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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Hon. R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2015-001345

Capital Bank, N.A.,

Respondent,

v.

Charles A. Moore a/k/a
Charles A.B. Moore

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals on May 27, 2015.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that summary judgment was properly granted prior to the completion of discovery?

2. Did the Court of Appeals err in holding that holding that the affidavit submitted in support of Capital Bank's summary judgment motion sufficiently demonstrated the affiant's personal knowledge, that the trial court did not err in considering the affidavit and its attached exhibits, and that this evidence was sufficient to support a grant of partial summary judgment regarding Petitioner's liability to Capital Bank?

STATEMENT OF THE CASE

This is an appeal from a circuit court order in a collection case granting partial summary judgment to Respondent as to the issue of liability only, and not as to the amount of damages owed. This is also an appeal from the circuit court order denying Appellant's motion to alter, amend or reconsider that prior order.

Respondent Capital Bank, N.A. commenced this collection action for suit on a promissory note with an alleged principal balance due of $753,245.09, plus fees and costs, by filing a summons and complaint in the Charleston County Court of Common Pleas on October 12, 2011, which was duly served on Petitioner Charles A. Moore in a

timely manner (R. pp. 9-18). Petitioner filed a timely Answer to the Complaint raising defenses and counterclaims on May 29, 2012 (R. pp.19-26). Petitioner's Answer disputed both that Petitioner was liable to Respondent and the amount of Respondent's claim (R. pp. 20, 25).

On September 28, 2012, Respondent filed a Motion for Summary Judgment ("MSJ") seeking summary judgment against Petitioner on Respondent's Complaint and on Petitioner's counterclaims (R. p. 27). Respondent simultaneously filed an Affidavit of Randy Foster in support of the MSJ (Foster Affidavit, R. pp. 28-40) and later on February 12, 2013 filed an Affidavit of Christopher T. Colwell (Colwell Affidavit, R. pp. 41-51), who is Respondent's attorney of record. Petitioner filed a timely Objection to Respondent's MSJ on February 12, 2013 (Objection, R. pp. 52-53) and simultaneously filed an Affidavit of Charles A. Moore (Moore Affidavit, R. pp. 54-55) in support of that Objection.

A Consent Scheduling Order (Scheduling Order, R. p. 1) was filed with the court on November 2, 2012, and was later amended by court order on March 13, 2013 to extend the time to complete written discovery from the prior deadline of March 1, 2013 until March 15, 2013 (Amended Scheduling Order, R. pp. 5-6).

On February 12, 2013, Judge R. Markley Dennis, Jr. held a hearing on the MSJ (MSJ Transcript, R. pp. 95-108). By order filed March 4, 2013, the court granted partial summary judgment to Respondent as to liability only, and denied summary judgment to Respondent as to both the amount of damages and Petitioner's counterclaims (MSJ Order, R. pp. 3-4).

Petitioner filed a timely Rule 59(e) motion on March 7, 2013 to alter, amend or reconsider the MSJ Order, which was later amended on March 20, 2013 (Amended Rule

59(e) Motion, R. pp. 56-68). Only the Amended Rule 59(e) Motion is included in the Record on Appeal, since the original motion would be unnecessarily duplicative since only minor changes were made, and the changes are not in dispute. A hearing before Judge Dennis on the motion to reconsider was held on May 28, 2013 (MTR Transcript, R. pp. 109-119). Petitioner's Brief in support of the motion to reconsider was also filed on May 28, 2013 (MTR Brief, R. pp. 69-80). By a Form 4 Judgment filed May 29, 2013, the court summarily denied this motion (MTR Order, R. pp. 7-8).

Petitioner filed a timely Notice of Appeal of both the MSJ Order and the MTR Order on July 8, 2013 (Notice of Appeal, R. p.120). The Court of Appeals affirmed the judgment of the circuit court. Capital Bank, N.A. v. Charles A. Moore, Unpub. Op. No. 2015-UP-152 (S.C. Ct. App. Filed March 18, 2015). Petitioner seeks a writ of certiorari to review that decision.

ARGUMENT

1. THE COURT OF APPEALS SHOULD HAVE HELD THAT SUMMARY JUDGMENT WAS IMPROPERLY GRANTED PREMATURELY BEFORE THE PETITIONER HAD A FULL AND FAIR OPPORTUNITY TO COMPLETE DISCOVERY.

Respondent's summary judgment motion was premature since discovery was not complete, and Respondent's motion should therefore either have been denied without prejudice or continued until such time as discovery was complete. As the Supreme Court stated in *Baughman v. AT&T*, 306 S.C. 101, 112-114, 410 S.E.2d 537 (1991), " Since it is a drastic remedy, summary judgment "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." [citations omitted].

This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery [citations omitted]." It is worth noting that in the *Baughman* case, more than three years had elapsed between the filing of the action and the premature grant of summary judgment. Also, in evaluating whether discovery was complete in the case of *Robertson v. First Union National Bank*, 350 S.C. 339, 565 S.E.2d 309 (Ct. App., 2002), our Court of Appeals stated, "Generally, it is not premature for the trial court to grant summary judgment after all relevant parties have been deposed because the litigants have had a full and fair opportunity to develop the record in the case [citations omitted]." In this case, the time frame between the initial filing of the action and the court's grant of summary judgment was much shorter than the time allowed in *Baughman*. In addition, the parties have a scheduling order in effect (Scheduling Order, R. p. 1), which allowed more time for discovery. The MSJ hearing was held on February 12, 2013. As can be seen from the referenced one page Scheduling Order (R. p. 1), written discovery did not have to be completed until March 1, 2013, which deadline was later extended on March 13, 2013 until March 15, 2013 (Amended Scheduling Order, R. p. 5). At the time of the MSJ hearing in this case, Petitioner had served Respondent with pending written discovery requests which had not yet been answered by Respondent. In addition, the deadline to take depositions did not expire until April 15, 2013. As of the time that the trial court denied defendant's Amended Rule 59(e) Motion in this case, only the Respondent had taken a deposition, thereby putting the Petitioner at a disadvantage in spite of Petitioner's reliance upon the current scheduling order. The Petitioner still wishes to be able to take depositions in this case, including deposition questions related to whether or not plaintiff has admissible evidence proving plaintiff's standing to collect this debt and showing that

defendant is liable on plaintiff's claims and also regarding plaintiff's conflicting documents regarding the two different chains of assignments alleged in this case, as will be more fully detailed below regarding the next issue, all of which create material issues of fact that cannot be resolved without allowing further discovery. Also, although the consent order stated that the deadline to file dispositive motions was June 1, 2013, the MSJ hearing was held over three months prior to that time. As a result of the trial court granting summary judgment before discovery was complete, Petitioner was unable to verify the facts alleged by Respondent in both its Complaint and in the Foster Affidavit, which was the document upon which the trial court's decision was based.

2. THE COURT OF APPEALS SHOULD HAVE HELD THAT SUMMARY JUDGMENT WAS IMPROPERLY GRANTED BASED ON INCOMPETENT AND INADMISSIBLE EVIDENCE WHICH DID NOT SATISFY RESPONDENT'S BURDEN OF PROOF REGARDING PETITIONER'S ALLEGED LIABILITY TO RESPONDENT.

The affidavits submitted in support of Respondent's motion for summary judgment were incompetent or ineffective for that purpose and the documents attached or referenced in support of the Foster Affidavit were inadmissible.

A. "Under Rule 56(c), SCRCP, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. [citations omitted]. **Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case**, [emphasis added] the opponent cannot simply rest on mere allegations or denials contained in the pleadings." *Schmidt v. Courtney*, 357 S.C. 310, 317, 592 S.E.2d 326 (Ct. App., 2003). It is clear that the movant has the initial burden of proof. If the movant does not carry the

burden of proof to show the absence of a genuine issue of material fact, then the opposing party may prevail without even having to raise a defense (*Standard Fire v. Marine Contracting*, 301 S.C. 418, 421, 392 S.E.2d 460, 462 (1990)).

B. In order to be competent to support a motion for summary judgment, the affidavit must be proper in form. Respondent's Foster Affidavit was not proper in form for the following reasons:

1. The Foster Affidavit's jurat section does not comply with the form as suggested by the South Carolina Secretary of State on its website in its 2012 version of the South Carolina Notary Public Reference Manual. This manual is a state government public record and can be found online at http://www.sos.sc.gov/forms/Notary/NotaryPublicReferenceManual.PDF, and relevant excerpts are also attached to Petitioner's MTR Brief as Exhibit A (R. p. 83). Note that the notary does not state that the affidavit was "subscribed" before the notary as the official form requires. Also note that there is no indication as to how the notary identified the affiant.

2. Although the notary's jurat section is dated, there is no date in the body of the Foster Affidavit indicating what date the affiant signed the affidavit.

3. Although at the beginning of the Foster Affidavit the affiant states that he was "duly sworn", there is no indication as to what the affiant was swearing. The affiant does not swear that the allegations made in the affidavit are "true and correct" or that the affidavit is being made under penalty of perjury. This failure renders the affidavit unreliable, since essentially the affiant is swearing to nothing at all, and is not agreeing to any penalty that will be imposed for a failure to tell the complete truth. See *Nissho-Iwai American Corp. v. Kline*, 845 F. 2d 1300

(5th Cir., 1988), where the court found that an affidavit offered in defense of summary judgment motion was incompetent since it was "neither sworn nor its contents stated to be true and correct nor stated under penalty of perjury." Regarding the importance of the form of the oath in the affidavit, see also *Searcy v. SC Dept Education*, 303 S.C. 544, 547-48, 402 S.E.2d 486 (Ct. App., 1991).

C. In order to be competent to support a motion for summary judgment, an affidavit must be made on personal knowledge, pursuant to Rule 56(e). See also, *Dawkins v. Fields*, 354 S.C. 58, 64, 580 S.E.2d 433 (2003). Respondent's Foster Affidavit alleges only that the affiant has "knowledge", not personal knowledge, which is required (R. p. 28). Personal knowledge cannot be assumed if the affiant doesn't even allege it, but even a bare allegation of personal knowledge is not sufficient unless the affidavit states facts which would tend to show that the affiant does indeed have any personal knowledge that might be alleged. (*Antonio v. Barnes*, 464 F. 2d 584 (4th Cir., 1972)). Further, based on the language in the affidavit, the affiant's knowledge appears to be based on some indeterminate records the affiant has consulted, and is therefore not personal knowledge as required by Rule 56(e), SCRCP.

D. In order to be competent to support a motion for summary judgment, an affidavit must show affirmatively that the affiant is competent to testify to the matters alleged therein, pursuant to Rule 56(e), SCRCP. In the Foster Affidavit, the affiant alleges that he is an employee of the Respondent (R. p. 28, ¶ 1). That is insufficient to show competency to testify for the Respndent. We do not know whether the affiant is the President and CEO of the Respondent, or perhaps its janitor. Even if a title were given, that would not necessarily show the employee's

competence to testify to the facts alleged in the affidavit, but the failure to do so certainly makes that employee's competency an unresolved question of material fact. The affiant also claims to be authorized to make the Affidavit on behalf of the Respondent, which means essentially that the affiant is claiming to be acting as an authorized agent of the Respondent; however, other than this self-serving statement of agency, there is no other indication (such as a corporate resolution) that any such authority has been given to the affiant by the Respondent. *Klippel v. Mid-Carolina Oil, Inc.*, 399 S.E.2d 163, 303 S.C. 127 (Ct. App., 1990) stated that "[t]he law is clear in this state that statements made by an agent concerning the existence or extent of his authority are insufficient standing alone to establish agency." There is no statement by the Respondent itself that the affiant was an authorized agent of Respondent for the purpose of executing this affidavit.

E. Rule 56(e), SCRCP also requires that the affidavit set forth only facts that would be admissible in evidence *(Hall v. Fedor*, 349 S.C. 169, 175-176, 561 S.E.2d 654 (Ct. App. 2002)), including a requirement that sworn or certified copies of all papers referred to in the affidavit be attached to the affidavit. The Respondent has also failed to follow this portion of the Rule, so the Foster Affidavit is defective for this reason and the attached or referenced exhibits should be disregarded. The exhibits referenced in the Foster Affidavit are defective as follows:

1. The first document referenced in the Foster Affidavit is the promissory Note at issue in this case (R. p. 28). The affiant claims that a true and correct copy of the Note was attached to Respondent's Complaint; however, the affiant does not state how the affiant knows that the Note

copy attached was true and correct. Indeed, the Note was not even made payable to Respondent, so it is unlikely that an employee of Respondent would have personal knowledge of the signing of the Note or would have been present at the closing on the loan when the Note was signed. The affiant makes no claim to even having seen the original Note, so the affiant has not shown affirmatively that the affiant is competent to testify regarding the authentication of the copy of the Note attached to the Complaint.

2. In paragraph 3 of Respondent's Foster Affidavit (R. p. 28), the affiant references two separate documents, but in a way that causes the reader to be misled into thinking only one document is at issue. The first document referenced in this paragraph that the affiant attempts to authenticate is a Purchase and Assumption Agreement dated July 16, 2010 between the FDIC and NAFH National Bank; however, no sworn or certified copy of this document is attached to the affidavit as is required of documents referenced in the affidavit pursuant to Rule 56(e), so this document cannot be considered in support of Respondent's summary judgment motion. This omission is critical, since this document is an essential link in the chain of assignments of this Note. Further, the affiant has not demonstrated competence to authenticate this FDIC Agreement, since the affiant does not claim to be an employee of either party to that Agreement, and does not otherwise demonstrate personal knowledge of that Agreement. The affiant's statements that the Note was assigned pursuant to this Agreement are therefore conclusory, and should be

disregarded (*Dawkins v. Fields* at 68). The affiant attempts in vain to draw attention away from this omitted Agreement by referencing another document in paragraph 3, which is a "true and correct copy of an assignment of the Note" (emphasis added) attached as Exhibit A to the Foster Affidavit (R. p. 31). One might think that the referenced exhibit is the same missing assignment being referenced earlier in that same paragraph, but that is not the case. As can be seen from viewing Exhibit A, that purported Assignment is dated September 25, 2012, which is well after the Respondent commenced this litigation in 2011. This Assignment is worthless and appears to have been manufactured by Plaintiff for the sole purpose of perpetrating a fraud upon the court by attempting to create standing for the Respondent where none exists. Note first that this fraudulent Assignment purports to have a retroactive effective date of July 16, 2010, which might mislead one to believe that it is the same Assignment referenced earlier in paragraph 3, but that is not the case, since the parties to the two Assignments are different. The July 16, 2010 assignment is alleged to have been given from the FDIC to NAFH National Bank. The September 25, 2012 assignment purports to have been given from the FDIC to Capital Bank, N.A, but effective as of July 16, 2010, which is impossible for the reasons indicated below, and further evidence of fraud. The affiant states in paragraph 4 of the Foster Affidavit (R. p. 28) that NAFH National Bank didn't merge with Capital Bank, NA until June 30, 2011, so Capital Bank, NA couldn't possibly have received an assignment of this Note on July 16, 2010, since that is prior to the date

of the merger. (It appears that the person creating this fraudulent September 25, 2012 assignment overlooked that fact.) Another significant reason why the September 25, 2012 assignment is legally worthless, and further evidence of fraud upon the court, is that the affiant claims that the promissory Note was assigned by the July 16, 2010 Purchase and Assumption Agreement from the FDIC to NAFH National Bank. If this is true, then the FDIC had no beneficial interest left to convey to Capital Bank, NA on September 25, 2012, which makes the second purported assignment legally worthless. Its only logical purpose is to mislead the court and the Petitioner into thinking that the Respondent's chain of title to this promissory Note is complete, even though the July 16, 2010 Purchase and Assumption Agreement is completely missing from the record properly before this court. In any event, Respondent's two different versions of the chain of title of this Note create a conflict on a genuine issue of material fact, which should not be resolved by summary judgment (*Stevens & Wilkinson of South Carolina, Inc. v. City of Columbia*, 396 S.C. 338, 343, 721 S.E.2d 455, 458 (Ct. App., 2011). Further, Respondent's failure to produce the July 16, 2010 Agreement creates a question of material fact as to whether that Agreement actually exists, which should preclude summary judgment from being given to Respondent on its Complaint on the issue of whether Petitioner owes a debt to Respondent or not. In addition, Respondent's use of the fraudulent September 25, 2012 Assignment to support its claims should have caused the trial court to issue a Rule to Show Cause why Respondent should not

have been sanctioned for introducing a fraudulent document into the record of this case in support of Respondent's Complaint. Upon information and belief, Robert Hintelmann, who signed the fraudulent Assignment on behalf of the FDIC, was also employed by Respondent at the time this document was executed, thereby creating an apparent conflict of interest by his representing both parties to this Assignment; however, Petitioner is awaiting confirmation of this belief from Respondent's responses to pending discovery requests, which is a further reason why summary judgment is inappropriate at this time. The Petitioner further believes that assignments cannot be made retroactive as a matter of law (see Exhibit B attached to Petitioner's MTR Brief, which is an unpublished case, *OneWest v. Cullen*), and Respondent's attempt to do so should be disregarded by the court, except to the extent the court finds Respondent's conduct in creating the fraudulent Assignment to be sanctionable. If the court were for some reason to find that the September 25, 2012 assignment to be effective as of that date, then it would be clear that Respondent lacked standing to file the Complaint in this case when it was originally filed, so Respondent's summary judgment motion should be denied for lack of standing to have filed the Complaint at that time. (*Wells Fargo Bank, NA v. Marchione,* 69 A.D.3d 204, 887 N.Y.S. 2d 615 (2d Dept., 2009) (*Beaumont v. Bank of New York Mellon*, 81 So.3d 553 (Fla. 5th DCA, 2012) (*Vidal v. Liquidation Properties, Inc.*, 104 So.3d 1274, 1276 (Fla. 4th DCA, 2013). Petitioner further alleges that Respondent is aware of this defect in its litigation, which is why the

fraudulent retroactive September 25, 2012 assignment appears to have been created. Even if the court were to find that the September 25, 2012 Assignment were proper evidence in this case, Respondent has not submitted a sworn or certified copy of this document as an attachment to the Foster Affidavit as is required by Rule 56(e), SCRCP, so it is inadmissible for that reason as well.

3. The affiant next attempts to authenticate Exhibit B attached to the Foster Affidavit, which the affiant claims to be a true and correct copy of a certification letter sent by the Comptroller of the Currency Administrator of National Banks to a representative of North American Financial Holdings, Inc. (R. pp. 33-34). However, the affiant neither claims to have sent the letter nor to have received the letter, and there is no evidence as to how the affiant can have personal knowledge of this letter. Indeed the affiant doesn't even claim to have been employed by either of the parties to this letter, and there are no other facts to show that the affiant is competent to testify as to the authenticity of this letter. In addition, no sworn or certified copy of this letter in admissible form has been produced by the affiant, so the court should disregard this Exhibit B as well. Of course, this doesn't stop the affiant from claiming in paragraph 4 that this letter (to which the affiant was not a party) was made in the ordinary course of the Comptroller's business (which appears to be mere speculation without foundation), including the time that it was made, or that it was kept or maintained by the Respondent herein (even though the letter was not addressed to the Respondent and it is simply hearsay). The

affiant's willingness to make such obviously unfounded statements should cause the court to mark the affiant as an unreliable witness as to other statements made by the affiant as well. "The absence of an affirmative showing of personal knowledge of specific facts vitiates the sufficiency of the affidavits and, accordingly, summary disposition based thereon was improper." (*Antonio* at 585) The court should also disregard the affiant's conclusory statements regarding whether there was any merger between NAFH National Bank and Capital Bank, NA, since the affiant shows no basis for this belief other than the inadmissible certification letter attached as Exhibit B to the Foster Affidavit.

4. Respondent's Exhibit C attempts to authenticate default notices sent by Respondent to Petitioner on June 2, 2011 and August 12, 2011 (R. pp. 36-40). However, Respondent has not complied with Rule 56(e), SCRCP by attaching sworn or certified copies of these referenced documents, so they should be disregarded as inadmissible as well. In addition, the June 2, 2011 letter purports to be sent from NAFH National Bank to Petitioner, not from Respondent to Petitioner as the affiant claims, so there is no reason to believe that the affiant, as an employee of Respondent, would have any personal knowledge of the mailing of either the June 2, 2011 letter or the letter affiant claims was sent by Respondent's counsel to Petitioner. The affiant's willingness to testify to matters about which it appears he could have no personal knowledge further erodes affiant's credibility. These letters are also hearsay, and inadmissible both due to that fact and lack of proper authentication.

F. The affiant makes other allegations regarding the amount of debt that affiant claims is due from Petitioner, but the Petitioner does not address those allegations at this time, since the court has already ruled that Respondent is not entitled to summary judgment on the issue of the amount of any debt that may be owed.

G. The affiant makes some allegations in paragraph 9 of the Foster Affidavit (R. p. 29) regarding the date of Petitioner's last payment on the Note, but the affiant alleges no personal knowledge of that payment, and sets forth no facts that would allow the court to conclude that the affiant has shown affirmatively that the affiant is competent to testify to those allegations. Similarly, the affiant makes allegations about the Petitioner being in default under the terms of the Note, but likewise fails to establish the basis for that allegation or show competence to testify to that allegation. Petitioner therefore asks that the court disregard these allegations as well, since they fail to meet the standards of Rule 56(e), SCRCP.

Although Petitioner has raised all of the arguments above regarding the defects in the Foster Affidavit, upon which summary judgment was based, in both the trial court and the Court of Appeals, and in spite of the lack of evidence that the affiant in the Foster Affidavit demonstrated the necessary personal knowledge to make those allegations, both the trial court judge (R. p. 105, lines 15-19) and the Court of Appeals decision (at page 2) make the conclusory finding that the affiant had personal knowledge, although neither court has identified the specific facts in the Foster Affidavit which establish that knowledge as is required by Rule 56(e), SCRCP. In light of the detailed arguments that have been made by Petitioner pointing out the failure to establish the necessary personal

knowledge by the affiant in the Foster affidavit, the courts' reliance upon conclusory statements finding such knowledge, without reference to specific facts demonstrating the actual existence of personal knowledge is clear error. Petitioner further believes that there are currently no appellate cases in this state on the issue of the proper standards for establishing a competent and admissible affidavit used in support of summary judgment, and that this novel issue merits the careful consideration of our Supreme Court.

CONCLUSION

For the reasons stated, Petitioner ask this court to grant the petition for a writ of certiorari.

July 16, 2015

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served a copy of the Petition for Writ of Certiorari on the following parties by depositing a copy of it in the United States Mail, postage prepaid, on July 16, 2015, addressed as indicated below:

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The Honorable Jenny Abott Kitchings
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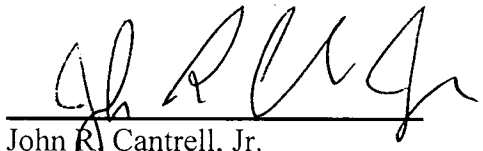
Dated this July 16, 2015



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