THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Court Judge

Appellate Case No. 2014-001285

National Security Fire and Casualty Company, Plaintiff,

v.

Rosemary Jenrette, AKA Rosemary Long Jenrette and Horry County State Bank, Defendants,

Of whom

Rosemary Jenrette, AKA Rosemary Long Jenrette is the Appellant,

and

Horry County State Bank is the Respondent.

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT

I. THE PROMISSORY NOTE IS NOT SUFFICIENT EVIDENCE TO ESTABLISH AN EQUITABLE LIEN.

A. The Promissory Note and Paragraph 17(I) of the Mortgage do not establish a Debt owed by Appellant to Respondent.

Respondent claims that it sufficiently satisfied each element of an equitable lien, and that the Trial Court correctly ruled in favor of Respondent. In support of its claim that there was a debt, Respondent claims that Appellant was obligated and bound by the Promissory Note, as well as the Mortgage, even though Appellant was not the debtor named in the Promissory Note. However, the parties do not dispute that Appellant was not a party to the Promissory Note.

A promissory note remains subject to Article 3 of the UCC when it is secured by a real estate mortgage. *Swindler v. Swindler*, 355 S.C. 245, 251, 548 S.E.2d 438, 441 (Ct. App. 2003). Pursuant to S.C. Code Ann. § 36-3-401(a) (2013), a person is not liable on an instrument unless the particular person signed the instrument. A maker of a promissory note means a person who signs or is identified in a note as a person undertaking to pay. S.C. Code Ann. § 36-3-103(a)(7) (2013). "In South Carolina, a mortgage is a mere security for a debt." *Blackwell v. Blackwell*, 289 S.C. 470, 472, 346 S.E.2d 731, 732 (Ct. App. 1986). "Care must be taken to remember that a security instrument is not a debt; at most it is evidence of a debt." *Id.* In *Chase Home Finance, LLC v. Risher*, 405 S.C. 202, 208-209, 746 S.E.2d 471, 475 (Ct. App. 2013), the South Carolina Court of Appeals held that the Master correctly determined that a mortgagee failed to establish an equitable lien when the Master found that the mortgagee was required to show a specific debt owed from the property owner, that such a showing of a

debt from the property owner was necessary for an equitable lien to attach, and that the mortgagee was required to show an expressed affirmative action from the property owner to make the debtor's debt her own debt.

On May 1, 2009, Michael Brooks Quickel ("Quickel"), in his capacity as member of Cajun Carolina, LLC ("Cajun"), executed and delivered the Promissory Note, wherein Cajun, as maker, promised to pay the principal sum of $350,000.00, together with interest as set forth therein (Jenrette Exhibit 7 p. 3; Bank Exhibit 5 p. 1; Transcript p. 31, line 21–p. 32, line 2). Appellant never executed a promissory note or a personal guaranty agreement as the Respondent informed her that she did not have to make any payments or pay any money (Transcript p. 120, line 25-p. 121, line 3). No monies were delivered or paid to Appellant under the Promissory Note as she did not receive any money from the Respondent (Transcript p. 138, lines 4-6). The Respondent did not create any special document for the closing of the loan to Cajun, and the Mortgage securing the Promissory Note was a standard mortgage used by the Respondent (Transcript p. 39, lines 7-22). The Respondent filed a complaint in the case bearing the designation of Civil Action Number 2010-CP-26-04456 ("Prior Foreclosure") on May 19, 2010 (Jenrette Exhibit 7 p. 2), and commenced foreclosure proceedings seeking judgment of foreclosure and sale of the parcels of real property securing the Promissory Note, including the Subject Real Property owned by Appellant (Order of February 11, 2014 p. 5, 10). Appellant was joined as a defendant in the Prior Foreclosure as the record owner of the Subject Real Property and as a mortgagor (Order of June 3, 2014 p. 2). Respondent did not sue Appellant for any money in the Prior Foreclosure (Transcript p. 134, lines 2-4). The Master's Order of Foreclosure and Sale did not render any findings as to Appellant since

she was not an obligor or guarantor of the debt evidenced by the Promissory Note (Order of February 11, 2014 p. 6), but found that Cajun and Quickel were liable for the debt (Jenrette Exhibit 7 p. 7). Respondent, for the first time on appeal, references paragraph 17(I) of the Mortgage to support its contention that Appellant was obligated and bound by the Promissory Note. Pursuant to Respondent's Brief, it appears that Respondent is attempting to create an obligation on the part of Appellant under the Promissory Note through paragraph 17(I) of the Mortgage to establish a debt between Respondent and Appellant, and to show that Appellant's involvement in the loan transaction was more than simply pledging property as collateral. Contrary to Respondent's reasoning, paragraph 17(I) of the Mortgage is not sufficient to obligate Appellant under the Promissory Note so as to create a debt owed by Appellant to Respondent. If Respondent's assertion was in accord with South Carolina law, Respondent could have asserted a cause of action against Appellant in the Prior Foreclosure Action for the indebtedness owed by Cajun under the Promissory Note. The Mortgage executed by Quickel as Appellant's attorney-in-fact is not a debt, but is a mere security for the debt owed under the Promissory Note. Appellant did not sign the Promissory Note and is not identified therein as a person undertaking to pay. Therefore, Respondent has failed to show any evidence of a debt owed to Respondent by Appellant.

B. Appellant was not Obligated and Bound by the Promissory Note.

Respondent contends that Appellant agreed to provide insurance for the better security of the Respondent, and that her purported agreement was evidenced by the Promissory Note and paragraph 17(I) of the Mortgage. In support of its argument, Respondent asserts that Appellant agreed to be bound by the terms and conditions of the

Promissory Note pursuant to paragraph 17(I) of the Mortgage, and that her purported agreement shows that her involvement was more than simply pledging property as collateral. However, the Respondent does not dispute that Appellant was not the debtor named in the Promissory Note.

"Where a mortgage seeks to incorporate by reference a note, both instruments are ordinarily construed together." *Harmon v. Bank of Danville*, 287 S.C. 449, 453, 339 S.E.2d 150, 153 (Ct. App. 1985). The terms of a note will control when there is an irreconcilable conflict with the terms of a mortgage. *Id.* at 454, 339 S.E.2d at 153. "To give effect to the parties' intentions, the court will endeavor to determine the situation of the parties and their purposes at the time the contract was entered." *U.S. Bank Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 374, 684 S.E.2d 199, 205 (Ct. App. 2009). "In respect to the terms of the debt or interest, or the time for its payment, if the note and mortgage contain conflicting provisions, the note will govern as being the principal obligation." *Rhodus v. Goins*, 129 S.C. 40, 41-42, 123 S.E. 645, 646 (1924). The term borrower is defined as "a person or entity to whom money or something else is lent." *Black's Law Dictionary* (7th ed. 1999). In the instant action, the standard language contained in the Mortgage listed Appellant as "Mortgagor," but also referenced her as "Borrower" even though she was not obligated to pay the debt secured by the Mortgage (Bank Exhibit 6). The Promissory Note provides that: "I will be in default if any one or more of the following occur: (2) I fail to keep the property insured, if required" (Bank Exhibit 5, p. 2). The terms "I", "me," or "my" is defined in the Promissory Note to mean "each Borrower who signs this note" (Bank Exhibit 5, p. 2). The loan transaction involving the Promissory Note was based upon the April 24, 2009 Loan Commitment which listed Cajun as "Borrower"

(Transcript p. 20, line 13-p. 21, line 21). Jenrette executed the April 27, 2009 POA to pledge part of her real property as collateral prior to Quickel's execution of the Promissory Note on May 1, 2009 (Transcript p. 109, line 11-p. 111, line 13; Bank Exhibit 5). The Respondent interprets the Mortgage, including paragraph 17(I), to require Appellant, as "Borrower" under the Promissory Note and Mortgage, to obtain insurance for the benefit of the Respondent. Such an interpretation of the terms of the Mortgage would reflect that Appellant, as "Borrower," was personally obligated to pay the indebtedness when due. This could not have been the intention of the parties as Appellant was not included as a "Borrower" in the Promissory Note nor the April 24, 2009 Loan Commitment. The Promissory Note identified Cajun as "Borrower," and Appellant was not an obligor or guarantor of the debt evidenced by the Promissory Note. There is no evidence in the record that shows that Appellant was obligated and bound by the terms and conditions of the Promissory Note. Therefore, the Promissory Note and paragraph 17(I) of the Mortgage do not give rise to an obligation on the part of Appellant to insure the Subject Real Property as better security for the Respondent.

II. ANY PURPORTED ASSIGNMENT OR COVENANT IN THE MORTGAGE IS NOT MATERIAL AS APPELLANT IS NOT PERSONALLY LIABLE UNDER THE MORTGAGE.

Respondent claims that Appellant's argument that she was not the debtor named in the Promissory Note is unpersuasive. In support of its argument, Respondent asserts that its alleged "equitable lien arises solely from the unperformed contract to protect, the theory being that since equity regards as done that which ought to have been done, if the mortgagor, having so covenanted, fails to make the insurance payable to the mortgagee, or to assign the same, the fund arising therefrom is within the operation of the maxim."

Blackwell v. State Farm Mut. Auto. Ins. Co., 237 S.C. 649, 654, 118 S.E.2d 701, 704 (1961).

A. Appellant has Produced Authority Supporting Her Argument that the Outcome would be affected in the Scenario Involving a Non-debtor Mortgagor.

Respondent contends that the decisive fact is that there is an agreement between the mortgagor and the mortgagee that the property be insured for the benefit and better security of the mortgagee. However, Respondent's Brief does not provide any response to Appellant's argument that the purported assignment or covenant pertaining to insurance proceeds is of no materiality because Appellant was not obligated to pay the indebtedness and had no personal liability under the Mortgage.

In *Farmers' Loan & Trust Co. v. Penn Plate Glass Co.*, 186 U.S. 434 (1902), the issue was whether an equitable lien should be imposed upon insurance monies to pay the residue of the balance remaining unsatisfied after application of the proceeds realized from the sale of the mortgaged property. *Id.* at 444. The insurance policy was obtained by purchasers who took title to the mortgaged property subject to a mortgage lien. *Id.* at 444, 450. Although the facts are not identical to the instant action, the United States Supreme Court first determined whether there was an obligation imposed by the mortgage on the mortgagor to obtain insurance. *Id.* at 449. The Court assumed that a covenant to insure on the part of the mortgagor existed under the terms of the mortgage. *Id.* at 453. The Court found that the mortgagor had no liability to pay the debt secured by the mortgage, and that the covenant to insure was of no materiality because the mortgagor was under no personal liability. *Id.* at 454, 457.

In the instant action, the Respondent could not bring an action seeking judgment against Appellant for the indebtedness owed under the Promissory Note regardless of whether it elected to bring an action solely on the Promissory Note, solely on the Mortgage, or on both. The Mortgage does not represent the full payment of the indebtedness owed under the Promissory Note because the indebtedness is the sum owed by Cajun, and the Mortgage is the security instrument for the indebtedness. In the event Appellant breached any covenant in the Mortgage, the Respondent could exercise is remedy of foreclosure and sale as it did in the Prior Foreclosure. However, the Respondent could not impose any personal obligation or seek a monetary judgment against Appellant upon any breach of a covenant in the Mortgage. Therefore, any purported assignment or covenant in the Mortgage pertaining to insurance proceeds is of no materiality because Appellant, like the mortgagor in *Farmers' Loan & Trust Co.*, was not obligated to pay the indebtedness owed under the Promissory Note and had no personal liability under the Mortgage.

B. An Equitable Lien does not arise from the Maxim that Equity regards as done that which ought to have been done.

South Carolina courts have the inherent power to do all things reasonably necessary to ensure just results are reached. *Buckley v. Shealy*, 370 S.C. 317, 323-24, 635 S.E.2d 76, 79 (2006) (citing *Ex Parte Dibble*, 279 S.C. 592, 310 S.E.2d 440 (Ct. App. 1983)). "Courts should also balance other equitable concerns when deciding whether a party is entitled to an equitable lien." *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 253, 715 S.E.2d 348, 354 (Ct. App. 2011). "The principle 'equity regards as done that which ought to be done' applies in cases where the party seeking equitable relief

establishes 'a clear obligation based upon a valuable consideration that another do some act which he has failed to perform.'" *Id.* (quoting *Wilkie v. Phila. Life Ins. Co.*, 187 S.C. 382, 393-94, 197 S.E. 375, 380 (1938)). "A court of equity should scrutinize the conduct of the plaintiff with the utmost care, to ascertain he has done everything which ought to have been done to secure the action requested." *Id.* at 254, 715 S.E.2d at 355. "'The rule that equity considers as done that which should be done cannot be invoked to create a right contrary to the agreement of the parties.'" *Id.* (quoting *Good v. Jarrard*, 93 S.C. 229, 239, 76 S.E. 698, 702 (1912).

At trial, the Respondent contended that an equitable lien arose as a result of the April 24, 2009 Loan Commitment and the Cajun Agreement to Provide Insurance. However, Quickel did not sign the Cajun Agreement to Provide Insurance as Appellant's attorney-in-fact (*See* Bank Exhibit 17). Although the Trial Court ultimately ruled in favor of the Respondent, it found that the Respondent's pre-loan dealings with Quickel were less than thorough with regard to setting forth any insurance requirements (*See* Order of February 11, 2014 p. 8). At the May 1, 2009 closing on the loan to Cajun, Quickel, as a member of Cajun, executed the Promissory Note and the Cajun Agreement to Provide Insurance (Bank Exhibit 5 p. 1; Bank Exhibit 17). The Cajun Agreement to Provide Insurance identifies Cajun as the owner of the properties listed thereon, sets forth the telephone numbers and addresses of Bradham Insurance Agency and the Insurer, and lists the policy number and policy period pertaining to the Insurance Policy (Bank Exhibit 17). However, the Respondent failed to require an insurance policy listing it as a loss payee in its pre-loan procedures (*See* Order of February 11, 2014 p. 8). From March of 2009 to the time of the January 15, 2011 fire casualty, Bradham Insurance Agency did

not receive any correspondence from the Respondent requesting that the Respondent be named as a loss payee under the Insurance Policy (Transcript p. 15, line 20-p. 16, line 1). The Respondent did not require Appellant to obtain casualty or liability insurance for its benefit (Transcript p. 159, lines 2-6), nor did the Respondent contact Appellant with regard to the Insurance Policy between the time she obtained the Insurance Policy and the time of the January 15, 2011 fire casualty (Transcript p. 159, lines 11-15). Although the Mortgage was signed by Quickel as Appellant's attorney-in-fact at the May 1, 2009 closing on the loan to Cajun, there is no evidence that Quickel was asked by the Respondent to sign any other document as Appellant's attorney-in-fact. Respondent's reference to the significance of the policy number set forth on the Cajun Agreement to Provide Insurance and the evidence in the record shows that Respondent was or should have been aware that Appellant was the mortgagor, owner of the Subject Property, and named-insured under the Insurance Policy she obtained in March of 2009. Therefore, the Respondent had sufficient information to secure its claim and avoid any loss it claimed to have sustained.

CONCLUSION

The Respondent did not present any evidence that Appellant owed a debt to the Respondent. Appellant was not obligated and bound by the terms of the Promissory Note, and paragraph 17(I) of the Mortgage is not sufficient to establish a debt owed by Appellant to the Respondent. The Respondent has failed to establish a clear obligation on the part of Appellant based upon valuable consideration that she was obligated to obtain insurance for the better security of the Respondent. The Mortgage is the only document relating to the loan transaction that was signed on the Appellant's behalf under

the Power of Attorney, dated April 27, 2009. Any purported assignment or covenant of the Mortgage pertaining to insurance proceeds is of no materiality because Appellant was not personally liable under the Mortgage. Equity does not permit the Respondent to attach insurance money due to a non-debtor under an equitable lien theory to satisfy a deficiency judgment previously awarded against its debtors, Cajun and Quickel. Therefore, the decision of the Trial Court must be reversed because its finding of an equitable lien in favor of the Respondent is against the preponderance of the evidence.

October 30, 2014

Respectfully submitted,

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and

Horry County State Bank is the Respondent.

PROOF OF SERVICE

I certify that I have served one (1) copy of the Initial Reply Brief of Appellant upon counsel for Respondent Horry County State Bank, depositing a copy of the same in the United States Mail, postage prepaid, on October 30, 2014, to the following address:

Randall K. Mullins, Esquire
Mullins Law Firm, PA
Attorney for the Respondent
Post Office Box 585
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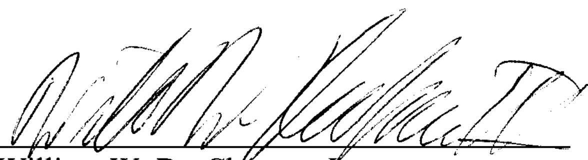
Dated: October 30, 2014

{SIGNATURE OF THE FOLLOWING PAGE}

DESCHAMPS LAW FIRM



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October 30, 2014

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The Honorable Jenny Abbott Kitchings
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Re: National Security Fire and Casualty Company v. Rosemary Jenrette a/k/a Rosemary Long Jenrette and Horry County State Bank
Appellate Case No.: 2014-001285

Dear Ms. Kitchings:

Please find enclosed herewith the original and one (1) copy of the Initial Reply Brief of Appellant. Once your office has filed the Initial Reply Brief of Appellant, please return the clocked copy of said document to our office. I have enclosed a self-addressed stamped envelope for your convenience in returning the clocked copy of the within Initial Reply Brief of Appellant.

By copy of this letter, I am serving the Initial Reply Brief of Appellant and Proof of Service, upon Randall K. Mullins, Esquire and Jarrod E. Ownbey, Esquire as attorneys for the Respondent, Horry County State Bank.

If you should have any questions or concerns, please do not hesitate to contact me.

Very Truly Yours,

William W. DesChamps, III

WWDjr:mjh

Enclosures

cc: Randall K. Mullins, Esquire
Jarrod E. Ownbey, Esquire
Rosemary Jenrette, Client

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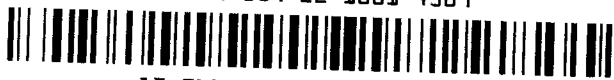

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