THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS
HON. ALEXANDER S. MACAULAY

APPELLATE CASE NO. 2014-000220

PLANTATION FEDERAL BANK as Successor in Interest to
FIRST SAVERS BANK... RESPONDENT

v.

J. CHARLES GRAY and WATERFORD RIDGE OWNERS ASSOCIATION, INC.,
DEFENDANTS,

Of Whom J. CHARLES GRAY...APPELLANT

PLANTATION FEDERAL BANK as Successor in Interest to
FIRST SAVERS BANK... RESPONDENT

v.

PEGGY B. GRAY and WATERFORD RIDGE OWNERS ASSOCIATION, INC.,
DEFENDANTS,

Of Whom PEGGY B. GRAY...APPELLANT

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

These two consolidated actions arise from the Appellants' refinancing of purchase money mortgages that were used to purchase Lot 27 and Lot 29 of Waterford Ridge (hereinafter "the Lots"). Said lots, which are interior lots located on Lake Keowee, were purchased at a real estate auction.[1] Appellants purchased the lots with the intent to construct speculative homes for resale.[2]

In 2008, Respondent extended one-year mortgage loans to Appellants which provided for interest only payments. Said mortgage loans refinanced Appellants original purchase money mortgages which were used to purchase the real property which is the subject of this foreclosure action.[3] When the 2008 mortgage loans with Respondent matured in 2009, Appellants renewed the mortgage loans with Respondent. Said renewal loans provided interest only repayment terms as well.[4]

The Appellants in their respective Amended Answers as well as in their deposition testimony admitted that they executed the mortgage loan documents that are the subject of this matter.[5]There is no dispute that the mortgage loans which are the subject matter of the foreclosure action were commercial transactions. The lots which are pledged as collateral for the Respondent's mortgage loans were purchased at an auction held by or on the behalf of Crescent Communities of S.C., LLC.[6] The Appellants arrived

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[1] Deposition of J. Charles Gray dated March 25, 2013 at Page 10, lines 8-24. (R. p. 230; lines 8-24).
[2] Deposition of J. Charles Gray dated March 25, 2013 at Page 13 lines 15-25 and page14 lines 1-3. (R. p. 233, lines 15-25; R. p. 234, lines 1-3).
[3] Deposition of J. Charles Gray dated March 25, 2013 at Page 53, lines 2-21. (R. p. 273, lines 2-21).
[4] Deposition of J. Charles Gray dated March 25, 2013 at Page 57, lines 9-12. (R. p. 277, lines 9-12).
[5] Deposition of Peggy B. Gray dated March 25, 2013 at Page 12, lines 16-17, at Page 10, lines 16-24, at Page 15, lines 12-15. See also deposition of J. Charles dated March 25, 2013 at Page 46, lines 8-16, at Page 58, lines 17-25, at Page 59, lines 1-10, at Page 57, lines 12-25, and Page 58, lines 1-3. (R. p. 358, lines 16-17; R. p. 356, lines 16-24; R. p. 361, lines 12-15). (*See also* R. p. 266, lines 8-16; R. p. 278, lines 17-25; R. p. 279, lines 1-10; R. p. 277, lines 12-25; R. p. 278, lines 1-3).
[6] Deposition of J. Charles Gray dated March 25, 2013 at Page 10, lines 8-21. (R. p. 230, lines 8-21).

at the purchase price they were willing to pay for the lots through an auction process.[7] The Appellants acknowledge that they had attended, participated in and purchased real property at several auctions such as the one that resulted in the purchase of the lots which are the subject of this action.[8] The Appellants acknowledge that they purchased the lots with the intention to build speculative construction for resale[9]. Aside from this transaction, Appellants have purchased and sold multiple investment properties; have developed subdivisions; built speculative homes for resale[10] and arranged financing through several different banks for properties they have purchased over the years.[11] Appellants are well versed in real estate financing and had full knowledge of the loan terms being extended by Respondent prior to executing the loan documents.

Due to the downturn in the economy the Appellants were unable to sell these lots prior to the loans maturing as they had planned. The Appellants testified that that the downturn in the economy led to a depressed market for real estate on Lake Keowee. The lack of interest in Lake Keowee real estate along with a decline in the economy led to Appellants inability to sell the lots.[12]

The Appellants' pleadings allege that the Respondent represented that the mortgage loans obtained in 2008 would be renewed by Respondent at the same or similar

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[7] Deposition of J. Charles Gray dated March 25, 2013 at Page 20, lines 10-25; Page 21; Page 22, lines 16-25; Page 23, line 1-3. (R. p. 240, lines 10-25; R. p. 241; R. p. 242, lines 16-25; R. p. 243, lines 1-3).
[8] Deposition of J. Charles Gray dated March 25, 2013 at Page 17, lines 6-13. (R. p. 237, lines 6-13).
[9] Deposition of J. Charles Gray dated March 25, 2013 at Page 13, lines 13-25; Page 14, Line 1-3. (R. p. 233, lines 13-25; R. p. 234, lines 1-3).
[10]Deposition of J. Charles Gray dated March 25, 2013 at Page 15, lines 4-11. (R. p. 235, lines 4-11).
[11] Deposition of J. Charles Gray dated March 25, 2013 at Page 34, lines 4-25; Page 35, lines 1-7; Page 43, lines 7-10; Pages 73-76. (R. p. 254, lines 4-25; R. p. 255, lines 1-7; R. p. 263, lines 7-10; R. pp. 293-296).
[12] Deposition of Peggy B. Gray dated March 25, 2013 at Page 20, lines 5-9; Page 23, lines 2-25. See also deposition of J. Charles Gray dated March 25, 2013 at page 69, lines 23-25, Pages 70 and 71, Page 72, lines 1-11. (R. p. 366, lines 5-9; R. p. 369, lines 2-25) (*See also*, R. p. 289, lines 23-25; R. pp. 290-291; R. p. 292, lines 1-11).

terms until such time the real property which secured said loans could be sold. In essence the Appellants allege that the Respondent promised or represented that the 2008 interest only loans would be renewed in perpetuity upon the same or similar loan terms. At no time did Respondent or any of its agents or employees represent, promise or otherwise imply that Respondent would renew the interest only loans upon the same or similar terms at maturity. In fact, Appellants depositions indicate that no such promises or representations were made.

Q. What was your understanding of the note with First Savers? Did you understand that it would be interest only in perpetuity?"
A. Uh-huh (affirmative).
Q. Did someone promise you that?
A. (Affirmative nod)
Q. Yes, that they would continue to refinance it, as long as it took, at interest only?
A. Yes.
Q. And who did you understand that from?
A. Just talking to Shane Smith at the bank.
Q. Shane?
A. At First Savers.
Q. Did he say that?
A. **Well, as long as everything was going good at Keowee** and all, there was no problem, he said. Now, forever? I don't know about forever." Deposition of Peggy B. Gray at Pages 18-19. (Bold Added)
(R. p. 364-365).

A. I figured when we got ready to sign one in 2009, it would be interest only.
Q. And why did you think that?
A. It was just my thinking.
Q. Did anyone promise you?
A. No, nobody. I don't have it in writing or anything, no. Deposition of Peggy B. Gray at Page 20 (Bold Added)
(R. p. 366)

Further, the Appellant, Peggy Gray admits that Respondent's employee, Shane

Smith, did not make any fraudulent statement to her concerning the terms of the loans.

18. Q. Do you think Mr. Smith made any fraudulent statements
19. to you, to you in particular?
20. A. No. I think Mr. Smith did exactly what he thought was
21. going to happen, you know. I think he was truthful
22. with us... Deposition of Peggy B. Gray at page 21.

(R. p. 367).

In 2009 when the Appellants' loans with Respondent were nearing maturity, the market on Lake Keowee had drastically declined and property values had plummeted.[13] When the original notes matured in 2009, the Respondent provided Appellant with an option to renew their loans with Respondent with interest only repayment terms for one more year provided the Appellants paid some principal down.[14] At the time of the 2009 renewals Respondent informed the Appellants that Respondent would not provide further renewal loans that provided interest only payments at maturity.[15]

Appellants admit that prior to executing the renewal loans with Respondent in 2009, neither Appellant contacted any other banks for financing options. The Appellants admit they found it fruitless to try as no bank was offering to make interest only notes.[16]

Subsequently after executing the 2009 renewal loans with Respondent, the Appellants ceased making payments in December 2009. Appellants ceased making payments due under the notes and mortgages as a result of the Appellants financial circumstances.

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[13] Deposition of Peggy B. Gray dated March 25, 2013 at Page 20, lines 18-25, and page 21, lines 1-6. (R. p. 366, lines 18-25; R. p. 367, lines 1-6).

[14] Deposition of J. Charles Gray dated March 25, 2013 at Page 63, lines 4-16. (R. p. 283, lines 4-16).

[15] Deposition of J. Charles Gray dated March 25, 2013 at Page 60, line 25, at page 61, lines 1-3, and page 63, lines 18-21. (R. p. 280, line 25; R. p. 281, lines 1-3; R. p. 283, lines 18-21).

[16] Deposition of J. Charles Gray dated March 25, 2013 at Page 64, lines 22-25, at page 65, lines 1-6. See also Deposition of Peggy B. Gray dated March 25, 2013 at Page 24, lines 10-14. (R. p. 284, lines 22-25; R. p. 285, lines 1-6) (*See also* R. p. 370, lines 10-14).

8. of this whole mess. But because I, you know, lost all
9. my equipment, dump trucks, the whole nine yards-- I
10. had to sell everything. And I lost over somewhere in
11. that neighborhood of one to one-point five million
12. dollars. Deposition of J. Charles Gray at Page 67.

(R. p. 287).

20. In 2005 my taxable income was--off my 1040 Form-- was
21. $205,467; 2006, it was $41,532; 2007, it was
22. 50,959. In 2008, it was 32,890. 2009 it had
23. dropped, $25,140.00. 2010 it was 24,329... Depositions of J. Charles Gray at Page 68.

(R. p. 288).

Prior to maturity of the 2009 renewal loans, Appellants defaulted upon their repayment obligations and Respondent initiated the foreclosure action which is the subject of this appeal. It is significant to note that at the time of default, Appellants were obligated to make interest only payments under the terms of the renewal loans. The Appellants admit that according to the terms of the loan documents Respondent has the right to foreclose and further admits that the circumstances leading to this action are a result of the economy and depressed real estate market on Lake Keowee.[17]

ARGUMENTS

I. The Court did not err in granting Summary Judgment in favor of Respondent

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56, SCRCP" *Wachovia Bank, N.A. v. Coffey,* 404 S.C. 421, 425, 746 S.E.2d 35, 37 (2013) (citation omitted). Rule 56(c) of the

[17] Deposition of J. Charles Gray dated March 25, 2013 at page 80, lines 18-22, at page 72, lines 9-12. See also Deposition of Peggy B. Gray dated March 25, 2013 at page 23, lines 23-25, at page 21, lines 7-11, and page 27, lines 21-23. (R. p. 300, lines 18-22; R. p. 292, lines 9-12). (*See also* R. p. 369, lines 23-25; R. p. 367, lines 7-11; R. p. 373, lines 21-23).

SCRCP states summary judgment may be granted if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with 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." Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC v. Cnty. Of Richland,* 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citation omitted).

II. Breach of Contract Accompanied by a Fraudulent Act and/or Fraudulent Intent

At the Summary Judgment stage, the Appellants have failed to satisfy the elements of a claim for Breach of Contract Accompanied by a Fraudulent Act and/or Fraudulent Intent.

"In order to have a claim for breach of contract accompanied by a fraudulent act, the plaintiff must establish three elements: (1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach" *Conner v. City of Forest Acres,* 348 S.C. 454, 465-66, 560 S.E.2d 606, 612 (2002). In *Conner v. City of Forest Acres*, the court defines a fraudulent act as "any act characterized by dishonesty in fact or unfair dealing" Id. at 466, 560 S.E.2d at 612. Normally fraudulent intent is proved by circumstances surrounding the breach of contract (*Floyd v. Country Squire Mobile Homes, Inc.,* 287 S.C. 51, 54, 336 S.E.2d 502, 503-04 (Ct. App. 1985).

The Appellants have failed to point to any breach of contract by Respondent. The Appellants accepted the loan terms and executed all loan documents at a closing

conducted by independent counsel of their own choosing who had represented them in several real estate transactions over the years. The Appellants do not dispute executing the notes and admit they mortgaged the properties as collateral for the notes. The terms of the notes and mortgages are unambiguous and speak for themselves. The Appellants admit no employee or agent of Respondent ever stated that the terms of the original loans from Respondent would be renewed with identical terms. The Appellants received exactly what they bargained and contracted for and can point to no evidence of a fraudulent act having been committed by Respondent.

The Appellants argue that a course of dealing or usage of trade had developed between Shane Smith and the Appellants while he was with Community First and that this course of dealing carried over to Respondent.

"A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement" S.C. Code Ann. §36-1-205(3), See also *Burden v. Woodside Cotton Mills,* 104 S.C. 435, 89 S.E. 474 (1916). A usage of trade or business is presumed to form part of a contract unless the usage of trade is excluded by agreement (*Weisz Graphics Div. of Fred B. Johnson Co. v. Peck Indus.,* 304 S.C. 101, 107 (S.C. Ct. App. 1991)). In the deposition of Peggy Gray, she states that Shane Smith informed her that Respondent would continue to renew the notes at interest only "as long as everything was going good at Keowee."[18] As stated previously, the Appellants admitted throughout their depositions that the market on Lake Keowee was in an economic decline which resulted in drastically decreased property values. The

[18] Deposition of Peggy B. Gray dated March 25, 2013 at page 19, line 3. (R. p. 365, line 3).

Appellants acknowledge that the Respondent is not responsible for or believed to have caused the economic downturn and subsequent depressed real estate market. Therefore, any usage of trade to continually renew the notes at interest only into perpetuity were excluded from the contract.

In the alternative, should it have been deemed that such a usage of trade was incorporated into the contract, the usage of trade in the lending industry had changed prior to the Appellants executing the renewal notes with Respondent. Charles Gray admits in his deposition that he was unsure any bank would have talked to him about refinancing the loans and that he did not think any other bank would refinance the loans at interest only. Therefore any usage of trade wherein the lending institutions continually renewed notes at interest only had been dispelled.

The Appellants further argue that a course of dealing had been established. Charles Gray admits in his deposition he did not have a banking relationship with Respondent prior to signing the initial notes.[19] Since this was the first banking relationship the Appellants had with Respondent, no course of dealing can be established. The Appellants have asserted that their course of dealing with Shane Smith carried over to Respondent and became part of the contract. As stated previously Peggy Gray states that Shane Smith only guaranteed interest only notes "as long as everything was going good at Keowee."[20] Therefore, any course of dealing wherein the notes were renewed with interest only payments into perpetuity should not form part of the contract as it was specifically excluded by Respondent.

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[19] Deposition of J. Charles Gray dated March 25, 2013 at page 52, lines 7-9. (R. p. 272, lines 7-9).
[20] Deposition of Peggy B. Gray dated March 25, 2013 at page 19, line 3. (R. p. 365, line 3).

The Appellants have failed to establish any usage of trade or course of dealing wherein the notes would be extended with interest only terms into perpetuity and therefore the Appellants have failed to establish any breach of contract by Respondent. The Appellants admit executing the notes and pledging the property as collateral for the loans. The Appellants further admit they accepted the interest only terms for one year and that Respondent had the right to foreclose once the Appellants breached the contract by failing to make their monthly interest payments.

The terms of the notes and mortgages are clear, unambiguous and speak for themselves. The Appellants' own admissions detail that no employee or agent of Respondent ever promised interest only terms into perpetuity. Therefore the Appellants' claim for Breach of Contract Accompanied by a Fraudulent Act and/or Fraudulent Intent must fail.

As the Appellants have failed to establish any breach of contract, the Appellants claim lies solely on a claim for fraud. "In the absence of a breach of contract, the plaintiffs proper cause of action will generally be for fraud in the inducement" *Floyd v. Country Squire Mobile Homes, Inc.* 287 S.C. 51, 54, 336 S.E.2d 502, 503 (Ct. App. 1985).

III. Appellants have failed to set forth facts stating a claim for Fraud.

Kahn Construction co. vs. South Carolina National Bank of Charleston restates the well established rule concerning fraud in South Carolina.

> "In order to recover in an action for fraud and deceit, based upon misrepresentation, the following elements must be shown by clear cogent and convincing evidence: (1) a representation; (2) its falsity; (3) its materiality; (4) either the knowledge of its falsity or a reckless disregard of its truth and falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon;

(9) the hearer's consequent and proximate injury. Failure to prove any one of the foregoing elements is fatal to recover." *Kahn Construction Co. vs. South Carolina Nation Bank of Charleston*, 275 S.C. 381, 384, 271 S.E.2d. 414 (1980).

At the summary judgment stage, the Appellants failed to demonstrate all nine elements of Fraud. The Appellants' allege that the Respondent represented that identical renewal loan terms would be extended into perpetuity. However, The Appellants admit in their depositions that no one employed by Respondent ever stated that the terms of the original loans from Respondent would be renewed with identical terms into perpetuity. Peggy Gray details in her deposition that Shane Smith stated that the loans would be renewed at interest only as long as Keowee was doing well. The Appellants both admit that when the loans matured, the market on Keowee was in an economic decline. Peggy Gray further admits in her depositions that she would estimate the value of the lot she purchased to be $50,000.00.[21] See Deposition of Peggy B. Gray at Page 21, line 11. (*See* R. p. 367, line 11).

When asked during her deposition if Respondent's employee had made a fraudulent statement to her, the Appellant, Peggy Gray, stated that no employee or agent of Respondent had. Therefore the Appellants have failed to establish any false representation made by Respondent. Absent a representation that could be considered false and material there is no genuine issue as to any material fact in regards to the Appellants' counterclaim for Fraud.

[21] Deposition of Peggy B. Gray dated March 25, 2013 at page 21, line 11. (R. p. 367, line 11).

IV. Breach of Fiduciary Duty

A fiduciary relationship exists when a person places special trust or confidence in another. *O'Shea v. Lesser,* 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992). However, "The normal relationship between a bank and its customer is one of creditor-debtor and not fiduciary in nature." *Burwell v. South Carolina National Bank,* 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986). The Appellants admit neither Respondent, its agents or employees advised the Appellants on the purchase of the properties that are the subject matter of this litigation, nor did Respondent ever misrepresent the terms of the loan documents they signed. The Appellants are seasoned and experienced real estate investors. Charles Gray admits that he has worked in the real estate business for over ten years and was familiar with the risk/rewards of investment opportunities. It is clear the Appellants knew the risks of real estate investing and understood the loan terms being extended to them by Respondent at all times. The Appellants own depositions establish there was no reason for them to place special trust in the Respondent or its employees as they are sophisticated real estate investors and experienced borrowers. The relationship between the Appellants and the Respondent was that of a creditor-debtor and not fiduciary in nature. Therefore Respondent owed no fiduciary duty to The Appellants. Even if a fiduciary relationship existed the Appellants fail to identify any action of Respondent which would have resulted in a breach of a fiduciary relationship. Once again the Appellants received what they requested from Respondent.

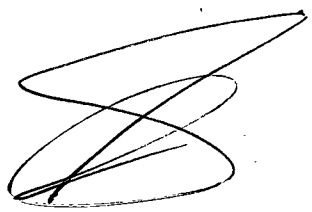
V. South Carolina Unfair Trade Practices Act

As set out hereinabove, Respondent acted in good faith in making the mortgage loans which are the subject of this litigation. Respondent never misrepresented the loan

terms to the Appellants and has fully complied with all agreed upon loan terms. The Appellants point to no deceptive, willful acts that would rise to the level of unfair trade practices. The Appellants have provided no evidence that there was any bank conduct in making their loans which adversely affected the public interest. The Appellants have failed to establish any evidence that shows that there is a genuine issue of material fact that the Respondent has violated the unfair trade practices Act. Accordingly, their claim must fail. *Robertson vs. First Union Nat'l Bank,* 350 S.C. 339, 565 S.E.2d 309 (Ct. App. 2002).

CONCLUSION

As shown herein, Respondent never guaranteed that Appellants' loans would be renewed with interest only payments into perpetuity. The Appellants were seasoned real estate investors with full knowledge and understanding of mortgage loan transactions. The Appellants received precisely what they bargained for. Respondent has complied with the terms of the notes and mortgages and Appellants have failed to provide any evidence of a fraudulent statement, breach of contract, breach of fiduciary duty or unfair trade practices.



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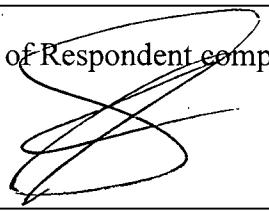
Of Whom PEGGY B. GRAY is an APPELLANT

CERTIFICATE OF COUNSEL

I hereby certify that The Final Brief of Respondent complies with Rule 211(b).



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CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2015 a copy of the Final Brief of Respondent was served by regular United States Mail to:

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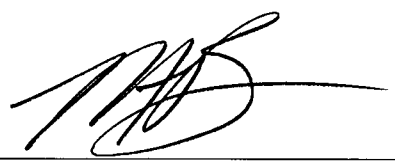

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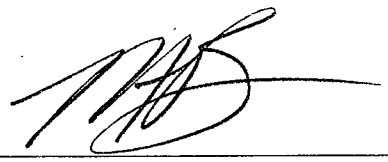

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