved for an Order enlarging the time for discovery (R pp 105-107). Counsel did not request to depose B W, but rather additional witnesses whom had been employed by the Respondent who could better explain what Respondent had done to verify the loan and who Respondent had interacted with. Counsel also wanted to time to review the retention of an expert witness (R pp 105-107).

The trial court denied the Motion. Although Appellant asserts that the record herein demonstrates sufficient material facts in dispute such that summary judgment is premature, Appellant further argues that further discovery to clarify the facts in advance

direct contact with the bank while the loan was underwritten and that the email address attributed to Stalliard, being "thefiat@yahoo.com" was not Stalliard's email address but was probably created and used by B W or S C

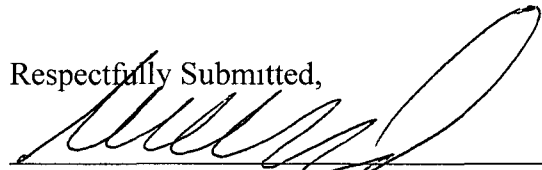
of a summary judgment motion was appropriate in this case Appellant was unduly prejudiced by the denial of the Motion to Enlarge because discovery of the additional witnesses, and potentially the retention of an expert witness, could have bolstered Appellant's defense, without unnecessary prejudice or harm to the Respondent, who had already foreclosed upon and sold the subject property

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court

Dated December 5, 2011

Respectfully Submitted,



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HON MARVIN H DUKES, III, MASTER-IN-EQUITY

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RESPONDENT

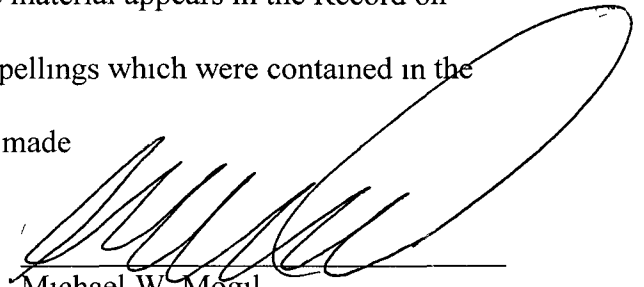
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ALFONSE STALLIARD, OLDFIELD CLUB, and
OLDFIELD COMMUNITY ASSOCIATION, INC ,
Of Whom ALFONSE STALLIARD is the

APPELLANT

RULE 211 CERTIFICATION

I, Michael W Mogil, undersigned attorney for the Appellant in this case, hereby certify that the Final Brief is identical to the brief previously served under Rule 208, except (1) references in the initial brief have been revised to indicate where the material appears in the Record on Appeal, and (2) obvious typographical errors and misspellings which were contained in the initial brief are corrected. No other changes have been made.



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PROOF OF SERVICE

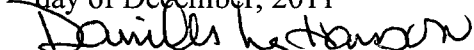
I, Lorraine Evans Wilson , associated with the Law Office of Michael W Mogil, P A , hereby certify that, on the 6th day of December, 2011, I personally served a copy of Appellant Alphonse Stalliard's Final Brief and Final Record on Appeal by hand delivery to the following

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Attorney for Respondent Harbourside
Community Bank



Lorraine Evans Wilson

Sworn to Before Me this 16
day of December, 2011


Notary Public for South Carolina

My Commission Expires 10 29 2014

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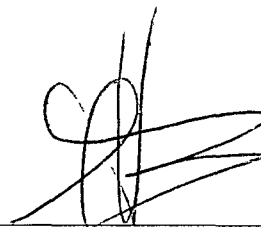
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Of Whom ALFONSE STALLIARD is the

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PROOF OF SERVICE

I, Richard H Bateman, employed by the Law Office of Michael W Mogil, P A , do hereby certify that on December 6, 2011, I served a true and accurate copy of the Appellant's Final Brief and the Record on Appeal in the above matter, by causing same to be delivered by hand to

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