

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APR 19 2015

APPEAL FROM GEORGETOWN COUNTY SC Court of Appeals  
Court of Common Pleas  
The Honorable Joe M. Crosby, Master-In-Equity

Case No. 2011-CP-22-0180  
Appellate Case No. 2013-001447

Kennedy Funding, Inc. as predecessor-in-interest, and  
BNP Paribas ..... Respondents,

v.

Pawleys Island North, LLC, Will Darwin Wheeler, Peggy Wheeler-Cribb, and J.  
Mars Sapp, Defendants,  
of whom Pawleys Island North, LLC, Will Darwin Wheeler and Peggy Wheeler-  
Cribb  
are Respondents and

J. Mars Sapp is the.....Appellant.

REPLY TO RESPONDENTS KENNEDY FUNDING, INC.'S AND BNP  
PARIBUS' RETURN TO PETITION FOR REHEARING BY APPELLANT

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Attorneys for Appellant J. Mars Sapp

Respondents Kennedy Funding, Inc. and BNP Paribas (collectively “Kennedy”) served their return to Appellant J. Mars Sapp’s (Sapp) petition for rehearing, and Sapp now submits this brief reply memorandum in support of his petition for rehearing.

1. Kennedy’s return demonstrates that Kennedy either misapprehended the fundamental basis for Sapp’s Petition for Rehearing or Kennedy cannot marshal a credible argument against it.
  - a. Kennedy asserts in its argument that the Kennedy loan to Pawleys was not fraudulent, a proposition which – however – is not argued in the Petition and is not relied upon by Sapp. As between Pawleys and Kennedy, that loan may be valid and enforceable, but that does not translate into a finding that Kennedy’s mortgage has priority over Sapp, Wheeler’s defrauded creditor. Whether the mortgage transaction between Pawleys and Kennedy was fraudulent is inconsequential to Sapp’s contention that his judgment lien has priority over the mortgage given by the fraudulent grantee to Kennedy. *See, Coleman v. Daniel*, 261 S.C. 198, 199 S.E.2d 74 (1973). In *Coleman*, the Supreme Court gave priority to the defrauded judgment creditor without even addressing the issue of the lender’s knowledge of the fraudulent conveyance. Here, Kennedy made the loan with actual notice, or at the very least inquiry notice, of the essential facts constituting the fraudulent conveyance, and the property should first be subject to Sapp’s judgment lien.
  - b. Kennedy has yet to cite a case to either the lower court or this Court in which a court has enforced a deed or mortgage over a fraudulent conveyance

where the grantee or mortgagee took his interest in the property with notice of the fraudulent conveyance. In contrast, none of the cases cited by Sapp enforce a mortgage (or deed) where the mortgagee has notice of a previous fraudulent conveyance of the mortgaged property.

2. Kennedy had actual notice of the essential facts of the fraudulent conveyance. At the least, Kennedy was on inquiry notice of these facts. Under either actual or inquiry notice, Kennedy had a legal duty to make reasonable inquiry into Sapp's equitable claim which is the subject of this litigation. The Opinion appears to excuse Kennedy from such inquiry, however, by adverting to Kennedy's supposed reliance on an opinion letter from borrower's counsel. Such reliance, however, was actually misplaced, as this Court recognized in *Horry County v. Ray*, 382 S.C. 76, 674 S.E.2d 519 (Ct. App. 2009). In that case, this Court expressed its reluctance to impute the knowledge of a borrower's counsel to the lender. In the present case, however, the facts giving rise to the fraudulent conveyance were known not just by borrower's counsel, but were also known by Kennedy's own counsel, and by Kennedy itself.

At no time did Kennedy, charged with the duty to make a reasonable inquiry, ever seek assurance from Sapp that Sapp had no interest in the property, which assurance Sapp surely would not have given since the conveyance and following mortgage would necessarily result in Sapp being unable to collect his judgment and additional litigation of which this case is "Exhibit 1." R. p. 719, 1. 1 – p. 721, 1. 2.

In *Horry County*, this Court found that inquiry should have been directed to the defrauded creditor (Horry County), or in this case, Sapp. Although this Court ultimately denied Horry County's claim of an equitable lien, it did so under the unique facts of that case. In *Horry County*, it was questionable if the lender was on any notice of the County's equitable claim to the property, but this Court determined that at the time such inquiry should have been made that the County would have assured the lender that the County had been paid in full.

Even if the title examination put HCSB on inquiry notice of the County's claim, it appears any inquiry would have resulted in assurances from the County that the matter had been or was about to be resolved.

*Horry County*, 382 S.C. at 83, 674 S.E.2d at 523 (footnotes omitted)

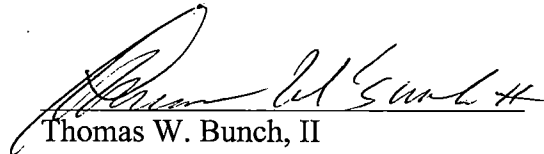
In the case before this Court, Kennedy's title examination and due diligence actually discovered the facts giving rise to the fraudulent conveyance. However, Kennedy made no inquiries to Sapp. Had Kennedy done so, Sapp would not have given assurance that Wheeler's debt to him had been paid (because it was not) or that the case against Wheeler was resolved (because it was not). Because of Kennedy's discovery of the facts giving rise to the fraudulent conveyance and its failure to make any inquiries to Sapp, Kennedy is not a good faith purchaser for value without notice, and its mortgage must be subordinated to Sapp.

3. Despite Kennedy's reliance on the recording statute and *Atlas Supply Co. v. Davis*, 273 S.C. 392, 256 S.E.2d 859 (1979), Kennedy has yet to cite a case where the recording statute can be used to protect a fraudulent grantee or one who takes his interest in property from a fraudulent grantee. Neither has

Kennedy addressed this Court's precedent in *Leasing Enterprises, Inc. v. Livingston*, 294 S.C. 204, 363 S.E.2d 410 (Ct. App. 1987) (holding that the recording statute does not apply where there is a fraudulent conveyance), or *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 715 S.E.2d 348 (Ct. App. 2011) (holding that the recording statute does not protect a recorded mortgage over a known equitable, but unrecorded interest in property) .

As stated in the Petition for Rehearing, "in the face of no contrary authority cited by the Respondents, under the holdings of *Coleman*, *Rilling*, *Messervy*, *Brunson*, *Leasing Enterprises, Inc.*, *Matthews*, and *Wingard*, this Court should rehear this case and issue its decision that the orders of the lower court be reversed in their entirety, and that the case be remanded to the Master-in-Equity to conduct a sale of the property to satisfy first Sapp's judgment against Wheeler, with any excess proceeds payable to Kennedy."

Respectfully submitted,



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Sapp, Defendants,  
of whom Pawleys Island North, LLC, Will Darwin Wheeler and Peggy Wheeler-Cribb  
are Respondents and


J. Mars Sapp is the .....Appellant.

PROOF OF SERVICE

I certify that I have served a copy of the Reply To Respondents Kennedy Funding, Inc.'s and  
BNP Paribus' Return to Petition for Rehearing by Appellant on opposing counsel by  
depositing a copy of it in the United States Mail, postage prepaid, on April 13, 2015 addressed  
as follows:

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April 13, 2015

**VIA HAND DELIVERY**

The Honorable Jenny A. Kitchings, Clerk of Court  
South Carolina Court of Appeals  
1015 Sumter Street  
Post Office Box 11629  
Columbia, SC 29211

**Re: Kennedy Funding, Inc., as predecessor-in-interest, and BNP Paribas  
v. Pawleys Island North, LLC, et al of whom J. Mars Sapp is the  
Appellant  
State Court Case No. 2011-CP-22-00180  
Appellate Case No. 2013-001447  
File No. 30440-0003**

Dear Ms. Kitchings:

Enclosed for filing please find the original and seven copies of the Reply To Respondents Kennedy Funding, Inc.'s And BNP Paribus' Return to Petition for Rehearing by Appellant in the referenced matter. Please return a clocked copy with our courier.

By copy of this letter, I am serving same upon opposing counsel.

Thank you for your consideration of this matter.

Yours very truly,

ROBINSON, MCFADDEN & MOORE, P.C.

  
Thomas W. Bunch, II

TWB:aelw  
Enclosure

cc: Robert H. Jordan, Esquire (w/enclosure)  
Robert H. Gwinn, III, Esquire (w/enclosure)