

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court Of Common Pleas

The Honorable Marvin H. Dukes, III

Appellate Case No. 2015-001312

Cynthia Griffis, Plaintiff,

v.

Cherry Hill Estates, LLC, Eugene O'Neil, and Ronald Faulkner, Defendants,

Cherry Hill Estates, LLC and Ronald Faulkner, Third Party Plaintiffs, Petitioners,

v.

Anthony E. Griffis, Third Party Defendant, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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JUL 21 2015

S.C. SUPREME COURT

Anthony E. Griffis
355 Park Ave SW
Aiken, SC 29081
(843) 368-5013
Pro Se Respondent

STATEMENT OF THE CASE

On October 10, 2007, Cynthia Griffis and Respondent Anthony E. Griffis, sold approximately 27 acres of property in Jasper County, to Petitioners. (HUD Settlement Statement, R. p. 213). As part of the consideration, Cynthia Griffis received a \$200,000.00 Purchase Money Promissory Note due on October 10, 2009, said Note containing the personal guarantees of Eugene O'Neil and Petitioners Ronald Faulkner. (Note, R. pp. 216-218). Additionally, a separate "Guaranty" was executed by Eugene O'Neil and Petitioners. (Guaranty, R. pp. 219-221). Petitioner Ronald T. Faulkner appointed John P. Qualey, Esq., as his attorney-in-fact, who executed said personal guarantees on behalf of Ronald Faulkner. (Power of Attorney, R. pp. 226-218). John P. Qualey, Esq., was also the settlement agent/attorney for the Petitioners in the closing. (HUD Settlement Statement, R. p. 213).

Following default on the Note by Petitioners, Cynthia Griffis brought action to collect said Note and to enforce the personal guarantees of Eugene O'Neil and Ronald Faulkner. As part of this litigation, Cherry Hill Estates, LLC and Ronald Faulkner as Third Party Plaintiffs, filed a Third Party Complaint against Anthony E. Griffis (Third Party Complaint, R. pp. 111-117). The Complaint alleged a pre-existing attorney-client relationship between Anthony E. Griffis and the Third Party Plaintiffs, and that Anthony E. Griffis was negligent and breached his ethical and fiduciary duties to Third Party Plaintiffs related to the sale of the property. (Amended Third Party Complaint, pp 4-7; R. pp.87-89). The Complaint alleges that Anthony E. Griffis did not advise Petitioners, in writing, to obtain independent legal counsel (Complaint, p 2, #7; p. 4, # 17,18; p. 6, # 25; R. pp. 87-89). However, Petitioners were represented at closing by independent counsel, John P. "Jack" Qualey, Esq., (Qualey deposition, p. 9, lines 10-13; p. 10, lines 21-22; R. pp.168-169).

On September 17, 2010, Anthony E. Griffis served an Answer and Counterclaim, in response to Third Party Plaintiff's Complaint, which Answer denied the substantive allegations of negligence and breach of fiduciary duty made by Third Party Plaintiffs.(Answer, R. pp. 100-110). Contemporaneously with the filing of his Answer and Counterclaim, Anthony E. Griffis filed a Motion to Dismiss pursuant to Rule 12(b), SCRCP, and S.C. Code Ann. §15-36-100 (Supp. 2010), for the failure of Petitioners to include the required expert affidavit with the Third-Party Complaint. (Motion, R. pp. 98-99).

On October 14, 2010, the trial court ruled that the First, Second, and Third Causes of Action of the Third-Party Complaint were dismissed without prejudice, and allowed Third-Party Plaintiff until November 14, 2010 to serve another Complaint "supported by the affidavit of an expert witness as required by S.C. Code Ann. Section 15-36-100 or to re-plead these matters so as not to require an expert affidavit". (Order dated October 26, 2010; R. pp. 10-11). On November 15, 2010, Third-Party Plaintiff/Petitioners filed the "Amended Third-Party Complaint", which included a purported expert affidavit notarized on November 11, 2010 (Amended Complaint and Affidavit, R. pp. 84-97). On December 23, 2010, Third-Party Defendant/Respondent moved for dismissal of the said causes of action based on S.C. Code Ann. §15-36-100(F) because the expert affidavit was not obtained within the statute of limitations (Motion dated December 23, 2010; R. pp. 79-80). This motion was denied on August 3, 2012, in which the court applied "equitable tolling" to allow Petitioners to file the required expert affidavit outside the applicable limitations period (Order dated August 3, 2012; R. pp. 8-9).

On August 13, 2012 Respondent filed a Motion to Reconsider the Order dated August 3, 2012 (Motion dated August 13, 2012; R. pp. 35-40). On March 5, 2013, the lower court entered an Order granting Respondent's Motion to Reconsider and entered summary judgment for Respondent on the First, Second and Third Causes of Action of Petitioners' Complaint, based on S.C. Code Ann. §15-36-100(F). (Order dated February 20, 2013; R. pp. 5-7).

Petitioners filed a Motion to Reconsider the summary judgment Order dated February 20, 2013, on March 18, 2013. The lower court denied this motion on May 16, 2013, (R. pp. 3-4) and the appeal followed. The South Carolina Court of Appeals, on April 1, 2015, unanimously affirmed the lower court's summary judgment order. (Unpublished Opinion No. 2015-UP-167).

STATEMENT OF ISSUE ON APPEAL

Did the trial court err in dismissing Petitioners' First, Second and Third Causes of Action, because Petitioners failed to timely obtain the expert affidavit as required by S.C. Code Ann. §15-36-100(F)? (Appealed Order dated February 20, 2013; R. pp. 5-7).

The Petitioners did not preserve any other issues for appeal at the lower court, as noted in the Court of Appeals opinion No. 2015-UP-167.

ARGUMENT

The statute of limitations for obtaining the expert affidavit expired on October 9, 2010, and Petitioners did not have the required expert affidavit until November 11, 2010.

The undisputed relevant facts are:

1. Petitioner Ronald Faulkner signed agreements dated September 13, 2007, and October 8, 2007, containing the language “Cynthia Griffis shall receive a Promissory Note guaranteed by Ron Faulkner and Eugene O’Neil for \$200,000.00” (Agreement dated September 13, 2007, R. p.211, and Agreement dated October 8, 2007, R. p. 209)
2. John P. Qualey, Jr., Esq., represented the Petitioners in the closing of the subject property as their attorney/agent:
 - a. Ronald Faulkner asserted an “attorney-client privilege” in the deposition of Mr. Qualey (Qualey deposition, p.9, lines 2-9, R. p.168);
 - b. Mr. Qualey was paid an attorney’s fee of \$500.00 by Petitioners at the closing on October 10, 2007 (line 1107 of the Settlement Statement, HUD; R. p. 214);
 - c. Mr. Qualey testified in his deposition that he represented the Petitioners in the closing on October 10, 2007 (Qualey deposition: p 9, lines 10-12; p. 10, lines 21-22, R. pp.168-169; p 55-56;; R. p. A4.
3. John P. Qualey, Jr. was the agent/attorney-in-fact for Ronald Faulkner in the closing under the recorded Power of Attorney executed on October 10, 2007 (Power of Attorney, R. pp. 226-227);
4. John P. Qualey, Jr. prepared the Note with personal guaranties, and the Guaranty agreement (Note, R. pp. 216-218); Guaranty, R. pp.219-221; Deposition of Qualey, p. 35, lines 20-25; p. 36, lines 1-4, R. p.171; p. 56, lines 20-25, R. p. A4)

5. John P. Qualey, Jr., as agent and attorney-in-fact for Ronald Faulkner, executed the personal guaranties (Note and Guaranty) on October 10, 2007 (Note, R. pp. 216-218; Guaranty, R. pp. 219-221)
6. Third-Party Plaintiffs did not have the expert affidavit until at least November 11, 2010, the date of notarization of said affidavit (Expert Affidavit, R. p. 97).

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that summary judgment “shall be rendered forthwith where there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law”. The undisputed fact in this case is that John P. Qualey was the agent for Third-Party Plaintiffs, either as their attorney and/or as the attorney-in-fact. Even if Third-Party Plaintiffs maintain that they did not “discover” the liability under the guaranty on the subject loans until being sued by Cynthia Griffis, it is undisputed that their agent, John P. Qualey, had notice of the guaranty no later than October 10, 2007 (when he prepared and signed the guaranty as attorney-in-fact), and under well settled agency law, said “notice” is imputed to Third-Party Plaintiffs for purposes of starting the period of limitations. It is also undisputed that Third-Party Plaintiffs did not have the required expert affidavit (notarized on November 11, 2010) within the applicable limitations period, which expired on October 9, 2010. When there is no conflicting evidence or only one reasonable inference can be drawn from the evidence (as in this case), the determination of when a party knew or should have known that he had a claim becomes a matter of law to be decided by the trial court.

Turner v. Milliman, 381 S.C. 101, 671 S.E.2d 636, 641 (S.C. App. 2009), citing *Arant v. Kressler*, 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997).

The three-year statute of limitations period applies to these causes of action. S.C. Code Ann. §§ 15-3-530 (1) & (5). See generally *Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 697 S.E.2d 644 (S.C. App. 2010) at page 654. The “discovery rule” also applies, which states that the statute of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence that a cause of action might exist. *Manios v. Nelson, Mullins, Riley & Scarborough, LLP, supra*.

The essential element in all of Third-Party Plaintiffs' (Petitioners') causes of action is the liability imposed by the personal guaranty on the purchase money notes - for without the personal guaranties Third-Party Plaintiffs would have no damages under any of the causes of actions.¹ Indeed, in all of the subject causes of action, Third-Party Plaintiffs allege the guaranty as an essential part of its causes of action and damages (See Amended Third Party Complaint, p. 3, #8, 9, 11, R. p.86; p. 5, #20, 22, 23, R. p. 88; p. 6, #26, 31; R. p. 89). Commencement of the period of limitations begins when Plaintiff “could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto.” *Dorman v. Campbell*, 331 S.C. 179, 500 S.E.2d 786 (S.C. App. 1998) at page 789. In the instant case, the commencement of the period begins on the date that Petitioners, or their agent, knew that a personal guaranty was required on the loans (on or before date of closing on October 10, 2007).

It is undisputed that Third-Party Plaintiff/Petitioner Ronald Faulkner executed two Agreements, dated September 13, 2007, and October 8, 2007, containing the following

¹ Except for the personal guarantees, Petitioners would have been enriched by at least the \$20,000+ received at closing (per HUD closing statement, line 303, R. p.139), and thereby would suffer no damages.

language:

“Cynthia Griffis shall receive a Promissory Note guaranteed by Ron Faulkner and Eugene O’Neil for \$200,000.00 ...” (Agreements of 9/13/07 and 10/8/07, R. p.211 and R. p.209)

In spite of the plain language of the above, Ron Faulkner maintains that he did not know or understand that he would be guarantying the loan to Cynthia Griffis, and it is this lack of knowledge of his personal guaranty on which he bases all of his claims and defenses. Regardless of his position, if he had exercised “reasonable diligence”, he “could or should have known” about his guaranty obligation when he signed the first agreement on September 13, 2007.

However, knowledge of the “personal guaranty” issue to Petitioners is more easily determined, as an indisputable fact and as a matter of law, under agency law. It is well settled that “notice to the agent is notice to the principal”, *Citizen’s Bank v. Heyward*, 135 S.C. 190, 133 S.E. 709 (1925)². It is undisputed that Third-Party Plaintiffs/Petitioners were represented by John P. Qualey, Jr., Esq., at closing, as both the Plaintiffs’ closing attorney³ and as the attorney in fact.⁴ John P. Qualey, Jr. prepared the Promissory Note with personal guaranties, and a separate personal Guaranty document, which he executed for Ronald Faulkner as his attorney-in-fact on October 10, 2007 (Promissory Note, R. pp. 216-218; and Guaranty, R. pp.219-221). According to the testimony of John P. Qualey, Jr., Esq., he had actual knowledge of the personal guaranties on October 9, 2007, and he

2 Bank President was deemed the “agent” for the bank

3 Deposition of John P. Qualey, Esq., December 10, 2010, p 9, lines 10-12,R. p. 168; p 55-56. (R. p. A4)

4 Ronald T. Faulkner executed a Power of Attorney to John P. Qualey, Jr., recorded in Jasper County ROD in DB 598 at P 256, under which John P. Qualey, Jr. acted as Faulkner’s agent/attorney-in-fact at the closing, and executed all closing documents including the closing statement, Promissory Notes with personal guarantees, and separate Guaranty, on October 10, 2007 (, Power of Attorney, R. pp.226-227).

understood the legal liability to his client, as a result of the guaranties which he prepared and executed as attorney-in-fact for Third-Party Plaintiffs⁵. As the Court in *Dorman*, *supra* at 789, in addressing the limitations period issue, stated “Nevertheless, the question of whether they actually received the letter is irrelevant, for knowledge of the information in Buist’s letter was imputed to the Dormans through their agent, attorney C.J. Manos.” The Court, citing *Crystal Ice Co. v. First Colonial Corp.*, 273 S.C. 306 (1979) stated “It is well established that a principal is affected with constructive knowledge of all material facts of which his agent receives notice while acting within the scope of his authority”, and further, citing *Faulkner v. Millar*, 319 S.C. 216 (1995) reaffirmed that “notice to an attorney is notice to the client”⁶. In *Crystal Ice Co.*, the court even stated that “The relation of agency need not depend upon express appointment, and acceptance thereof, but may be, and frequently is, implied from the words and conduct of the parties and circumstances of the particular case ... notwithstanding a denial by the alleged principal and whether or not the parties understood it to be an agency”, *Crystal Ice Co.*, 257 S.E.2d at p 497. In the instant case, there was an express appointment by Ronald Faulkner of John P. Qualey, Esq., through the recorded Power of Attorney – so the issue of “agency” in the instant case is undisputed (regardless of what Mr. Faulkner may allege). (See Power of Attorney, R. pp. 226-227)

Therefore, regardless of Third-Party Plaintiff’s/Petitioners’ position that he did not know that he would be personally guarantying the Note, he is bound by the notice to his

⁵ Qualey deposition, pages 58-59 ; R. p.A5; Mr. Qualey further stated, p 58, lines 9-16; R. p.A5, that there “is no question in my mind that I had that (express) authorization” to execute the guarantees to Cynthia Griffis and to Woodlands Bank on Ronald Faulkner’s behalf.”

⁶ In *Faulkner*, *fn 1*, notice to the Seller’s real estate agent, Dale Dawson, was also deemed to be effective notice to the Seller

agent, John P. Qualey, Jr., on October 9, 2007⁷, and by the execution of the personal guaranties by John P. Qualey, Jr., as attorney-in-fact, on October 10, 2007. The three year statute of limitations expired on October 9, 2010, and Third-Party Plaintiff did not obtain the expert affidavit until after November 11, 2010 (see date of expert affidavit, R. p. 97). Therefore, Third-Party Plaintiff's First, Second, and Third Causes of Action must be dismissed pursuant to S.C. Code Ann. §15-36-100(F)⁸.

Rebuttal to Petitioners' Argument regarding the "side agreement":

Even though Petitioner Ronald Faulkner signed the "side agreement" providing that Respondent would receive a one-third (1/3) ownership interest in Cherry Hill Estates, LLC, after the closing and in consideration of payment of \$320,000.00 for said interest (R, p. 212, 141), Petitioner is arguing that, because the Petitioner's attorney, Jack Qualey, was unaware of this "side agreement", that this somehow negates imputation of knowledge to Mr. Qualey for purposes of commencing the statute of limitations. Mr. Qualey testified in his deposition (Supplemental ROA, A3, Page 46, L 4-14) that this "lack of knowledge" about the side agreement was insignificant:

"Q: Well, I mean, had you known about it, would you have acted or operated any differently than the way you did relative to this transaction?

A: If I had known that Tony Griffis was going to be a member of Cherry Hill Estates at some point in the future, after the transaction?

⁷ Qualey deposition, p 58, lines 22-25; p. 59, lines 1-6; R. p.A5: Q:" Is there any doubt in your mind that as of October 9, 2007, you as the attorney and later as the attorney in fact had notice that there were personal guarantees required for the \$200,000 Note given to Cynthia Griffis? Qualey's answer: "You put me on notice of that requirement." Q: "On October 9, 2007?"; A: "Correct"

⁸ Even the hearing on October 14, 2010, and the resulting Order dated October 26, 2010 (R. pp.10-11) are outside the period of limitations which expired on or before October 10, 2010. The Court cannot extend an expired period of limitations.

Q: Yes

A: I don't think it would have affected my handling of the transaction any differently, no."

The "side agreement" had nothing to do with any possible damages to Petitioners, because the only damages Petitioners could sustain arose solely from the personal guarantees on the Promissory Notes.⁹ It is undisputed that Petitioner signed the "side agreement" (R, p 212) and agreement providing for a personal guarantee on October 8, 2007 (R. p 209), and that his attorney-in-fact, Mr. Qualey, prepared and executed the personal guarantees (R, pp. 216-222) on October 10, 2007. Any damages to Petitioners arise solely from the personal guarantees, which were personally known to Petitioner when he signed on October 8, 2007, and by his attorney-in-fact no later than October 10, 2007. *Regions Bank v. Schmauch*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003); *Crystal Ice Co. of Columbia, Inc. v. First Colonial Corp*, 272 S.C. 306, 309, 257 S.E.2d 496, 497 (1979). The statute of limitations expired no later than October 9, 2010, and the Petitioners did not have the expert affidavit until November 11, 2010 (R, p 97).

Petitioners' argument that somehow the closing was structured "against public policy" because it "involved an undisclosed side agreement" relating to distribution of loan proceeds... to bring the case within the "common knowledge exception to the expert affidavit requirement", was never preserved as a proper appellate issue. Further, there is nothing in the record to indicate that Respondent engaged in any fraudulent activities related to the loan transaction, had any privity to the lender in the transaction or owed any

⁹ If there were no personal guarantees, Petitioners would have benefited from the \$20,000 excess closing proceeds at closing (R, p 49), and also the \$320,000 paid by Respondent for his 1/3 ownership interest (R. pp103-109)

duty to Petitioners' lender. The record does not contain evidence of any contact by Respondent whatsoever with Petitioners' lender throughout the entire transaction. The only party who can possibly be damaged by any "non-disclosure of a so-called side agreement" would be the lender - certainly not Petitioners, who suffered no damage from such non-disclosure (their only damage arising solely from the personal guarantees), and have no standing to bring any action regarding said alleged non-disclosure. In fact, the party which would have the duty of disclosure should have been Petitioners themselves, if such a duty existed in the first place.

CONCLUSION

This Court should deny a Writ of Certiorari because the issues raised by Petitioners were not preserved for appellate review, and also do not raise any novel questions of law as required by Rule 242, SCACR.

Respectfully Submitted,



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July 17, 2015

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court Of Common Pleas

The Honorable Marvin H. Dukes, III

Appellate Case No. 2015-001312

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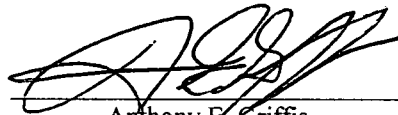
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PROOF OF SERVICE

I certify that I have served the Return to Petition for Writ of Certiorari on Michael W. Mogil, Esq. attorney for Petitioners, by depositing a copy of it in the United States mail, postage prepaid, on July 17, 2015, addressed to Michael W. Mogil, 2 Corpus Christie Place, Ste. 303, Hilton Head Island, SC 29928.



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