

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Richard L. Booth, Master-In-Equity

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OCT 24 2014

S.C. Supreme Court

Case No.: 2014-002036
Op. No. 2014-UP-241 (S.C. Ct. App. filed June 25, 2014)

First Citizens Bank and Trust Company, Inc.....Respondent,

v.

Charles T. Brooks III and the South Carolina Department of Revenue, Defendants,

of whom Charles T. Brooks, III, is thePetitioner.

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON APPEAL

- I. THE COURT OF APPEALS CORRECTLY HELD THAT THE ISSUES CONCERNING ANY AMBIGUITIES IN THE FORBEARANCE AGREEMENT WERE NOT PRESERVED FOR APPELLATE REVIEW.
- II. THE LOWER COURT CORRECTLY FOUND THAT THE FORBEARANCE AGREEMENT PROVIDED FOR ONGOING PAYMENT OF THE MONTHLY PAYMENTS DUE UNDER THE NOTE AND LINE OF CREDIT AND THAT THE FORBEARANCE AGREEMENT CONTAINED A TERM THAT “THE ACCEPTANCE OF MONIES UNDER THE AGREEMENT WAS NOT AN ESTOPPEL, PREJUDICE OR WAIVER OF PLAINTIFF’S RIGHT TO PROCEED WITH THE FORECLOSURE ACTION.”
- III. THE COURT OF APPEALS CORRECTLY FOUND THAT PETITIONER BREACHED THE TERMS OF THE FORBEARANCE AGREEMENT BY AGREEING TO WITHDRAW HIS ANSWER BUT BY FAILING TO DO SO.

STATEMENT OF THE CASE

The Respondent is not dissatisfied with the Petitioner's Statement of the Case with the noted exceptions that follow and Respondent elects not to provide a detailed Statement of the Case aside from setting forth the following exceptions. First, with regard to Petitioner's footnote 1 stating that since no court reporter was present, Respondent arguably could not have complied with Rule 71, SCRPC. [Petition, p. 7]. Had the lower court granted summary judgment and issued an Order for Foreclosure and Sale, a written record would have been prepared, signed by the lower court, and filed with the Clerk of Court which would have complied with Rule 71, SCRPC. However, the issue is immaterial for the purposes of this appeal.

Second, Petitioner states that he made all the payments called for, and more, under the forbearance agreement beyond the maturity date of the forbearance agreement. [Petition, p. 5]. Petitioner also asserts that Respondent accepted the payments and refused to allow Petitioner to catch up on payments when he fell behind. [Petition, p. 6]. The facts surrounding any payments made under the forbearance agreement, and whether payments were accepted, are not relevant to this appeal. As set forth in the master's order, a trial was to convene on the intention of the parties regarding the payment by Petitioner, and the acceptance by Respondent, of forbearance payments. [Appx. p. 78].

FACTS

This case involves the foreclosure of a commercial mortgage involving Petitioner's business property located in Sumter County. [R. pp. 7-18, 26-39]. The validity of the Note, Line of Credit and Mortgage, the terms of the Note, Line of

Credit and Mortgage, the default of the terms of the Note, Line of Credit and Mortgage prior to the initiation of the foreclosure action, the Respondent's right to accelerate the payment prior to the initiation of the foreclosure action, and Respondent's right to foreclose on the property in an attempt to satisfy the debt are not in dispute based upon the Affidavit and Counter-Affidavit filed and served prior to the summary judgment hearing. The specific terms of the Note, Line of Credit and Mortgage are incorporated as if more fully set forth herein verbatim. [R. pp. 22-51]. The Note and Mortgage had a maturity date of May 5, 2010 and, therefore, the Petitioner would have been in maturity default on the instruments by failing to pay the balance due on the debt by that date. [Id.].

It is further uncontested that on or about March 7, 2010, prior to maturity default, the parties entered into a settlement and forbearance agreement in which Respondent allowed Petitioner the opportunity to avoid foreclosure of his business property by making payments as more fully set forth in the document entitled "Forbearance Agreement." [R. pp. 40-42]. In addition, the parties agreed as part of the Settlement that Petitioner would withdraw the Answer filed and served on or about November 3, 2009, and allow the foreclosure action to remaining pending with the lower court until such time as the lower court would allow or until [Petitioner] "defaults on **any portion** of this Agreement." [R. pp. 41-42 at part 1, subpart (6)-(1) and part 3].

The terms of the forbearance agreement provided *in part* that in order to address the arrearage, Petitioner would pay to Respondent an initial lump sum of \$5,000.00 no later than March 15, 2010, that Petitioner would continue to make

payments to Respondent in the amount of \$1,500.00 per month beginning April 1, 2010 and ending March 1, 2011, and that the “balance of the loan will become immediately due and payable, should [Petitioner] and [Respondent] fail to enter a separate loan agreement by that date to cure the arrearage or pay off the loan.” [R. pp. 44 at part 3]. It is uncontested that the loan has not been paid off and that the Respondent again failed to make monthly payments after this agreement was made. [R. pp. 22 at paragraphs 2 and 3].

It is uncontested that the Petitioner failed to withdraw his Answer as provided by the terms of the settlement agreement, payoff the loan as required, or make monthly payments in or around December 2011. [R. pp. 22-25, 48].

The only evidence before the lower court for consideration at the summary judgment hearing was the Complaint, Answer, Motion for Summary Judgment with Affidavit of Dave Davies and supporting exhibits, and Counter-Affidavit of Charles Brooks. [R. pp. 1-2].

The lower court issued its Order making twenty-five (25) findings of fact which it determined were not at issue and could not be further contested. The lower court also ordered that a non-jury trial take place on February 7, 2013 for the parties to present evidence regarding the following issues:

- a. The balance due Plaintiff after giving credit for all payments made pursuant to the loan documents and also the forbearance agreement;
- b. The intention of the parties in Defendant Brooks’ payment of and Plaintiff’s acceptance of monthly forbearance payments after the March 1, 2011 maturity date of the original forbearance agreement, the relevance of the language of the forbearance agreement

referring to acceptance of payments, and the effect on Plaintiff's right to proceed with foreclosure;

- c. Whether or not Plaintiff made any monthly payments as they came due under the existing loan documents after entering into the settlement and forbearance agreements, and the effect of the forbearance agreement upon the post-maturity status of the line of credit note at the inception of the forbearance agreement and the maturity of the real estate note and mortgage during the forbearance period.

[R. p. 6]. This appeal followed. The Court of Appeals held that two of the issues presented by Petitioner were not preserved for appellate review. The Court of Appeals also held that Respondent was entitled to summary judgment on the issue of whether Petitioner failed to withdraw its Answer.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE ISSUES CONCERNING ANY AMBIGUITIES IN THE FORBEARANCE AGREEMENT WERE NOT PRESERVED FOR APPELLATE REVIEW.

In the lower court's order, the master found that "the forbearance agreement also provided for ongoing payment of the monthly payments due under the Note and Line of Credit" [Appx. p. 77] In his brief to the court of appeals, the Petitioner alleged that the master's factual finding in this regard was in error because there was an ambiguity in the forbearance agreement that created a factual issue. [Appx. p. 32] The master also found that "the forbearance agreement contained a term that stated that acceptance of monies under the agreement was not an estoppel, prejudice[,] or waiver of [Respondent]'s right to proceed with the foreclosure action." [Id.] Likewise, Petitioner contended in his brief to the court of appeals that the master

erred because the master did not make “findings as to other language in the documents at issue that makes that term ambiguous.” [Appx. P. 19]

The Court of Appeals found that these issues were not preserved for appellate review. Petitioner now contends that the court of appeals erred by finding that these issues were not preserved for appellate review.

The court of appeals was correct in holding that the ambiguity issues were not preserved for review. These issues were not preserved for appellate review because the issues were either not raised to the lower court or ruled upon by the lower court. “An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court.” In re Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004).

First, the issue concerning whether ambiguities in the forbearance agreement created an issue of fact regarding payments called for under the agreement was neither raised to the lower court nor ruled on by the lower court. The only evidence regarding the specific terms of the Forbearance Agreement is contained in the agreement itself. Respondent’s Affidavit in support of summary judgment provides no evidence concerning the specific provisions of the Forbearance Agreement other than stating that the Forbearance Agreement was attached to the affidavit and the terms were incorporated by reference. [R. pp. 22-47].

Petitioner’s counter-affidavit does not address the payment terms of the Forbearance Agreement and does not allege any matter related to the forbearance payments as they relate to the monthly payments under the Note and Line of Credit. [R. p. 48]. Finally, there is no argument set forth in the Order relating to Petitioner’s

contention that there was ambiguity relative to whether Petitioner was required to make regular monthly payments as required by the Note and Line of Credit in addition to the forbearance payments.¹ [R. pp. 2-3]. Finally, Petitioner did not file a Rule 59(e), SCRCP motion raising the alleged error to the lower court where it could be addressed and ruled upon.

Second, Petitioner states that he argued to the master that the settlement documents contain numerous ambiguities. [Petition, p. 2] However, the master did not rule, or make any findings, on whether the documents contained ambiguities. The master simply found that the forbearance agreement provided for ongoing payments under the Note and the Line of Credit, and that the forbearance agreement contained a term that acceptance of monies would not act as an estoppel, prejudice, or waiver of Respondent's rights. The master did not make any findings or rulings concerning whether ambiguities existed. To the extent that the Petitioner wanted the master to make findings on these issues, it was incumbent on the Petitioner to seek a ruling on these issues by way of a Rule 59(e) motion.

Therefore, as these issues were never specifically ruled upon by the lower court, either in the master's order or through a motion for reconsideration, they cannot be raised here for the first time on appeal. Cowburn v. Leventis, 366 S.C. 20, 619 S.E.2d 437 (Ct. App. 2005).

In order for an issue to be preserved for appellate review, with few exceptions, it must be raised and ruled upon by the trial judge. When a trial court makes a general ruling on an issue, but does not address the specific argument raised by a party, that party must

¹ The only argument noted in the order concerning ambiguities was a general one, stating that "[Petitioner] contended that all ambiguities in the operative documents should be construed against the [Respondent]." [Appx. p. 74]

make a Rule 71 motion asking the trial court to rule on the issue in order to preserve it for appeal.

Id. at 41, 619 S.E.2d 437, 449 (internal citations omitted).

Because the lower court did not make these findings, Petitioner apparently wanted the court of appeals to make these findings regarding ambiguities. However, the court of appeals could not make these findings without the benefit of a ruling from the master on these issues. See State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003) (stating that an issue that was not preserved should not be addressed by the court of appeals).

Therefore, for the reasons stated above, the court of appeals correctly found that the issues regarding any ambiguities in the documents were not preserved for appellate review.

II. THE LOWER COURT CORRECTLY FOUND THAT THE FORBEARANCE AGREEMENT PROVIDED FOR ONGOING PAYMENT OF THE MONTHLY PAYMENTS DUE UNDER THE NOTE AND LINE OF CREDIT AND THAT THE FORBEARANCE AGREEMENT CONTAINED A TERM THAT “THE ACCEPTANCE OF MONIES UNDER THE AGREEMENT WAS NOT AN ESTOPPEL, PREJUDICE OR WAIVER OF PLAINTIFF’S RIGHT TO PROCEED WITH THE FORECLOSURE ACTION” WITHOUT MAKING ADDITIONAL FINDINGS REGARDING THE AGREEMENT.

Petitioner now contends, despite the failure to preserve the issues for appellate review, that he is correct on the merits of the issues and that the alleged ambiguities in the settlement documents created a factual issue precluding partial summary judgment.

- A. The lower court correctly found that the forbearance agreement provided for ongoing payment of the monthly payments due under the note and line of credit.

First, Petitioner contends that the lower court erred in finding that, in addition to the lump sum payment of \$5,000.00 and monthly payments of \$1,500.00, the Forbearance Agreement also provided for ongoing payment of the payments due and payable under the Note and Line of Credit. Petitioner contends that to the extent the payment requirements set forth above which are stated in paragraph 3 of the Forbearance Agreement conflict with other provisions in the agreement, paragraph 3 should control. Petitioner argues that the conflicting provisions create an ambiguity that should be resolved in favor of the Petitioner. [Petitioner's Final Brief, pp. 18-19].

In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties.” Ecclesiastes Prod. Ministries v. Outparcel Associates, LLC, 374 S.C. 483, 497-98, 649 S.E.2d 494, 501-02 (Ct. App. 2007).

The parties' intention must, in the first instance, be derived from the language of the contract. To discover the intention of a contract, the court must first look to its language-if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect. “Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions. The parties' intention must be gathered from **the contents of the entire agreement and not from any particular clause thereof.**

Id. (internal citations omitted) (emphasis added).

Contrary to Petitioner's arguments, the following provisions when read as a whole support the lower court's finding:

1. Lender's Forbearance. Lender shall forbear from exercising any and all of its rights and remedies presently existing or arising during the term of this Agreement under the Loan Documents, the ongoing foreclosure action or this Agreement, provided that there exists no Event of Default as such term is defined herein at Paragraph 5; . . .

3. Borrower's Payment of the Arrears. **THIS FORBEARANCE AGREEMENT IS NOT DESIGNED TO CURE THE ARREARAGE.** The intent of this agreement is to provide time for the Lender to sell other properties deeded to it from Borrower as part of a separate Settlement and Release Agreement dated March ___, 2010. . . .

4. Borrower's Payment of Payments Coming Due. **Commencing with the regular payment due (next regular payment date),** Borrower shall make all future Payments as they become due, which Payments may change in accordance with the terms of the Notes and Mortgage.

5. Events of Default. If Borrower fails to make any of the payments of the Arrears as specified herein on the due date thereof; **if the Borrower fails to make any of the Payments pursuant to the terms of the Notes and Mortgage;** of if Borrower fails to keep a promise or agreement or perform or discharge any agreement, covenant, obligation or undertaking created or agreed to by Borrower in the Loan Documents and this Agreement, same shall constitute an event of default ("Event of Default") hereunder and under the Loan Documents.

13. Reinstatement. In the event Borrower cures the Arrears by making all payments required under paragraphs 3, **is current with the Payments then due, and no Event of Default exists under the Loan Documents and this Agreement,** Lender shall reinstate the Notes and Mortgage according to its original terms and conditions.

[R. pp. 43-46].

As evidenced above, the \$5,000.00 lump sum payment and the \$1,500.00 monthly payments set forth in paragraph 3 were not intended to cure the arrearage and the Forbearance Agreement clearly states that Petitioner was obligated to make regular future payments in accordance with the terms of the Note and Mortgage as they became due which would have been the next regular payment date after executing the agreement. Moreover, the document clearly provides for default if the borrower failed to make payments set forth in paragraph 3 or if the borrower failed to

make payments under the terms of the Notes and Mortgage as set forth in paragraph

5. Accordingly, there is no ambiguity in the terms and the lower court did not err. Id.

B. The lower court correctly found that the forbearance agreement contained a term that “the acceptance of monies under the agreement was not an estoppel, prejudice or waiver of Plaintiff’s right to proceed with the foreclosure action” without making additional findings regarding the agreement.

Next, Petitioner contends the lower court erred in making a factual finding that the Forbearance Agreement contained a term that “the acceptance of monies under the agreement was not an estoppel, prejudice or waiver of Plaintiff’s right to proceed with the foreclosure action” [R. p. 5 at paragraph 22] without making additional findings regarding alleged ambiguities in the agreement. [Petitioner’s Final Brief, p. 19-20].

The Forbearance Agreement specifically provides:

6. Lender's Rights and Remedies Upon Events of Default. . . . Noting [sic] contained herein shall constitute a waiver of any or all of the Lender's rights or remedies including the right to proceed with the foreclosure action. This Agreement shall not be construed as a discontinuance of the foreclosure action and any forbearance by the Lender and acceptance of monies hereunder shall not be deemed an estoppel, prejudice or waiver of Lender's right to proceed with the foreclosure action.

[R. p. 45].

As previously set forth above, the only evidence regarding the terms and conditions of the Forbearance Agreement are the document itself. As the document specifically contains the term set forth in the lower court’s order, there is no error.

As a practical matter, Petitioner’s arguments are without merit as the lower court scheduled a non-jury trial in part to determine “. . . the relevance of the language

of the forbearance agreement referring to acceptance of payments, and the effect on [Respondent's] right to proceed with foreclosure." Accordingly, although the lower court correctly made a finding of fact about a term contained in the Forbearance Agreement, the relevance and effect of the term was left open as an issue to be proven at trial. Accordingly, judgment was not rendered on the term to affect Petitioner's rights.

III. THE COURT OF APPEALS CORRECTLY FOUND THAT PETITIONER HAS BREACHED THE TERMS OF THE FORBEARANCE AGREEMENT BY AGREEING TO WITHDRAW HIS ANSWER BUT BY FAILING TO DO SO.

Petitioner contends the court of appeals erred by finding as a matter of law that Petitioner agreed in the Forbearance Agreement to withdraw his Answer but failed to do so. [Petitioner's Final Brief, pp. 20-21]. Petitioner apparently contends that the court of appeals erred by requiring Petitioner to come forward with specific facts showing that there is a genuine issue for trial. See Rule 56(e), SCRPC.

In making this argument, Petitioner assumes that Respondent did not meet its initial summary judgment burden of demonstrating the absence of a genuine issue of a material fact. See Rule 56(c), SCRPC. However, as previously shown by Respondent, and as shown below, Respondent clearly met its initial burden, thereby entitling it to summary judgment. Therefore, the court of appeals was entirely correct in affirming the lower court on this issue. In addition, in that event, there is nothing incorrect about the court of appeals citing to case law stating that a non-moving party may not rest upon the mere allegations or denials of his pleadings. Nelson v. Piggly Wiggly Cent., Inc., 390 S.C. 382, 701 S.E.2d 776 (Ct. App. 2010).

For the following reasons, the court of appeals correctly found that Respondent was entitled to partial summary judgment on the issue of whether Petitioner breached the terms of the forbearance agreement by failing to withdraw his answer. In support of Respondent's summary judgment motion, an affidavit of Dave Davies was submitted along with supporting documentation. [R. pp. 22-47]. The affidavit established the following: the creation of the Note, Line of Credit and Mortgage; the terms of the original security instrument; the default by Petitioner on the terms of the security instruments; and Respondent's acceleration of the debt and election to foreclose its mortgage in an attempt to satisfy the debt. Id.

Petitioner's Answer admitted the Note, Line of Credit and Mortgage as being created as evidence of the underlying debts, but denied the default or right to foreclose the mortgage due to his default on the terms of the security instruments. [R. pp. 19-20]. The Answer contains no legal or equitable affirmative defenses.

As evidenced by the Forbearance Agreement voluntarily entered into by the parties, which is uncontested, the Petitioner agreed to the following statements:

WHEREAS, Borrower is in default in the payment of monthly installments of principal, interest, escrow, and other payments called for under the Loan Documents (the "Payments") for the period commencing on May 10, 2009 (the "Arrears")

WHEREAS, as a result of the Arrears, Lender has the right to require that Borrower make immediate payment in full of all monies remaining unpaid under the Loan Documents, and has already commenced foreclosure proceedings to foreclose the Mortgage;

...

2. Borrower's Admissions. Borrower admits the amounts owing to Lender under the Loan Documents as indicated in this Agreement, and represents and acknowledges that there are no defenses, offsets or counterclaims of any nature whatsoever to any of the Loan

Documents. Borrower acknowledges valid service of the Summons and Complaint in the foreclosure action, that Borrower does not intend to enter any answer or defenses therein, and specifically waives any rights Borrower might otherwise have to do so. If Borrower has already answered, Borrower hereby withdraws its answer and defenses with prejudice;

[R. pp. 43-44].

Petitioner did not present any evidence in his counter-affidavit addressing the allegations in Respondent's Complaint or Petitioner's failure to withdraw his Answer after entering into the Forbearance Agreement. Accordingly, the only admissible evidence presented to the lower court is that Petitioner voluntarily entered into a contract supported by consideration, admitted the material terms entitling Respondent to obtain a judgment or foreclosure and sale *prior* to the execution of the Settlement and Forbearance Agreements, agreed to withdraw the Answer, and the Answer has not been withdrawn which, in and of itself is a breach of the terms of the agreement.

Moreover, because no counter-affidavit was served by Petitioner specifically addressing the factual allegations raised in the Complaint and in-part addressed by Respondent's affidavit in support of its motion for summary judgment, there is no genuine issue of material fact as to those matters and the lower court correctly determined that Petitioner cannot further contest those issues. Garvin v. Bi-Lo, Inc., 337 S.C. 436, 523 S.E.2d 481 (Ct. App. 1999) (holding that once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent must come forward with specific facts showing there is a genuine issue for trial and cannot merely rely upon the pleadings, but must submit some additional evidence creating a genuine issue of material fact).

Finally, there is no ruling by the lower court that Petitioner's Answer was "struck" or otherwise indicating that Petitioner cannot further contest the issues preserved for trial as set forth by the Order all of which involve matters that took place after the Defendant's Answer was filed.

CONCLUSION

For the reasons set forth herein, Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari, and remand this matter to the lower court for a trial as to the specific issues set forth in the master's Order, and for such other and further relief as may be just and proper.

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October 24, 2014

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Richard L. Booth, Master-In-Equity

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S.C. Supreme Court

Case No.: 2009-CP-43-2538

First Citizens Bank and Trust Company, Inc..... Respondent,

v.

Charles T. Brooks III and the South Carolina Department of Revenue, Defendants,
of whom Charles T. Brooks is theAppellant.

CERTIFICATE OF SERVICE

I hereby certify that this day I have deposited a copy of the **Respondent's**

Return to Petition for Writ of Certiorari in the United States Mail, postage prepaid

and addressed to the following individuals:

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October 24, 2014

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The Honorable Daniel E. Shearouse
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OCT 24 2014

S.C. Supreme Court

Re: First Citizens Bank v. Charles Brooks, III
Appellate Case No.: 2014-002036
My File No.: 4026.00509

Dear Mr. Shearhouse:

Please find enclosed for filing one (1) original unbound and six (6) stapled copies of the Respondent's Return to Petition for Writ of Certiorari with Certificate of Service. Please file same and return the clocked copy with my courier.

Please do not hesitate to contact me with any questions.

Sincerely,



Peter M. Balthazor
Attorney for Respondent

PMB/mwt

Enclosures

cc: Andrew Sims Radeker, Esquire (w/enclosure)
Ronald W. Urban, Esquire (w/enclosure)