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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James B. Jackson, Jr., Special Circuit Judge

Common Pleas Case Nos. 2007-CP-38-196 & 2007-CP-38-201
Appellate Case No. 2014-001634

First Citizens Bank and Trust Company,.....Appellant/Respondent,

v.

Clyde B. Livingston; Technico Marketing & Distribution, Inc.; B. Livingston and Charlotte V. Livingston; American First Federal Inc.; Citibank South Dakota, N.A.; Branch Banking and Trust Company of South Carolina; G&G Rentals; Miller Communications, Inc.; and Wells Fargo Bank, N.A., Defendants,

Of Clyde B. Livingston is the.....Respondent/Appellant.

And

First Citizens Bank and Trust Company,.....Appellant/Respondent,

v.

Clyde B. Livingston; American First Federal Inc.; Citibank South Dakota, N.A.; Branch Banking and Trust Company of South Carolina; G&G Rentals; Miller Communications, Inc.; and Wells Fargo Bank, N.A., Defendants,

Of Clyde B. Livingston is the.....Respondent/Appellant.

RESPONDENT/APPELLANT'S INITIAL (APPELLANT'S) BRIEF

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STATEMENT OF ISSUES

I. **Did the circuit court err in granting Appellant/Respondent's motion for summary judgment as to Respondent/Appellant's claim for violation of the South Carolina Unfair Trade Practices Act?**

STATEMENT OF THE CASE

Community Resource Bank, N.A., which was formerly known as Orangeburg National Bank, brought these foreclosure actions against the Respondent/Appellant, Clyde B. Livingston (hereinafter "Livingston"), seeking mortgage foreclosure. (R. pp. _____; -196 summons and complaint; -201 summons and complaint.) Community Resource Bank, N.A., later merged into First Citizens Bank and Trust Company, Inc., the Appellant/Respondent in this case, and the case captions were amended to note that. (R. pp. _____; -196 order amending caption; -201 order amending caption.) First Citizens Bank and Trust Company, Inc., Community Resource Bank, N.A., and Orangeburg National Bank are all referred to hereinafter as "the Bank." The parties and the circuit court have treated these cases as though they are consolidated even though no formal order consolidating them has been issued.

Both Livingston and the Bank made various motions as the case progressed, including a summary judgment motion by the Bank directed at Livingston's counterclaims that was granted in part and denied in part. (R. pp. _____; Bank's initial motions for summary judgment; Judge Goodstein's order denying summary judgment.) One of the claims that survived the ruling of the Honorable Diane S. Goodstein on that motion was for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.* (hereinafter "UTPA"). (R. pp. _____; Judge Goodstein's order denying summary judgment.)

Over the course of the litigation, affidavits of Livingston were served and filed, and the depositions of Livingston, Linda G. O'Dell (a former employee of the Bank), and Samuel F. Reid, Jr., Esquire, were taken and their transcripts filed. (R. pp.

_____; affidavits of Livingston; deposition of Livingston; deposition of O'Dell; deposition of Reid.) The testimony presented in these affidavits and depositions was that Livingston's home equity line of credit mortgage closing (which produced one of the mortgages sought to be foreclosed by the Bank) was conducted by an employee of the Bank (Orangeburg National Bank, at the time) at an office of the Bank, without attorney supervision, in 2000. (R. pp. _____; March 10, 2010, affidavit of Livingston p. 1; deposition of Livingston p. 29 ln. 10-18; deposition of O'Dell p. 16 ln. 14 through p. 20 ln. 17, p. 22 ln. 13-25; deposition of Reid p. 6 ln. 19 through p. 8 ln. 24.) The deposition testimony of Ms. O'Dell and Mr. Reid further showed that this was a common practice of the Bank at the time with regard to mortgage loans that did not involve a purchase transaction. (R. pp. _____; deposition of O'Dell p. 16 ln. 14 through p. 20 ln. 17, p. 22 ln. 13-25; deposition of Reid p. 6 ln. 19 through p. 8 ln. 24.) Livingston testified in his affidavit that the Bank did not provide him with an opportunity to select an attorney to represent him in the closing. (R. pp. _____; March 10, 2010, affidavit of Livingston p. 1.)

The home equity line of credit documents are written as though Livingston could borrow up to $57,000.00 on the line of credit. (R. pp. _____; HELOC note; mortgage.) Livingston's testimony, however, indicates that the Bank did not honor its obligations to allow him to borrow up to that amount, because of the Bank's imposition of an unwritten "term" upon the loan during the equity line's origination process. (R. pp. _____; deposition of Livingston p. 62 ln. 9 through p. 63 ln. 11, p. 63 ln. 24 through p. 64 ln. 22.) Livingston testified as follows in his deposition:

Q: Did you borrow $57,000 on your Brookside [home] in 2000 from Community Resource or Orangeburg National?

A: I think what I got was $40,000 or $45,000, somewhere in that neighborhood. . . . The appraiser that did the appraisal on the house . . . see, the line of credit's based on the appraised value, less the first mortgage, times the percentage or something like that, I believe. Anyway, he said if the house were painted, it would appraise for this, but it's in bad need of paint, and, therefore, I'm only going to appraise it for this. Well, it was supposed to be worked out when I got the house painted that I would be able to get the rest of the money.

. . .

Q: I'm still not real clear, but could you please explain a little more that you said you went in to borrow the $57,000 or $60,000 . . .

A: Right.

Q: . . . and they said it needed some paint. So tell me what happened after that.

A: Well, we had to get . . . well, the guy . . . the appraiser, he talked to them back and forth and they said, okay, we'll let Clyde have the $45,000. And I thought the paperwork was done for it to go up higher. . . . Anyway, when I got the house painted and went back and said something about it, I was told that, you know, well, the line of credit was done for $45,000, I believe it was somewhere in that neighborhood, and that's what it was. And there wasn't any extra, you know, that could be borrowed.

Q: So are you saying that you only received . . . tell me how much money you received from this loan, to your knowledge.

A: Well, it was no less than $40,000 and no more than $45,000. Between $40,000 and $45,000.

(R. pp. _____; deposition of Livingston p. 62 ln. 9 through p. 63 ln. 11, p. 63 ln. 24 through p. 64 ln. 22.) That only this amount of money was loaned to Livingston on the equity line is consistent with the Bank's demand letter to Livingston. (R. pp. _____; deposition of Livingston exh. 19.)

The Bank moved for summary judgment again on Livingston's remaining counterclaims, including the UTPA claim. (R. pp. _____; Bank's second motions for summary judgment.) The court denied the Bank's motion with respect to all claims except for the UTPA claim, on which it granted summary judgment in favor of the Bank. (R. pp. _____; order of Judge Jackson on summary judgment motions and motions to strike jury demand.) In granting summary judgment on the UTPA claim, the court ruled as follows:

> Because the acts subject of this claim are not unfair and deceptive acts in trade or commerce that affected the public interest, the Plaintiff's motion for summary judgment on this counterclaim is granted. See Beattie v. Nations Credit Financial Services Corp., 69 Fed. Appx. 585, 586 (4th Cir. 2003) (finding no evidence of any unfair or deceptive act that violated the public interest).
>
> In a light favorable to Defendant Livingston, the record indicates that the bank simply reneged on its own agreement with Defendant Livingston by refusing him access to the remainder of his credit line. These actions are not immoral or offensive to public policy. Further, in a typical case where a contract is breached, there will be no effect on the public interest. The isolated nature of a breach of contract under typical circumstances makes potential for repetition or other impact on the public interest all but impossible. See Perry v. Green, 313 S.C. 250, 437 S.E.2d 150 (Ct. App. 1993); Columbia East Assocs. V. Bi-Lo, Inc., 299 S.C. 515, 522, 386 S.E.2d 259, 263 (Ct. App. 1989); S.C. Nat. Bank v. Silks, 295 S.C. 107, 111, 367 S.E.2d 421, 423

> (Ct. App. 1988); Key Co., Inc. v. Fameco Distributors, Inc., 292 S.C. 524, 357 S.E.2d 476 (Ct. App. 1987). As Defendant Livingston has failed to adduce evidence tending to show satisfaction of the first two elements of an Unfair Trade Practices claim, the Plaintiff's motion for summary must be granted as to this claim.

(R. pp. _____; order of Judge Jackson on summary judgment motions and motions to strike jury demand p. 12.)

Livingston moved to reconsider the grant of summary judgment on this claim, and the court denied that motion. (R. pp. _____; order on motion to reconsider pp. 1-2.)

This appeal followed.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). That standard is that "summary judgment may be rendered only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Additionally, it must be shown that further inquiry into the facts of the case is not desirable to clarify the application of the law." Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986).

"All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." Nelson v. Charleston County

Parks & Recreation Comm., 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004). If "the parties vehemently dispute the inferences and conclusions to be drawn from the undisputed facts, . . . that simply establishes that summary judgment is not appropriate[.]" Montgomery v. CSX Transp., Inc., 656 S.E.2d 20, 29 (S.C. 2008).

"When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues." Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008).

In 2009, the South Carolina Supreme Court clarified earlier confusion about whether a scintilla of evidence is sufficient to defeat summary judgment. Hancock v. Mid-South Management Co., Inc., 381, S.C. 326, 330, 673 S.E.2d 801, 802-3 (2009). In Hancock, the Court held that "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Id. More than a scintilla is required only in cases requiring heightened burdens of proof or applying federal law. Id. Accordingly, when the ordinary burden of proof is applicable, only a scintilla of evidence is required to withstand summary judgment. Id.

ARGUMENT

I. The circuit court erred in granting summary judgment on Livingston's UTPA claim, particularly since the court did not take into account the Bank's frustration of Livingston's right to counsel in the analysis.

An action for damages under the UTPA lies where there is a violation of the UTPA (i.e., an unfair or deceptive act in trade or commerce that impacts the public interest) that proximately causes damages to the plaintiff. See, e.g., Charleston Lumber Co., Inc. v. Miller Housing Corp., 318 S.C. 417, 458 S.E.2d 431 (Ct. App. 1995). To recover under the UTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff suffered damages as a result. Wright v. Craft, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006).

The South Carolina Supreme Court has stated that demonstrating the potential for an unfair trade practice's repetition is a demonstration of the requisite "adverse effect on the public interest[,]" though the Court has never held that showing potential for repetition is the *only* way to prove impact on the public interest. Crary v. Djebelli, 329 S.C. 385, 388, 496 S.E.2d 21 (1998). The Court has "specifically declined" to hold that such potential for repetition must be demonstrated by any particular means and has stated that "each case must be evaluated on its own merits." Id.

Never has a South Carolina appellate court held that repetition or potential for repetition is a necessary element of a UTPA cause of action; rather, our courts have held that showing potential for repetition is *one way* in which a party can satisfy the public interest requirement. Id. Here, however, we have both evidence of actual repetition in the past and an impact on the public interest that would exist regardless

of whether potential for repetition exists. Ms. O'Dell's deposition testimony, along with Mr. Reid's, shows that it was this bank's practice regularly to close non-purchase mortgage loans without an attorney for the borrower present. Even the Bank's counsel in this case acknowledged that mortgage loan closings around the time in question were "done more commonly without having lawyers present[.]" (R. pp. ____; Transcript of Dec. 11 hearing p. 34 ln. 5-6.)

A person has the right to be represented by an attorney of his own choice, without conflicts of interest, in a mortgage closing. See Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773, 777-78 (2003); State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987). The right to be represented by an attorney of one's own choice is a substantial right. Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005). Even an isolated instance of a mortgage lender's suppression or frustration of this right would impact the public interest, and a regular practice of it (which is what this case presents) certainly would. In Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010), *aff'd as modified* 404 S.C. 421, 746 S.E.2d 35 (2013), this court noted that "[t]he unauthorized practice of law is inherently prejudicial to not only the parties involved in the instant transaction but also the public at large[,]" noting that the reason for requiring lawyers to supervise mortgage loan closings "is for the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law." Id. at 76. The Supreme Court favorably cited this passage from Coffey in Matrix Financial Services Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532, 534 (2011). Ever since the Supreme Court ruled in State v. Buyers Service, Inc. that "real estate

and mortgage closings should be conducted only under the supervision of attorneys," it has been plain that the reason for this requirement is that "protection of the public is of paramount concern." 292 S.C. 426, 434, 357 S.E.2d 15, 19 (1987). Indeed, the Supreme Court's opinion in Buyers Service is the source of the language used by this court in Coffey to state that requiring lawyers to supervise mortgage loan closings "is for the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law." Buyers Service, 292 S.C. at 431; Coffey, 398 S.C. at 76.

The Bank's actions in this case are plainly within the definitions of trade and commerce under the UTPA. "'Trade' and 'commerce' shall include the . . . distribution of any services and any property, tangible or intangible, . . . and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State." S.C. Code Ann. § 39-5-10(b). Trade and commerce are interpreted broadly for purposes of the UTPA. The text of S.C. Code Ann. § 39-5-10(b) states that:

> "Trade" and "commerce" shall include the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal, or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State.

This court has held that "[t]he statute's use of the words 'shall include' clearly suggests the legislature did not intend to limit 'trade' and 'commerce' to only the listed transactions." Baker v. Chavis, 306 S.C. 203, 208-09, 410 S.E.2d 600, 603 (Ct. App. 1991). "[T]he UTPA 'should be given a liberal construction.'" McTeer v.

Provident Life and Accident Ins., 712 F. Supp. 512, 515 (D.S.C. 1989) (quoting Connolly v. People's Life Ins. Co., 294 S.C. 355, 359, 364 S.E.2d 475, 477 (Ct. App. 1988)). All of the actions of the Bank here occurred within the context of the Bank's sale and distribution of lending services. (R. pp. _____; HELOC note; mortgage.) The Bank's actions were within the definition of trade and commerce under the UTPA. S.C. Code Ann. § 39-5-10(b); Baker, 306 S.C. at 208-09; Connolly, 294 S.C. at 359; McTeer, 712 F.Supp. at 515.

The Bank's actions were also unfair and deceptive. The unfairness of a lender's unilaterally imposing an unwritten, un-bargained-for term upon a line of credit, then reneging upon that term, is self-evident. It is further unfair, too, for the Bank to deprive Livingston of the benefit of counsel in connection with the closing, as the reason that mortgage closings must be supervised by attorneys is because they "have the ability to furnish their clients legal advice should the need arise[.]" Buyers Service, 292 S.C. at 434. That would include advice that the Bank is not permitted to impose such a condition, unilaterally, upon the terms of the equity line.

When one notes that the Bank's other actions that form the basis of Livingston's UTPA claim occurred in conjunction with the Bank's closing the home equity loan without the supervision of an attorney, it becomes plain that the Bank committed an unfair or deceptive act in the conduct of trade of commerce that affects the public interest. This was no mere or typical breach of contract, and the Bank's regular practice of closing such loans without the supervision of a lawyer was certainly not a mere breach of contract. There was more here than a "deliberate or intentional breach of a valid contract[.]" Columbia East Assocs. V. Bi-Lo, 299 S.C.

515, 386 S.E.2d 259, 263 (Ct. App. 1989). It was error for the circuit court to see the record otherwise, particularly in a summary judgment context.

The cases discussing a lack of liability under the UTPA for a mere breach of contract, even an intentional one, focus on the isolated nature of a breach of contract under *typical* circumstances in which a contract is breached, because those circumstances make potential for repetition or other impact on the public interest extremely unlikely. See Perry v. Green, 313 S.C. 250, 437 S.E.2d 150 (Ct. App. 1993); Columbia East Assocs., 299 S.C. at 522; S.C. Nat. Bank v. Silks, 295 S.C. 107, 111, 367 S.E.2d 421, 423 (Ct. App. 1988); Key Co., Inc. v. Fameco Distributors, Inc., 292 S.C. 524, 357 S.E.2d 476 (Ct. App. 1987). That does not, however, mean that the mere presence of a contractual relationship between the parties and a breach of that contract by one of them will *rule out* liability of the breaching party under the UTPA. In a case against a group of landlords where evidence was presented showing other, different lease violations with different tenants than the plaintiffs, the landlords tried to make that very argument, and this court rejected it. Burbach v. Investors Mgmt. Corp. Intl., 326 S.C. 492, 496-97, 484 S.E.2d 119, 121 (Ct. App. 1997). This court held in Burbach that "the conduct of the landlords is capable of repetition. '[U]nfair or deceptive acts or practices in the conduct of trade or commerce have an impact on the public interest if the acts or practices have the potential for repetition.'" Id. at 497 (quoting Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc., 290 S.C. 475, 480, 351 S.E.2d 347, 350-51 (Ct. App. 1986)). The court went on to note that "[t]he problems experienced by the Burbachs are not

isolated events. At least several other tenants experienced similar problems. . . . Clearly, the landlords' behavior is capable of repetition." Id.

When the "mere breach of contract"/"intentional breach of contract" cases discuss the principle at issue, they state that the UTPA "is not available to redress a private wrong *where the public interest is unaffected*" and that "a deliberate or intentional breach of a valid contract, *without more*, does not constitute a violation of the Unfair Trade Practices Act." Columbia East Assocs., 299 S.C. at 522 (emphasis added). Proving the "more[,]" to prove that the public interest is affected, can be done by showing potential – just *potential* – for repetition. Crary, 329 S.C. at 388; Noack Enterprises, 290 S.C. at 480. Given that there is evidence here of actual repetition of the Bank's practice of closing mortgage loans without attorney supervision, thus preventing its borrowers from accessing appropriate legal advice, this has been more than satisfied.

The Bank's impression of the orally imposed "term" on the equity line is tied to its suppression of Livingston's right to be represented by an attorney at the closing. If Livingston had been represented by competent counsel who supervised the closing, he would have been appropriately counseled that the Bank cannot unilaterally impose a term on the parties' agreement, and that lawyer would probably have put a stop to the Bank's imposition of this condition, as Livingston argued. The Bank's closing the loan without attorney supervision is very much linked with its imposition of a unilateral "term" upon this loan, and the circuit court erred in failing to see that connection or how it brings the events of this case within the UTPA's requirement that the unfair or deceptive act affects the public interest. At least when viewing the

record and its inferences in the light most favorable to Livingston, if Livingston had had a lawyer supervising this closing, the Bank's imposition of this condition on his equity line never would have occurred.

CONCLUSION

The circuit court erred in granting summary judgment on the UTPA claim. The court should reverse that decision and remand the case for a jury trial.

Respectfully submitted,

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January 28, 2015

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PROOF OF SERVICE

I certify that I served the foregoing Respondent/Appellant's Initial (Appellant's) Brief by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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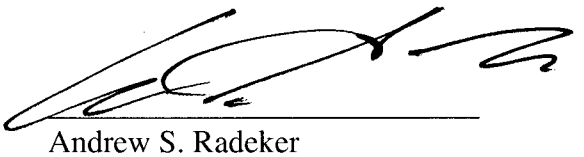

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