

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEE COUNTY
Court of Common Pleas

W. Jeffrey Young, Presiding Judge, Third Judicial Circuit

Appellate Case No. 2014-0002451

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SC Court of Appeals

Ernestine N. Palmer, as Trustee of the
Article IV Trust created under the Will of
Mary Denman Newman, deceased; Ronald
O. Palmer; Ernestine N. Palmer, as Trustee
of the Article IV Trust created under the
Will of James E. Newman, deceased,

Respondents,

v.

Hatcham Grove, Inc., and David H.
Lucas,

Appellants.

REPLY BRIEF OF APPELLANTS

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ARGUMENT

- I. The circuit court erred by finding that Respondents ascertained the Appellants' attorney preference as to the legal counsel to be employed to represent Appellants in the transaction prior to the closing.

Section 37-10-102(a) of the South Carolina Code provides, in pertinent part: “[w]henever the primary purpose of a loan that is secured in whole or in part by a lien on real estate is for a personal, family or household purpose ... [t]he creditor *must ascertain prior to closing* the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction...” S.C. Code § 37-10-102(a) (emphasis added) (hereinafter referred to as the “Attorney Preference Statute”). A violation of the Attorney Preference Statute is enforced by section 37-10-105(A) of the South Carolina Code, which states: “[if] a creditor violates a provision of this chapter, the debtor has a cause of action ... to recover actual damages and also a right in an action ... to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars.” S.C. Code § 37-10-105(A). Compliance may be established by including the preference information on or with the credit application so that the information is provided on a form substantially similar to a form distributed by the administrator, or providing written notice to the borrower of the preference information with the notice being delivered or mailed no later than three business days after the application is received or prepared. S.C. Code § 37-10-102(a)(1)-(2). If a creditor uses a preference notice form substantially similar to a form distributed by the administrator, the form is in compliance with this section. Id.

Respondents have failed to offer any evidence to show that they ascertained the Appellants' attorney preference prior to the closing. Appellant Lucas' deposition testimony, Appellants' response to Interrogatory 25, and the Return to Plaintiffs' Motion for Summary

Judgment unequivocally state that Appellants were not notified by Respondents of their right to select an attorney to represent them at the closing, that Respondents did not ascertain Appellants' attorney preference prior to the closing, and that Respondents did not obtain an executed attorney preference form or any other writing compliant with the statute from Appellants. The foregoing was part of the written record presented to the Circuit Court and from which Respondents are simply unable to satisfy their burden to show they have complied with their statutory obligations. As a result, the Circuit Court erred in granting summary judgment on Appellants' claim for violation of the Attorney Preference Statute.

While the statute contains qualifying language that a creditor 'may' show compliance by using a form or providing written notice to the borrower of their right to select an attorney, it categorically states that a creditor must ascertain the preference of the borrower prior to the closing. The loan closing file produced by Respondents is devoid of any documentation setting forth the statutorily required information before the closing. R. pp. 163; 197-254.¹ In response to Respondents' Interrogatory 25, Appellants stated:

25. Please list each and every document, correspondence, e-mail, or other evidence you contend support the allegations of Paragraph 54 of your responsive pleading.

RESPONSE #25: Defendants object to this interrogatory on the grounds that it is overly broad and unduly burdensome in failing to include an appropriate temporal limitation, not reasonably calculated to lead to the discovery of admissible evidence, and to the extent the information sought is already in Plaintiffs' possession and/or readily available to them. Notwithstanding the foregoing objections, Defendants state that Plaintiffs failed to secure an Attorney Preference Form from Defendants in connection with the subject loan closing; or otherwise comply with the applicable statute by ascertaining Defendant's right to choose an attorney to represent them in the transaction prior to the closing.

(emphasis added).

¹ Plaintiffs' Responses to Defendants' Request for Production from Palmer-0001 through Palmer-0462 are not relevant to this appeal.

And contrary to the selective excerpts of Appellant Lucas' testimony offered by Respondents as proof of their alleged compliance, the entire colloquy pertaining to the Attorney Preference Statute shows that the Respondents selected the closing attorney for the transaction without consulting Appellants, that Appellants were not represented by counsel in the closing, and that the Respondents' selection of the closing attorney was previously decided by Respondents, leaving Appellants with no option to select an attorney to represent them in the transaction:

Q. Jimmy Segars, do you know him?

A. I do.

Q. How long have you known him?

A. Well, I've known him -- I've known about him ever since he was born, but known him, probably ten years. Since I moved back up here to Lee County.

Q. And Mr. Segars had represented you on several transactions prior to this one here, had he not?

A. Yeah, he did not represent me on this one.

Q. He did?

A. He did not, no. That I know of. I don't know what technically it would have been -- he represented Mr. Palmer and the trust.

Q. So how did Mr. Palmer, who is from Texas, know to get in touch with Jimmy Segars?

A. At my recommendation.

Q. So you told him as you all were discussing this loan, why don't you go see Jimmy Segars?

A. No.

Q. What did you say?

A. I didn't say anything. He went to Jimmy Segars.

Q. How did he get to Jimmy Segars?

A. He had dealt with Jimmy Segars on matters pertaining to Grease Guard several years prior.

Q. Now, you just said a minute ago it was on your recommendation.

A. No, I did not. You said, how did he me[e]t Jimmy Segars, and I said it was on my recommendation. This was not when he met Jimmy Segars. He met Jimmy Segars several years before that in negotiating with -- about Grease Guard and about other matters and about the first loan that he made here.

Q. Did you want somebody else to represent you?

A. No. I was not -- no. I mean, I did not -- it was what it was. It was presented as a *fait accompli*.

Q. Did you ever voice any objection to Jimmy Segars?

A. No, I did not.

R.pp. 135-137.

No matter how tortured a reading Respondents attempt to impart, this testimony does not show that Respondents provided Appellants with the requisite statutory information prior to the closing. It is immaterial whether Appellant Lucas knew the closing attorney, had used him in the past for other matters, or even recommended him to the Respondents years prior to the subject transaction; his testimony plainly states that he was not represented in the closing and that the selection of Mr. Segars by Respondents was presented to him as a "*fait accompli*." Even so, had the Appellants recommended Segars to close the transaction at issue and wanted Segars to represent Appellants in all aspects of the closing, which Appellants deny, it is entirely extraneous to determining whether Respondents notified Appellants of their right to select an attorney to represent them in the transaction.

There is little case law on the statute; however a review of the foundational cases is relevant to understanding the purpose of the statute and its requirements. In Tilley v. Pacesetter Corp., the Supreme Court found that there was no separate statement *or* attorney/insurance preference statement to show the creditor's compliance with the Attorney Preference Statute, and

therefore the trial court properly ruled that Pacesetter had not substantially complied with the statute. See Tilley v. Pacesetter Corp., 333 S.C. 33, 39, 508 S.E.2d 16, 19 (1998). Tilley distinguished the Davis v. NationsCredit Financial Services Corp. decision, which addressed the lender's use of a separate piece of paper to ascertain a borrower's preferences of legal counsel and hazard insurance, rather than including a preference statement on the first page of the credit application. See Davis v. NationsCredit Financial Services Corp., 326 S.C. 83, 484 S.E.2d 471 (1997). There the Court held a creditor need only show substantial compliance to satisfy the statute, such as providing a clear and prominent request for the information. Id. In contrast to Davis, the timing of the attorney preference disclosure was at issue in King v. NationsCredit Financial Services Corp., where the Court determined the substantial compliance standard could not apply to the requirement to provide the disclosure contemporaneously with the loan application. See King v. NationsCredit Financial Services Corp., 386 S.C. 82, 687 S.E.2d 321 (2009).

While Davis and King address the Attorney Preference Statute as it existed before May 30, 1996, they are nevertheless relevant to the instant case in that the prior version still required a creditor to ascertain a borrower's attorney preference prior to the closing transaction based upon the legislative purpose of the statute "to protect borrowers." "[T]he suggestion that the attorney preference disclosure may be made at closing borders on frivolity." King, 386 at 91, 687 at 325. Similarly to Tilley, the Respondents have not offered any documentation to show that they provided Appellants the statutorily required information. And like King, Respondents cannot satisfy the timing requirement to provide the information prior to the closing; Respondents are unable to point to a specific time when they allegedly notified Appellants of their right to select an attorney. The evidence they offer plainly shows Respondents' closing attorney selection was

presented to Appellants as a “*fait accompli*.” As a result, they cannot demonstrate compliance with the statute.

The Respondents have failed to provide any evidence of their compliance with S.C. Code § 37-10-102, *et seq.* For these reasons, the ruling of the circuit court for partial summary judgment should be reversed as to Appellants’ claim for violation of the Attorney Preference Statute.

II. Issues of material fact exist regarding Respondents’ compliance with the Attorney Preference Statute.

“Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law.” Rule 56(c), SCRCF; Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). “Summary judgment should be granted when plain, palpable, and undisputable facts exist on which reasonable minds cannot differ.” Trico Surveying, Inc. v. Godley Auction Co., 314 S.C. 542, 431 S.E.2d 565 (1993). “To determine whether an issue of fact exists, the court must view the evidence and all its inferences in a light most favorable to the nonmoving party.” Koester v. Carolina Rental Ctr., Inc., 313 S.C. 490, 443 S.E.2d 392 (1994).

Respondents argue they have satisfied their requirements as a creditor under the Attorney Preference Statute, but have not offered any competent evidence of their alleged compliance. What Respondents attempt to offer in support of their assertion that they did ascertain the Appellants’ preference of the legal counsel to represent them in the transaction prior to the closing merely shows that Appellant Lucas knew the closing attorney and had recommended him to Respondents at some point in the past. That is simply not enough to show Appellants are entitled to summary judgment as a matter of law. There is no dispute that Respondents have not offered any evidence that they provided the statutorily required information to Appellants in

writing prior to the closing. Nor have Respondents offered any affirmative evidence to refute Appellants' claim that they were never provided the statutorily required information prior to closing. At minimum, the evidence offered by Respondents indicates that it is an issue of material fact whether actual evidence of Respondents' compliance exists. Summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).

A plain reading of the record before the Circuit Court does not contain plain, palpable, and undisputable facts demonstrating Respondents notified Appellants of their right to select an attorney of their choosing to represent them in the transaction prior to closing. Accordingly, issues of material fact exist and it was improper for the Circuit Court to grant summary judgment on Appellants' claim for violation of the Attorney Preference Statute.

III. The primary purpose of the subject loan was for personal, family and household purposes and therefore the provisions of the South Carolina Consumer Protection Code are applicable.

The South Carolina Consumer Protection Code applies to consumer credit transactions made within this State and provides that a consumer credit transaction is made in this State if: (a) a signed writing evidencing the obligation or offer of the consumer is received by the creditor in this State; or (b) the creditor induces the consumer who is a resident of this State to enter into the transaction by face-to-face solicitation in this State. S.C. Code § 37-1-201(1)(a)-(b). For purposes of this section, a "consumer credit transaction" means a consumer credit sale or consumer loan or a refinancing or consolidation thereof, a consumer lease, or a consumer rental-purchase agreement. S.C. Code § 37-1-201(7)(b). "Consumer" means the buyer, lessee, or

debtor to whom credit is extended in a consumer credit transaction.² Chapter 10 of the Consumer Protect Code applies to designated loan transactions other than consumer loan transactions (Sections 37-3-104 and 37-3-105). S.C. Code § 37-10-101.

A “consumer loan is a loan made by a person regularly engaged in the business of making loans in which (a) the debtor is a person other than an organization; (b) the debt is incurred primarily for a personal, family, or household purpose; (c) either the debt is payable in installments or a loan finance charge is made; and (d) either the principal does not exceed twenty-five thousand dollars or the debt is secured by an interest in land. S.C. Code § 37-3-104(a)-(d). Except as otherwise provided in S.C. Code § 37-3-105(2), unless the loan is made subject to this title by agreement (Section 37-3-601), “consumer loan” does not include a loan secured by a first lien or equivalent security interest in real estate. S.C. Code § 37-3-105(1). However, loans excluded from the definition of a “consumer loan” pursuant to subsection (1) also are subject to the provisions of Chapter 7, Chapter 10, Chapter 22, and Chapter 23 of this title. S.C. Code § 37-3-105(3).

The promissory note executed by Appellants constitutes a signed writing evidencing the obligation of Appellants received by the Respondents in this State. R. p. 197. The mortgage securing the note is a first lien in real estate, and the subject property is the primary residence of Appellant David Lucas, the guarantor for the subject note. R. pp. 198-206. While the loan is by definition excluded from the definition of a “consumer loan,” it remains subject to the provisions of Chapter 10 of the Consumer Protection Code where the Attorney Preference Statute is codified because it is specifically included in the list of loans what are subject to the provisions

² In addition, for purposes of Chapters 10, 11, 13, and 15 of this title... the term also includes: (1) a natural person who is a purchaser or lessee or prospective purchaser or lessee in any transaction arising out of the production, promotion, sale, or lease of consumer goods or services; or (2) a natural person who is the object of a solicitation or offer relating to a contest, game, or prize offer subject to Chapter 15. S.C. Code § 37-1-201(10)(1)-(2).

of Chapter 7, Chapter 10, Chapter 22, and Chapter 23. S.C. Code § 37-3-105(3). Additionally, Chapter 10 applies to loans for personal, family or household purposes secured by a lien on real estate. S.C. Code § 37-10-102.

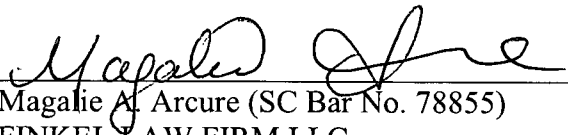
The mortgage loan obtained by Appellants from Respondents was a refinance transaction that paid off an existing mortgage on the subject property from the Pee Dee Farm Credit ACA of Florence. R. pp. 207-208. The proceeds were also used to pay off a prior debt of Appellant Lucas, individually. R. pp. 67-68. Because the subject loan is secured by real estate and was used to pay a prior personal debt of Appellant Lucas and to provide Appellants the necessary funds to maintain the family farm on the property, the subject note and mortgage fall under the purview of S.C. Code § 37-10-102. Thus the attorney preference provisions of the Consumer Protection Code apply to the within-captioned action.

CONCLUSION

Respondents have not demonstrated compliance with the provisions of S.C. Code § 37-10-102(a). This Court should reverse the order of the circuit court.

Respectfully submitted,

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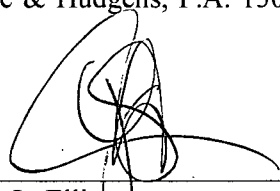
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PROOF OF SERVICE

I hereby certify that I have served the Final Brief of Appellants and Reply Brief of Appellants on Ernestine N. Palmer by depositing a copy of it in the United States Mail, postage prepaid, on June 18, 2015, addressed to her attorney of record, Kyle B. Parker, Pope & Hudgens, P.A. 1508 College Street, Newberry, South Carolina 29108.

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