

STATE OF SOUTH CAROLINA)
)
COUNTY OF ORANGEBURG)

COURT OF COMMON PLEAS

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OCT 31 2014

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

SC Court of Appeals

PLAINTIFF,)
)
)

TRANSCRIPT OF MOTIONS

C/A No. 2007-CP-38-00196

2007-CP-38-00201

v.)
)
)

Clyde B. Livingston, et al.)
)
)

DEFENDANT.)
)
)

Orangeburg County Courthouse
June 19, 2014

BEFORE:

HONORABLE JAMES B. JACKSON, JR., PRESIDING

APPEARANCES:

Erik T. Norton, Esquire
Attorney for

Andrew S. Radeker, Esquire
Attorney for

TAKEN BY MELISSA R. SINGLETARY
CERTIFIED VERBATIM REPORTER

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Certificate of Service

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First Citizens Bank, etc. vs. Clyde B. Livingston, et al

1 The Court: This is First Citizens Bank and Trust
2 Company vs. Clyde Livingston. 2007-CP-38-196 & 201.

3 It's two cases, is that correct?

4 Mr. Norton: That's correct.

5 The Court: Erik T. Norton represents First Citizens
6 Bank and Andrew Radeker represents Clyde B. Livingston.
7 Go ahead, Mr. Norton let me hear from you first.

8 Mr. Norton: Thank you, Your Honor. We'll just start
9 out. You may remember this is all based on your Order
10 dated April 10, 2014. In that Order, you dismissed the
11 UTPA claim and we think rightfully because all of this
12 stems out of a breach of contract action related to
13 whether or not this alleged oral agreement was made and
14 honored by the bank. As you wrote in the Order, and I
15 think it's largely agreed upon, with opposing counsel,
16 that we have an isolated incident and the breach of
17 contract just doesn't meet the requirements for UTPA.
18 Then Mr. Radeker's motion to reconsider, what it raises
19 is that there is sort of another wrongful act. He
20 mentions not having a lawyer present at the closing
21 document in the year 2000. And rather than go in a long
22 history of it, I'd just recommend to, Your Honor, that
23 you look at the cases that we cited, the Hambrick vs.
24 GMAC case, which says there's no private right of action
25 no matter what you call it for not having a lawyer

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1 present at closing. So we think you were right on that
2 one for sure.

3 On the other issues, I don't think necessarily
4 you're wrong, I just think the way in which the case has
5 sort of moved has sort of changed the facts a little bit.
6 As you recall there was some dispute about when this
7 unilateral agreement was entered into, made. I think the
8 briefing and the way in which the Order sort of came out
9 and the facts sort of put us in a little different
10 posture. And so, you know, before what we were talking
11 about was whether this unilateral agreement to paint the
12 house in order to get the remainder of the loan funds
13 when that request was made, but what the briefing that
14 has been done since the Order shows is that Mr.
15 Livingston knew about this unilateral condition at the
16 time of the loan closing in the year 2000. And as, you
17 know, Your Honor, you don't have to wait until a cause of
18 action accrues. I mean, once he knows there is this
19 unilateral condition imposed it is contrary to the loan
20 documents, he is on notice of a potential claim and the
21 statute of limitations begins to run because he wasn't
22 given the money at the time of the closing which he was
23 entitled to and apparently was looking for.

24 So, we believe the statute of limitations begins to
25 run as a result of that and that would take care of

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1 really all of these causes of action. Moving onto ...

2 The Court: You understand, I mean, I take the
3 position that, and I might have been wrong, but I take
4 the position that his allegation is he was promised that
5 additional money when he painted his house. The statute
6 of limitations wouldn't begin to run until he painted his
7 house and notified the bank that he painted his house and
8 didn't get the additional money. That is sort of what I
9 based that on.

10 Mr. Norton: I think what the briefing since then has
11 shown two things. Mr. Radeker is saying this agreement
12 was tied to not having the lawyer present in the closing.
13 If it's tied to it and the lawyer not being there in
14 closing that puts you on notice that there is something
15 wrong and could give rise to a cause of action. I think
16 also, you know, if you look back at the deposition
17 testimony that Mr. Livingston gave, what he's saying is
18 that the appraiser is telling him this and that at the
19 time of the loan closing he's asking for a loan for
20 \$57,000 but he's only given \$45,000 which would be
21 wrongfully. It could put you on notice of a right.
22 There is nothing in the loan documents that would allow
23 the bank to impose that unless he terms it unilateral
24 condition. So, I believe, rightfully or wrongfully that
25 the unilateral condition being imposed starts the clock

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1 for the statute of limitations . So, I'll just let, Your
2 Honor, rule on that. No reason to go around and around
3 on it.

4 The Court: I appreciate that.

5 Mr. Norton: The other couple of issues I just want
6 to raise and mostly just so it will get us all cleared
7 up. On the attorney preference statute, what was raised
8 in the Order is that 37-5-205 allows the debtor to always
9 raise a claim. But 37-5-205 doesn't cover part ten of
10 the Consumer Protection Code. In fact, if you look at
11 our memo, it specifically limited to that part and the
12 attorney preference is under part ten so it just is an
13 entirely separate part and it just doesn't apply in this
14 particular case. That's the one area where I think that
15 we were kind of talking back and forth ...

16 The Court: It looks to me, when I look at it, that
17 section allowed him to raise not as a separate case but
18 as a reduction of what he might owe.

19 Mr. Norton: And I think that's right. I think ...

20 The Court: I'll look at that again to see whether

21 ...

22 Mr. Norton: And I would just say to, Your Honor, I
23 don't know that may or may not be true that you may be
24 able to do that but it want save the affirmative
25 counterclaim. It might become a defense but it wouldn't

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1 be a counterclaim so ...

2 The Court: Word for word, I think I've held it to
3 that.

4 Mr. Norton: You have.

5 The Court: I think Mr. Radeker might have to agree
6 that forty-five might be reduced ...

7 Mr. Norton: I think where that's relevant, Your
8 Honor, it goes to whether that's a counterclaim or
9 whether it's a legal right to a jury trial on that
10 particular issue.

11 The Court: All right.

12 Mr. Norton: Of course, because we're at a trial
13 issue, we are sort of compiled to deal with it at this
14 point. On the liable claim, we've briefed this, I mean,
15 you know, I understand that you feel like you've got to
16 tell a circuit court judge that has made a ruling you
17 can't do this. I wanted to point out by law that you're
18 not bound to it, you can do what you need to do with
19 that, but I do want to point out that even if you get
20 into the merits at all and we would appreciate at least
21 on this we wanted to make sure that we had a ruling on
22 the merits. That the SCRA really should preempt this and
23 Mr. Radeker rightfully points out that the rule that
24 malice can be an exception to that preemption but under
25 persuasive authority in the Fourth Circuit, because it's

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1 a Federal statute, you know, what they say is that when
2 you have a reporting that occurs during a contested
3 foreclosure that's not as a matter of law malice. So, I
4 mean, we just don't think that that claim, that liable
5 claim should survive it's really preempted by the SCRA.
6 I really think that sort of takes us to the end.. It
7 takes us to the jury trial. We believe you should
8 reconsider it because of the change of circumstances.
9 But I won't burden you with what's there. Our arguments
10 are in the record. If you have got questions, we'd be
11 glad to answer them.

12 The Court: Okay. I appreciate that.

13 Mr. Norton: Thank you, Your Honor. That's all we
14 ask, we appreciate it.

15 Mr. Radeker: Thank you, Your Honor. Like my
16 opponent, for the sake of gravity, I'll just incorporate
17 what's in our memorandum and previous arguments, previous
18 hearing and memorandum under that motion.

19 Kind of to hit the high points here. As to their
20 argument which I got in their recent memorandum that the
21 fact that there was unauthorized practice of law involved
22 in the facts that underlie the South Carolina Unfair
23 Trade Practice Act that claim that makes summary judgment
24 on that claim proper. I'd say, first of all, that
25 Hambrick case, I'd say it's wrong and our Supreme Court

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1 has already recognized that in Matrixx. Hambrick,
2 essentially, allowed the defendant to use the fact that
3 there was unauthorized practice of law in the factual
4 circumstances that gave rise to a claim is a shield from
5 liability. When those circumstances would have given
6 rise to that claim regardless of whether there had been
7 authorized practice of law. It is a deeply flawed
8 opinion. In the Matrixx decision that our Supreme Court
9 ruled on, they at least implicitly reject that and
10 overruled that. If Hambrick hadn't been overruled by
11 Matrixx, it ought to be. But I think it basically
12 already has been. It said, look a trial court obviously
13 can determine, you know, okay, was there an unauthorized
14 practice of law here. Okay. We tell you whether or not
15 we, the Supreme Court, tells you what unauthorized
16 practice of law is, what constitutes it and what doesn't,
17 but you're going to have to apply those rules on the
18 particular facts. That's what Matrixx said. It said
19 that the court should have done that there. It should
20 have barred one of the other defendant's from relief.

21 Also, as to when the cause of action accrued, I
22 would say, Your Honor, is right about the point the cause
23 of action would have accrued. Because if this loan is
24 closed without an attorney to basically say, hey you guys
25 can't impose this unilateral loan condition on this it

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1 wouldn't have happened, that's true. But, if Mr.
2 Livingston paints the house and notifies the bank and
3 they extend the rest of the credit to him he doesn't have
4 any damages so he doesn't have a claim. So, there being
5 no damages there wouldn't be a claim in that situation. I
6 would also note the points raised by my opponent about
7 the Consumer Protection Code, the Consumer Protective
8 Code is supposed to be liberally construed. What the
9 scope of what is allowed is an offset that would
10 otherwise be time barred and what's not would seem to a
11 novel issue in this State and those are best addressed
12 based on the evidence at trial ...

13 The Court: Those sections seem to be totally
14 opposite. One says three years from the time of the loan
15 and the other one says, well, they can ...

16 Mr. Radeker: Right. And I agree that ...

17 The Court: I don't know. That in and of itself I
18 think you can grant summary judgement. At least that's
19 the way I saw it.

20 Mr. Radeker: I was listening to the argument in the
21 earlier case before Mr. Norton came in today where
22 someone said reading them the Consumer Protection Code is
23 kind of like to get to this section you have to kind of
24 put a few fingers there, flip back and read another
25 statute to see if it makes sense and what it means. I'd

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1 agree with that. It's not exactly clear.

2 So, as to reliance on Wells Fargo vs. Smith. I've
3 become aware of something and I'll hand a copy of this to
4 opposing counsel. I don't know if he knows about it. I
5 just found out about it myself. This is a Supreme Court
6 Order that makes the Court of Appeals decision in Wells
7 Fargo vs. Smith have no precedential value. It says take
8 this published opinion and make it unpublished. This
9 just came out recently. So to the extent that they
10 relied on that argument there is nothing to rely on
11 anymore.

12 The Court: ... publish an opinion.

13 Mr. Radeker: So, well, when you're the Supreme
14 Court of South Carolina you can do that.

15 I would note, I agree, I don't know when this is
16 dated but, I mean, certainly these appear to be Supreme
17 Court justice signatures. So, I don't know I haven't
18 seen it in the advance sheets. It was sent to be by a
19 lawyer who represented Mr. Smith in that case saying for
20 what it's worth here's this. So, in any event, for what
21 it is, I hand that up.

22 The Court: Thank you.

23 Mr. Radeker: I think the real issue on whether we
24 are entitled to a jury trial is the law of the case.
25 When Judge Burgdorf rendered his decision that Mr.

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1 Livingston has raised a counterclaim and has a right to a
2 jury trial on those counterclaims that was immediately
3 appealable trial order the plaintiff chose not to appeal
4 that. Accordingly, they are stuck with it as the law of
5 the case. I disagree with their contentions that it
6 wasn't an immediately appealable Order. I mean, it
7 decided that he does have a right to a jury trial on
8 those.

9 The Court: That's the way I saw it when I look at
10 that.

11 Mr. Radeker: I think that's about all I've got. I
12 mean and again, just as my opposing counsel I incorporate
13 our previous memoranda and arguments. Unless you have
14 questions, Your Honor, I'd be happy to ...

15 The Court: I don't have any. I appreciate it. I'll
16 certainly considerate both of your memorandums.

17 Mr. Norton: Thank you, Your Honor.

18 Mr. Radeker: Thank you, Your Honor.

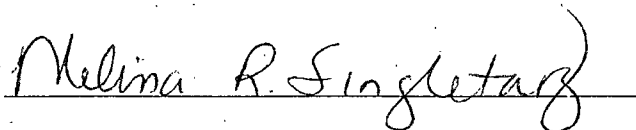
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CERTIFICATE

This is to certify that the motion transcript in the matter of First Citizen Bank and Trust Company, Inc. Vs. Clyde B. Livingston, et al., consisting of Twelve (12) pages is a true and correct transcript; said hearing was reported by the method of Stenomask with Backup.

I further certify that I am not employed by any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 21st day of October, 2014.



Melissa R. Singletary
Certified Court Reporter

Notary Public for South Carolina

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October 30, 2014

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OCT 31 2014

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court, Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RE: First Citizens Bank and Trust Company, Inc. v. Clyde B. Livingston, et al.
Civil Action No. 2007-CP-38-00196 and 2007-CP-38-0201
Our File No. 00689/01777

Dear Ms. Kitchings:

Please be advised that we have received the remaining relevant hearing transcript in the above matter on or about October 24, 2014. We have enclosed a copy of the transcript for the court's records. Per our calculations, Appellant's initial appeal brief and designation of matter are due on November 24, 2014 based upon date of receipt of the transcript.

With kind regards, I remain

Sincerely,



Erik T. Norton

ETN:tm6
Enclosures

cc: Andrew S. Radeker, Esquire