

2

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

174940

APPEAL FROM YORK COUNTY

Court of common Pleas

S. Jackson Kimball, Special Circuit Judge

Case No. 2007-CP-46- 04305

SunTrust Mortgage, Inc. Respondent,

Mark Ostendorff, Appellant.

MOTION TO FILE OUT OF TIME

FOR RECORD ON APPEAL

RECEIVED

FEB 04 2015

SC Court of Appeals

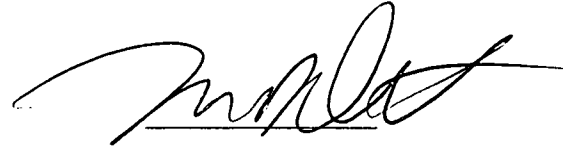
Appellant Ostendorff respectfully moves to this Court, pursuant to Rule 263 (b) , SCACR, Motion To File Out Of Time for his Record on Appeal.

After reviewing the rules of court, it appears that the issue brought up by the U S Supreme Court that Ostendorff addressed in his earlier Motion To File Late Reply And Record On Appeal, would be better served by a possible later motion for Supplemental Record.

Thus , Ostendorff moves to this Court to grant Motion Out Of Time For Record On Appeal. The Record On Appeal has been sent under separate cover.

January 30 ,2015

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark Ostendorff', written over a horizontal line.

Mark Ostendorff
135 Cedar Creek Circle
Central, SC 29630
(864) 640-3340
Appellant, Pro Se

Brian S, Tatum
Tatum Law Firm
PO Box 11250
Charlotte , NC 28220

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM YORKCOUNTY

Court of common Pleas

S. Jackson Kimball, Special Circuit Judge

Case No. 2007-CP-46-04035

SunTrust Mortgage, Inc.,Respondent,

v.

Mark Ostendorff,Appellant.

CERTIFICATE OF MAILING

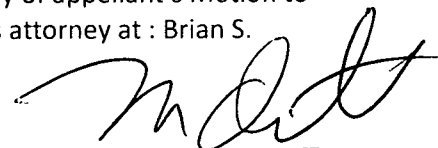
RECEIVED

FEB 04 2015

SC Court of Appeals

I, Mark Ostendorff, hereby certify that I placed in the U S Postal Service, a copy of appellant's Motion to File Out of Time for Record on Appeal, with proper postage paid to SunTrust's attorney at : Brian S. Tatum, Tatum Law Firm, PO Box 11250, Charlotte, NC 28220.

January 30, 2015



Mark Ostendorff
135 Cedar Creek Circle
Central, SC 29630
(864) 640-3340
Appellant, Pro Se

No. _____

In The
Supreme Court of the United States

Mark Ostendorff,
Petitioner,

v.

SunTrust Mortgage, Inc.,
Respondent.

COPY

On Petition for Writ of Certiorari
To the South Carolina Supreme Court

PETITION FOR WRIT OF CERTIORARI

Mark Ostendorff
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(864) 640-3340
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QUESTIONS PRESENTED

1. Whether a state court 's order for summary judgment to dismiss a compulsory counterclaim denied petitioner Ostendorff of his right to a trial by jury.
2. Whether a state court's order to dismiss a compulsory counterclaim changed the terms of the contract between petitioner Ostendorff and respondent SunTrust.
3. Whether the SC Supreme Court's denial of petitioner Ostendorff's petition for Writ denied him due process and equal treatment of the law.

LIST OF PARTIES AND DISCLOSURE STATEMENT

Parties- SunTrust Mortgage, Inc.,Respondent

Mark Ostendorff,.....Petitioner

Rule 29.6- Petitioner states that he has no parent companies or nonwholly subsidiaries. (Petitioner is a citizen of the United States and South Carolina).

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion to affirm by the SC Court of Appeals is not reported as a timely Writ of Certiorari was made by petitioner Ostendorff (App., infra 7-9). The notice of denial of Writ by the SC Supreme Court(App., infra 10-11). The notice of denial (reinstate) from the SC Supreme Court (App., infra, 12).

JURISDICTION

The SC Court of Appeals decision to affirm was entered on November 14, 2012. A timely petition for rehearing was denied. A timely petition for a Writ of Certiorari was made to the SC Supreme Court in which was denied on August 21, 2014. A timely petition for rehearing (reinstate) was made and denied on September 9, 2014.

CONSTITUTIONAL PROVISIONS INVOLVED

The Supremacy Clause of the Constitution provides in relevant part: “ [T]he Laws of the United States*** shall be the supreme Law of the Land***any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. art. VI. Cl. 2.

The US Constitution, Fourteenth Amendment, Section I, “ No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

The US Constitution, fifth amendment, rights of persons,..” No person...,nor be deprived of life , liberty, or property, without due process...”

STATEMENT

This case raises important, recurring questions relating to mortgage contracts and whether a state judge can circumvent a trial by jury for a compulsory counterclaim by dismissing the counterclaim by granting a summary judgment. It raises a question whether a state judge can add provisions to a contract that were not intended by the original parties who originated the contract. It raises the question if a state supreme court (the court of last resort) can deny a citizen due process and equal treatment of the law.

A . SUMMARY JUDGMENT

In *Anderson et al. v. Liberty Lobby, Inc., et al* 477 U.S. 242 (1986), The Court's opinion is replete with boilerplate language to the effect that trial courts are not to weigh evidence when deciding summary judgment motions: "[I]t is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter..." Ante, at 249. " Our holding ... does not denigrate the role of the jury... Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." Ante, at 255.

The trial court is to follow the procedure as set out by the SC Supreme Court in *C & S Real Estate Services v. Massengale*, 350 SE 2d 191 , SC Supreme Court (1986)..." (4) If the complaint is equitable and the counterclaim legal and compulsory , the defendant has a right to a jury trial on the counterclaim. In that case, the proper procedure is as follows:....(c) If there are factual issues common to both claims, absent the " most imperative circumstances,"the "at law" claim must be tried first..." .

Petitioner Ostendorff demanded jury trial and asserted his right to that jury trial during the motion for summary judgment hearing, as the counterclaim facts would have bearing on the foreclosure part of the case. Summary judgment was granted to SunTrust.

The foreclosure part of the case has been completed. Petitioner Ostendorff has that case at the SC Court of Appeals as Ostendorff was never informed of the hearing nor informed of the Notice of Sale.

There appears not to be a conflict with findings with the US Supreme Court and South Carolina Supreme Court but South Carolina courts not following their own findings and decisions. Their actions are in conflict with both their own case law and also similar U S Supreme Court case opinions.

B. CONDITIONS OF CONTRACT

The trial judge stated in granting SunTrust's motion for Summary Judgment that Ostendorff missed paying his monthly interest payments by the due date and thus SunTrust was no longer required to give Ostendorff his monthly construction draws to rehab his existing home.

The construction mortgage did not state any due date for the monthly interest payments Ostendorff was to make. The trial judge added a due date without a specific day of the month. All other findings of fact in the order were convenient misinformation created by the trial judge.

The construction mortgage did not have any monthly due date requirements. The only due date on the note was one year after its origination. After the one year rehab period, a 30 year note would provide permanent financing. Neither party was obligated to enter the permanent note. The 30 year note did have a monthly due date with a specific day of the month. It also allowed the borrower to make monthly payments via an automatic draft from his bank account. The borrower could elect to make payments 1, 2, 3, or 4 days past their due date.

SunTrust never brought up the issue in its pleadings or any affidavits. It was only a surprise issue at the motion hearing brought up by SunTrust's attorney. Ostendorff was not prepared to address the issue since there never was an issue with SunTrust since originating the mortgage probably two years before the hearing.

The moving party provided no evidence that Ostendorff missed any due date, only an internal account summary made by a SunTrust vice-president in her affidavit showing the monthly payments made by Ostendorff. Her affidavit made no reference to any missed due dates as a reason to stop construction draws to Ostendorff. SunTrust never notified Ostendorff that he was in breach, the construction mortgage required that they do so within 30 days of any breach.

In *Soil Remediation Co., v. NuWay Remediation Inc.*, 325 SC 231 (1997) 482 S.E. 2d 554 (1997)... “ Although as a general rule contracts are to be construed by the court, where a contract is capable of more than one construction, the question of what the parties intended becomes one of fact to be submitted to jury... Since the contract is capable of more than one construction , summary judgment was improperly granted.”

In *Gilstrap v. Culpepper*, 283 S.C. 83 , 320 S. E. 2d 445 (1984).....” Courts are without authority to alter a contract by construction or to make new contracts for the parties. Their duty is limited to the interpretation to the contract made by the parties themselves”... regardless of its wisdom or folly, apparent unreasonableness, or failure to guard their rights carefully.”

No conflict can be found between SC Supreme Court and US Supreme Court. The SC Court of Appeals and the SC Supreme Court seem to be in conflict with their own case law and opinions.

C. DENIAL OF DUE PROCESS

No reasonable person would conclude that any Justice at the SC Supreme Court reviewed Ostendorff's Writ before denying it.

Respondent filed a Motion to Dismiss Ostendorff's appeal on the foreclosure with the SC Court of Appeals. Ostendorff filed his opposition to motion with the SC Court of Appeals.

Any reasonable person would conclude that Respondent also filed the Motion to Dismiss with the SC Supreme Court without notice to Ostendorff. Ostendorff's Petition for Writ with the SC Supreme Court was denied approximately 15 days after Respondent filed with the SC Court of Appeals. This time is consistent with a court granting a motion if it is not opposed in ten days.

No reasonable person would conclude that the denial of Ostendorff's Petition for Writ was a coincidence.

Considering issues in the counterclaim, it is odd that the SC Supreme Court Denied Ostendorff's Writ without any comments.

Ostendorff was denied an opportunity to respond to the SC Supreme Court.

Ostendorff filed a Motion to Reinstate with the SC Supreme Court. It was denied by the Clerk of Court. Any reasonable person would conclude that the same clerk of court denied Ostendorff's Writ and not the Chief Justice.

The denial of Ostendorff's Motion to Reinstate by the clerk was very evasive. The denial made little sense and the letter talked in circles. A simple statement that Respondent SunTrust never sent the SC Supreme a Motion to Dismiss and the date the Chief Justice actually reviewed the case. This would have cleared up any suspicion. Respondent never opposed Ostendorff's Motion to Reinstate.

Ostendorff was denied due process and equal protection under the law.

Article I, Section 3 of the South Carolina Constitution provides that no "person [shall] be deprived of life , liberty or property without due process of law, nor shall any person be denied the equal protection of the law..."

Fifth Amendment of the US Constitution, Rights of Persons, .."No person....., nor be deprived of life, liberty, or property, without due process..."

Fourteenth Amendment, Section I, of the US Constitution, "...nor any state deprive any person of life, liberty, or property without due process of law..."

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" ..

Their seems to be no conflict, just the SC courts disregarding Ostendorff's constitutional rights.

REASONS FOR GRANTING THE PETITION

The very plain reason is that with the current disregard for property rights and the disregard for due process by the Courts in this case have a negative impact on our economy.

The order by the trial judge show a conscious disregard for the rule of law and any resemblance to judicial restraint.

The inaction of the higher SC courts to supervise and correct orders that have no evidentiary support can only lead to corruption. The financial opportunity for judges in foreclosure hearings is astronomical due to the volume and value of housing.

Based on this case, along with the foreclosure case, a citizen can lose his home and its equity without even notice, much less a trial that is impartial.

I would like the opportunity to have my counterclaim to be tried in front of a jury to recover my damages that SunTrust cost me for their breach.

CONCLUSION

The petition for writ of certiorari should be granted .

Respectfully submitted,



Mark Ostendorff
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Petitioner, Pro Se
markostendorff@yahoo.com

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

SunTrust Mortgage, Inc., Respondent,

v.

Mark Ostendorff, Appellant.

Appellate Case No. 2010-150386

Appeal From York County
S. Jackson Kimball, Special Circuit Judge

Unpublished Opinion No. 2012-UP-608
Heard October 30, 2012 – Filed November 14, 2012

AFFIRMED

Mark Ostendorff, Appellant pro se.

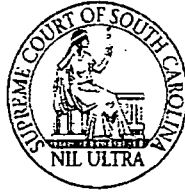
Brian Steed Tatum, of Tatum Law Firm, PLLC, of
Charlotte, North Carolina, for Respondent SunTrust
Mortgage Inc.

PER CURIAM: In this mortgage foreclosure case, Appellant Mark Ostendorff seeks review of the circuit court's order granting summary judgment to Respondent SunTrust Mortgage, Inc. on Ostendorff's counterclaim for breach of contract. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to the circuit court's conclusion that SunTrust was entitled to suspend construction draws as a matter of law: Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); *Hardee v. Hardee*, 355 S.C. 382, 387, 585 S.E.2d 501, 503 (2003) ("The judicial function of a court of law is to enforce a contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous."); *Charles v. Canal Ins. Co.*, 238 S.C. 600, 608, 121 S.E.2d 200, 205 (1961) ("[T]he function of courts is to adjudge and enforce contracts as they are written and entered into by the parties.").
2. As to whether the issues of fact asserted by Ostendorff precluded summary judgment: Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); Rule 56(c), SCRCP (providing that summary judgment shall be granted 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 a judgment as a matter of law" (emphasis added)); *In re Walter M.*, 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009) ("Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review.").
3. As to whether SunTrust's failure to provide Ostendorff with certain discovery responses precluded summary judgment: *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) ("[T]he nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence.").
4. As to Ostendorff's challenge to the jurisdiction of the special circuit judge: *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review."); *State v. Colf*, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App. 1998), *aff'd as modified*, 337 S.C. 622, 525 S.E.2d 246 (2000) ("An issue is also deemed abandoned if the argument in the brief is merely conclusory.").

AFFIRMED.

HUFF, THOMAS, and GEATHERS, JJ., concur. ✓



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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September 9, 2014

Mr. Mark Ostendorff
135 Cedar Creek Circle
Central SC 29630

Re: Sun Trust Mortgage v. Mark Ostendorff
Appellate Case No. 2013-000144
Lower Court Case No. 2007CP460405

Dear Mr. Ostendorff:

In the above case, this Court denied the petition for a writ of certiorari to review the South Carolina Court of Appeals' decision in Appellate Case Number 2010-150386. You have now filed a motion for reinstatement with this Court, and this motion has been construed as a petition for rehearing regarding the order denying the petition for a writ of certiorari.¹

Please be advised that Rule 221 of the South Carolina Appellate Court Rules (SCACR) provides: "No petition for rehearing shall be allowed from an order

¹ A motion to reinstate is only appropriate when the clerk of court has dismissed a matter. *See* Rule 260, SCACR. Any challenge to an order issued by the members of the Court must be made by a petition for rehearing under Rule 221, SCACR.

denying a petition for a writ of certiorari under Rule 242, SCACR." Therefore, no action will be taken on your petition for rehearing by this Court.²

I do note that you have an appeal currently pending before the South Carolina Court of Appeals from an order dated October 9, 2013. This appeal, which also arises out of 2007CP460405, has been assigned Appellate Case Number 2013-002432. The motion to dismiss and the return to the motion to dismiss that you have enclosed with the petition for rehearing have been filed in Appellate Case Number 2013-002432.

Very truly yours,



CLERK

cc: Brian Steed Tatum, Esquire

² Contrary to your assertion, the Court of Appeals may send the remittitur once the petition for a writ of certiorari is denied. Rule 221(b), SCACR ("If a petition for writ of certiorari is filed [under Rule 242], the Court of Appeals shall not send the remittitur until notified that the petition has been denied.").

The Supreme Court of South Carolina

Sun Trust Mortgage, Inc., Respondent,

v.

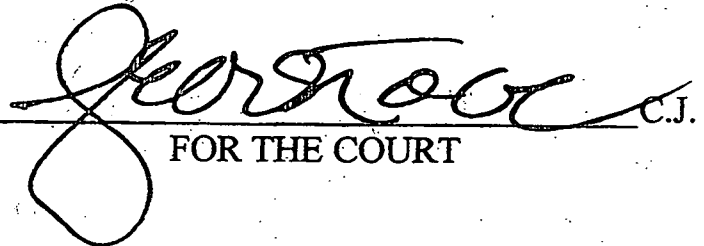
Mark Ostendorff, Petitioner.

Appellate Case No. 2013-000144

Lower Case No. 2007-CP-46-04305

ORDER

Petitioner seeks a writ of certiorari to review the Court of Appeals' decision in *Sun Trust Mortgage, Inc. v. Ostendorff*, Op. No. 2012-UP-608 (S.C. Ct. App. filed Nov. 14, 2012). The petition is denied.


C.J.
FOR THE COURT

Columbia, South Carolina

August 21, 2014

cc:

The Honorable Jenny Abbott Kitchings

The Honorable David Hamilton

Brian Steed Tatum, Esquire

Mark Ostendorff

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APPENDIX

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IN THE
SUPREME COURT of the UNITED STATES

Mark Ostendorff

Petitioner,

v.

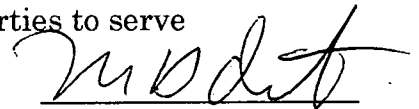
SunTrust Mortgage, Inc.,

Respondent.

To the South Carolina Supreme Court

CERTIFICATE OF SERVICE

I, Mark Ostendorff, hereby certify that on this day of November 19, 2014, I mailed three copies of the Petition for Writ of Certiorari in the above entitled case to Respondent's attorney at: Tatum Law Firm, Brian s. Tatum, PO Box 11250, Charlotte, NC 28220, (704) 307-4197. There are no other parties to serve



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