THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough
Charleston County
Trial Court Case No.: 2010-CP-10-06945

Appellate Case No.: 2014-001398

Wells Fargo Bank, N.A., Respondent,

v.

Ronald R. Watkins and Ashland Plantation Property Owners Association, Defendants

Of whom Ronald R. Watkins is Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

DID THE MASTER-IN-EQUITY ERR IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND IN FAILING TO FIND THE AFFIRMATIVE DEFENSE OF UNCLEAN HANDS AS PLED BY APPELLANT WAS APPLICABLE?

STATEMENT OF THE CASE

In 2010, Respondent brought this foreclosure lawsuit against Appellant. Summons and Complaint. Appellant filed an Answer and Counterclaims, in which Appellant raised the affirmative defense of unclean hands based upon Respondent's unauthorized practice of law. Answer and Counterclaims. Respondent filed a Motion for Summary Judgment. Motion for Summary Judgment. The trial court held a hearing on April 21, 2014. By way of Order, filed May 28, 2014, the trial court granted Respondent's Motion for Summary Judgment. Order. On June 20, 2014, Appellant served the Notice of Appeal on the Respondent. Notice of Appeal.

FACTS[1]

In 2007, Appellant refinanced a real estate loan with the Respondent, with the first and second promissory notes being secured by a first and second mortgage on Appellant's real estate. On or about June 22, 2007, the subject matter loans, a first Mortgage in the amount of $398,000.00, along with a simultaneous second Mortgage line

[1] Respondent's counsel at the Summary Judgment hearing stipulated "that there is no issue of fact" and that "the loans were closed as witness only closings." Transcript, p. 6, lines 12-25.

of credit in the amount of $49,200.00, were closed at a Wachovia branch location in Charleston, South Carolina. Complaint; Affidavit in Support of Response in Opposition to Motion for Summary Judgment, ¶ 3. Upon information and belief, Respondent contracted with National Settlement Services, a title agency company, which routinely provides real estate loan closing services, to perform the subject matter loan closings, including but not limited to, preparing the preliminary and final title insurance policies, performing the title abstract, preparing the legal documents, recording legal documents, obtaining payoffs, and disbursing funds. Affidavit in Support of Response in Opposition to Motion for Summary Judgment, ¶ 4; Transcript, p. 6, lines 21-25. Each of these actions undertaken by National Settlement Services, on behalf of the Respondent and at the Respondent's direction, constitutes the unauthorized practice of law.

Respondent instituted a foreclosure action. Appellant contends that the Respondent is unable to prevail at law or equity, based upon Respondent's unclean hands for engaging in the unauthorized practice of law. As the record and transcript of proceedings reflect, the Master-in-Equity erred in various findings, including but not limited to holding that Appellant's affirmative defense of unclean hands was not applicable and granting Respondent's motion.

ARGUMENT

THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, AND IN FAILING TO FIND THE AFFIRMATIVE DEFENSE OF UNCLEAN HANDS AS PLED BY APPELLANT WAS APPLICABLE.

Standard of Review

"On appeal from the grant of a summary judgment motion, this Court applies the same standard as that required for the circuit court under Rule 56(c), SCRCP." *Wachovia*

Bank, N.A. v. Coffey, 398 S.C. 76, 698 S.E.2d 244 (Ct. App. 2010) (citing *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000)).

> Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Under Rule 56(c), SCRCP, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. With respect to an issue upon which the nonmoving party has the burden of proof, this initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the nonmoving party's case. Once the moving party carries its initial burden, the 'opposing party must, under Rule 56(e), 'do more than simply show that there is some metaphysical doubt as to the material facts' but 'must come forward with specific facts showing that there is a ***genuine issue for trial.***' The party opposing summary judgment cannot simply rest on mere allegations or denials contained in the pleadings. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. If triable issues exist, those issues must be submitted to the jury. Summary judgment is not appropriate where further inquiry into the facts of the case is desireable to clarify the application of the law. Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. However, when plain, palpable, and indisputed facts exist on which reasonable minds cannot differ, summary judgment should be granted. J.S. Kahn, SOUTH CAROLINA RULES OF PROCEDURE ANNOTATED (2004) 256 (citing *Hedgepath v. AT&T*, 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001)).

Law and Analysis

I. RESPONENT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

A. The Respondent should not be entitled to legal or equitable enforcement of its Promissory Notes and/or Mortgages, as the Respondent engaged in the unauthorized practice of law, and thus has unclean hands, which the Master-in-Equity should have found applicable as raised by Appellant's affirmative defense of the same.

"All real estate and mortgage loan closings must be supervised by an attorney." *Matrix Financial Services Corporation v. Louis M. Frazer*, 394 S.C. 434, 714 S.E.2d 532 (2011) (citing *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003); *State v. Buyers Serv. Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987)). "Performing a title search, preparing

title and loan documents, and closing a loan without the supervision of an attorney constitutes the unauthorized practice of law. *Id.* (citing *Buyers*, 292 S.C. at 430-34, 357 S.E.2d at 17-19). Furthermore, the closing of a real estate loan without the supervision of an attorney constitutes the unauthorized practice of law by the lender, resulting in unclean hands and the inability to enforce the borrower's Promissory Note and Mortgage at law or equity. *Id.* (citing *Coffey, supra*).

> The unauthorized practice of law is inherently prejudicial to not only the parties involved in the instant transaction but also to the public at large for the reason so cogently stated in *Buyers*:
>
> The reason preparation of instruments by lay persons must be held to constitute the unauthorized practice of law is not for the economic protection of the legal profession. Rather, it is for the protection of the public from the potentially severe economic and emotional consequences which may flow from the erroneous advice give by persons untrained in the law.

Id, citing *Coffey*, *supra* at 248 (citing *Buyers*, 292 S.C. 426, 431, 357 S.E.2d 15, 18 (1987)).

The closing of a real estate loan requires multiple steps, including but not limited to the preparation of documents (including the note and mortgage, preparation and issuance of preliminary and final title insurance policies, requesting of payoffs, disbursement of funds, recording of certain loan documents, and attorney supervision and advice to the borrower over the entire process). *See e.g. Buyers*, 292 S.C. 426, 357 S.E.2d 15 (1987); *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773; *In the Matter of Fortson*, 361 S.C. 561, 606 S.E.2d 461 (2004); and *In The Matter of Boyce*, 364 S.C. 353, 613 S.E.2d 538 (2005). When an attorney fails to supervise the above-mentioned real estate loan closing requirements or is present at a real estate loan closing to act only as a witness and/or notary public to the signing of the documents, this constitutes an improper "witness-only" closing in clear violation of S.C. law. *Id. See also, In re Calhoun*, 371

S.C. 403, 639 S.E.2d 679 (2007), *S.C. Bar Ethics Advisory Opinion 05-18, In the Matter of Lester*, 353 S.C. 246, 578 S.E.2d 7 (2003), *Ex Parte Wilson*, 356 S.C. 432, 589 S.E.2d 760 (2003), *In the Matter of Arsi*, 357 S.C. 8, 591 S.E.2d 627 (2004), *In the Matter of Pstrak*, 357 S.C. 1, 591 S.E.2d 623 (2003); *See generally, In re Wilkes*, 359 S.C. 540, 598 S.E.2d 272 (2004), *S.C. Bar Ethics Advisory Opinion* 99-11.

Respondent may argue that *Matrix* and *Kinder* are the controlling precedent in this present matter; however, this Court's *Coffey* analysis should be the controlling on this appeal.[2] Transcript, p. 11, lines 18-24. *Matrix* is distinguishable, because it dealt with the limited issue of equitable subrogation, and the Court specifically held that this equitable remedy was not available to a lender who had committed the unauthorized practice of law, under those specific circumstances. *Matrix, supra.* The *Matrix* Court did not address the issue of a homeowner, who is directly affected by the bank's unauthorized practice of law. The *Matrix* Court further noted that "[w]e do not believe the doctrine of unclean hands is the appropriate basis for resolution of this case." *Matrix, supra* at 534. The *Kinder* opinion is distinguishable from this present matter, as the Court in *Kinder* dealt with the impact of unclean hands related to the limited and specific issue of an assignee or lienholder seeking surplus funds. *BAC Home Loan Servicing, L.P. v. Debra Kinder*, 398 S.C. 619, 731 S.E.2d 547 (2012). The case at hand does not involve equitable subrogation, a surplus funds issue, or a non-signatory to the closing documents. Here the facts are distinguishable from *Coffey* wherein the victim at hand is the homeowner, who was present at the loan closing. A homeowner has always had the

[2] Of note, the S.C. Supreme Court affirmed as modified the Court of Appeals decision; however, the Supreme Court declined to address the unauthorized practice of law issue. The Supreme Court instead held that Wachovia was unable to pursue an action on an invalid mortgage, because the mortgagor did not sign the loan documents. *Wachovia Bank, N.A. v. Coffey*, Op. No. 27282 (S.C. Sup. Ct. filed July 10, 2013).

affirmative defense of unclean hands, even prior to post-2011 decisions regarding the affect of unclean hands' impact on third-parties.

The legal concept of possessing unclean hands and therefore, not legally or equitably being able to seek to enforce something that arose out of illegal or inequitable conduct is historically well grounded. In 1945, the U.S. Supreme Court stated "[a]ny willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for invocation of the maxim." *Precision Instrument Mfg. Co. v. Automotive Maint. Mach. Co.*, 324 U.S. 806, 815 (1945). Previously and in 1933, the U.S. Supreme Court stated

> [t]hat whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his [or her] prior conduct, then the doors of the court will be shut against him [or her] in limine; the court will refuse to interfere on his [or her] behalf, to acknowledge his [or her] right, or to award him [or her] **any remedy**.

Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 244-45 (1933) (emphasis added). "[R]ights not suited for protection at equity should not be protected at law." *Buchanan Homes and Auto Supply Co, Inc. v. Firestone Tire and Rubber Co.*, 544 F. Supp. 242, 245 (D.S.C. 1981).

At hand, Respondent concedes that all of the subject matter real estate closings were "witness only" closings. Transcript, p. 6, lines 14-17. This Court in *Coffey* held that if a lender possesses unclean hands, due to its unauthorized practice of law, then the lender is unable to recover at law or equity. *Coffey, supra.* Further, this Court in *Coffey* discussed that as it related to recovering at law that "this is consistent with South Carolina precedent asserting that no person be permitted to acquire a right of action from their own unlawful act and that one who participates in an unlawful act cannot recover

damages for the consequences of that act." *Coffey*, *supra*, (citing *Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 276-77, 437 S.E.2d 168, 170-71 (S.C. Ct. App. 1993)). "[O]ur supreme court refused to allow a public insurance-adjusting business to be compensated for the value of its performance attributable to the unauthorized practice of law." *Id.* (citing *Linder v. Ins. Claims Consultants, Inc.*, 348 S.C. 477, 560 S.E.2d 612 (2002)). In *Coffey*, this Court found that the lender had committed the unauthorized practice of law by not following the regulations of our state as it relates to real estate loan closings, i.e. failing to have attorney supervision over the requisite real estate loan closing steps. *Id.* Therefore, the lender possessed unclean hands and was barred from seeking relief. *Id.*

In the present case, the Respondent, by its own stipulation at the hearing that this was a "witness only" closing, has admitted that it failed to fulfill the requirements of a real estate closing by not having the supervision of a licensed South Carolina attorney and following the requirements of *Buyers*. Transcript p. 6, lines 12-25. The loan documents provide ample evidence of the Respondent's unauthorized practice of law in connection with the closing. The HUD-1 Statement reflects that the place of settlement (closing) was at 373 Inverness Parkway, Ste. 100, Centennial, CO 80112, and that the settlement agent (closing agent) was National Settlement Services. Response in Opposition of Plaintiff's Motion for Summary Judgment. Furthermore, the first Mortgage reflects on the top, left hand corner of the first page, at Book K633 at Page 214, that the Mortgage was prepared by World Savings Bank, Genet Solomon, and that the recording was requested by the same entity and person, along with Lenders First Choice. *Id.* The Mortgage, at Book K 633 at Page 232, reflects that the second mortgage was not recorded by a closing attorney, and that the same was recorded and returned to Lenders

First Choice. *Id.* As it relates to the second Mortgage reflected on the top, left hand corner of the first page, at Book K633 at Page 233, the second Mortgage was prepared by World Savings Bank, Genet Solomon, and the recording was requested by the same entity and person, along with Lenders First Choice, Recoding Department. *Id.*

The title insurance policies for both the first and second subject matter loans clearly reflect that the same were prepared/issued by Lenders First Choice (NSS) at the same address as National Settlement Services. *Id.* The issuance of a title insurance policy is based upon a title search of the property and would have been requested by the party issuing the title policies. The HUD-1 Statement reflects that Lenders First Choice was paid for the title search, title insurance policies, wire fee, and delivery fee. Furthermore and pursuant to the HUD-1 Statement, National Settlement Services was paid for the settlement or closing fee and the signing fee. Finally, the HUD-1 Statement reflects two payoff disbursements performed by National Settlement Services. Clearly, a South Carolina lawyer did not close and/or supervise the subject matter loans, rather a national title company performed this service, in violation of our well settled state law.

The Respondent's actions constitute the unauthorized practice of law, and therefore, the Respondent possesses unclean hands. The Respondent should not be entitled to enforce its subject matter loans, at law or equity, under this Court's analysis in *Coffey*. Furthermore and since 1987, lenders have been on notice of the State of South Carolina's real estate loan closing requirements, regulations, and laws, and the lenders have a choice whether to either comply with our state law or circumvent our state law. In the present cases, as alleged by Appellant by way of the affirmative defense of unclean hands, Respondent has circumvented South Carolina state law and, in doing so, the

Respondent has engaged in the unauthorized practice of law. As a matter of such, Respondent possesses unclean hands. Accordingly, Respondent should not be permitted to enforce its subject matter notes and mortgages against Appellant, at law or equity, and the Master-in-Equity erred in granting Respondent's Motion for Summary Judgment. Transcript, pp. 1-17.

CONCLUSION

For the reasons stated, this Honorable Court should reverse the Order of the Master-in-Equity, find that the Respondent's Motion for Summary Judgment should have been denied, as Respondent possesses unclean hands and is barred from recovery at law or equity, remand the matter for further proceedings if deemed necessary, and for other such further relief as appropriate.

Respectfully submitted,

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October 17, 2014

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ADMITTED SOLICITOR OF THE SENIOR COURTS
OF ENGLAND AND WALES

October 17, 2014

The Honorable Kenneth A. Richstad
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

RE: **Wells Fargo Bank, N.A. v. Ronald R. Watkins, *et al.***
Case No.: 2014-001398

Dear Kenneth:

Enclosed, you will find the original and one copy of the Appellant's Initial Brief, Designation of Matter to be Included in the Record on Appeal, and Proof of Service for the same. Please file these documents, and return the filed copies to me in the enclosed, prepaid envelope.

If you have any questions and/or concerns do not hesitate to contact me.

All the best,

Brian M. Knowles

Encl.

cc: Thomas E. Lydon, Esquire