

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

OCT 19 2015

J. Michael Baxley, Circuit Court Judge

S.C. SUPREME COURT

Unpublished Opinion No. 2015-UP-320 (S.C. Ct. App. filed July 1, 2015)

AMERICAN COMMUNITY BANK,
a division of Yadkin Valley Bank & Trust, Respondent,

vs.

MICHAEL R. BROWN; C. W. HORNE;
SHORTT AUCTION & REALTY CO., INC.;
BANK OF AMERICA, N.A.; and
JAGUAR PORTFOLIO, LLC, Defendants,

of whom MICHAEL R. BROWN is Petitioner.

APPENDIX TO PETITION FOR WRIT OF *CERTIORARI*

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Other Counsel of Record:

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

American Community Bank, a division of Yadkin Valley
Bank & Trust, Respondent,

v.

Michael R. Brown; C. W. Horne; Shortt Auction &
Realty Co., Inc.; Bank of America, N.A.; and Jaguar
Portfolio, LLC, Defendants,

Of Whom Michael R. Brown is Appellant.

Appellate Case No. 2012-213587

Appeal From Chesterfield County
J. Michael Baxley, Circuit Court Judge

Unpublished Opinion No. 2015-UP-320
Submitted March 1, 2015 – Filed July 1, 2015

AFFIRMED

John Martin Foster, of Rock Hill, for Appellant.

James W. Sheedy and Susan Elizabeth Driscoll, both of
Driscoll Sheedy, P.A., of Charlotte, NC, for Respondent.

PER CURIAM: Michael R. Brown appeals the trial court's grant of summary judgment in favor of American Community Bank (the Bank). On appeal, Brown argues the trial court erred in granting the Bank's motion for summary judgment because the evidence showed a genuine issue of material fact existed as to whether the Bank (1) waived its rights to enforce its mortgage lien and collect the outstanding balance on its loan to Brown, (2) improperly failed to satisfy Brown's mortgage, and (3) violated the South Carolina Unfair Trade Practices Act (SCUTPA). We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. We find Brown presented no evidence that the Bank waived its right to collect the outstanding balance on its loan. *See Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438-39 (2003) ("In reviewing the grant of a summary judgment motion, the [appellate court] applies the same standard as the trial court under Rule 56(c), SCRCF . . ."); Rule 56(c), SCRCF (stating summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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"); *Dawkins*, 354 S.C. at 69, 580 S.E.2d at 439 ("In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party."); *King v. James*, 388 S.C. 16, 30, 694 S.E.2d 35, 42 (Ct. App. 2010) ("A waiver is a voluntary and intentional abandonment or relinquishment of a known right. . . . In order for a party to waive a right, the party must have known of the right and known that the right was being abandoned.").

2. Brown admitted he never paid off the mortgage; therefore, we find the Bank did not fail to satisfy his mortgage. *See* S.C. Code 29-3-310 (2007) ("Any holder of record of a mortgage who has *received full payment or satisfaction* or to whom a legal tender has been made of his debts, damages, costs, and charges secured by mortgage of real estate shall, at the request . . . of the mortgagor . . . , enter satisfaction in the proper office on the mortgage which shall forever thereafter discharge and satisfy the mortgage." (emphasis added)); *Dykeman v. Wells Fargo Home Mortg., Inc.*, 381 S.C. 333, 339, 673 S.E.2d 804, 807 (2009) (stating payment of the mortgage is the first step in the mortgage satisfaction process set forth in section 29-3-310).

3. We find the trial court properly granted summary judgment as to Issue 3 because Brown presented no evidence that his claims impacted the public interest. *See Dawkins*, 354 S.C. at 69, 580 S.E.2d at 438-39 ("In reviewing the grant of a

summary judgment motion, the [appellate court] applies the same standard as the trial court under Rule 56(c), SCRCPP"); Rule 56(c), SCRCPP (stating summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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"); *Dawkins*, 354 S.C. at 69, 580 S.E.2d at 439 ("In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party."); *Noack Enterp., Inc. v. Country Corner Interiors of Hilton Head Island, Inc.*, 290 S.C. 475, 479, 351 S.E.2d 347, 349-50 (Ct. App. 1986) ("An unfair or deceptive act or practice that affects only the parties to a trade or a commercial transaction is beyond [SCUTPA's] embrace To be actionable under [SCUTPA], therefore, the unfair or deceptive act or practice in the conduct of trade or commerce must have an impact upon the public interest. [SCUTPA] is not available to redress a private wrong where the public interest is unaffected." (citation omitted)); *Schnellmann v. Roettger*, 368 S.C.17, 23, 627 S.E.2d 742, 746 (Ct. App. 2006), *aff'd as modified*, 373 S.C. 379, 645 S.E.2d 239 (2007) ("An impact on the public interest may be shown if the acts or practices have the potential for repetition. The potential for repetition may be shown by proving that the same kind of actions occurred in the past or by showing that the procedures employed by the defendant create a potential for repetition of the deceptive practices." (citation omitted)).

AFFIRMED.¹

SHORT, LOCKEMY, and McDONALD, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Appellate Case No. 2012-213587

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AMERICAN COMMUNITY BANK,
a division of Yadkin Valley Bank & Trust, Respondent,

vs.

MICHAEL R. BROWN; C. W. HORNE;
SHORTT AUCTION & REALTY CO., INC.;
BANK OF AMERICA, N.A.; and
JAGUAR PORTFOLIO, LLC, Defendants,

of whom MICHAEL R. BROWN is Appellant.

MEMORANDUM ON PETITION FOR REHEARING

The Petitioner petitions for a rehearing of the matter above under Rule 221(a), S.C.A.C.R.

This Petition is based upon those certain points, factual and legal, which the Petitioner believes the Court to have overlooked or misapprehended, as set out herein.

THE DECISION ON APPEAL

This decision of this Court was filed July 1st, 2015. To the extent allowed, the Petitioner restates and by this reference reargues all matter set out in his Brief and referenced in the Record on Appeal.

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BACKGROUND

Petitioner BROWN borrowed \$150,000.00 from the predecessor of Respondent AMERICAN COMMUNITY BANK, secured by a Note and Mortgage on 106.85 acres in Chesterfield County, dated December 29, 2000. The Note was guaranteed by Defendant HORNE. By an Assignment of the same date, HORNE's wife assigned a CD account as security.

A "Disbursement Request and Authorization" purportedly signed by BROWN lists the "primary purpose" of the loan as "Business". The Lender's Title Insurance binder on the loan contained language identifying it as for residential property. No attorney preference was given or received. No three day waiting period was observed before disbursement of the loan proceeds.

Both BROWN and HORNE executed a "Modification and Extension Agreement" as to the Note and Mortgage dated January 23, 2012. There follows a series of such agreements ranging (on their faces) from August 28, 2003 through October 20, 2007, bearing what purport to be the signatures of BROWN and HORNE. Both BROWN and HORNE deny the authenticity of those later signatures.

Each of the "Modification and Extension Agreements" lack any description of further collateral. There exist, however, a contemporary documents to the "Agreements" designated as "Assignment of Deposit Account" or "Additions or Substitution to Collateral", purportedly executed by HORNE or his wife, and listing bank accounts with Respondent's predecessor as collateral.

In addition, there exists a 2007 Form 1098, reciting a debt opened in "12/00", a high balance of "150,000", a payment of \$87,400.00 and a reported balance of "-0-".

Petitioner response to the Respondent Bank's foreclosure action sets forth defenses and counterclaims for Truth-in-Lending violations, unfair and deceptive trade practices, waiver, and a failure to satisfy the mortgage.

The Circuit Court granted the Respondent summary judgment as to unfair and deceptive trade practices, waiver, and failure to satisfy the mortgage by its Order dated July 27, 2012. This was confirmed by its Order disposing of the Petitioner's Motion under Rule 59, S.C.R.C.P. After receipt of the later Order on November 27, 2012, this appeal was filed by Notice mailed December 11, 2012.

The unreported decision of the Court of Appeals affirming the decision of the Circuit Court was filed July 1st, 2015.

GROUND OF APPELLATE DECISION

The *per curiam* decision of the Court of Appeals panel disposes of the argument of Petitioner in this matter on what appear to be two bases. The first basis is, the Petitioner argues, adequately summarized as follows:

1. We find Brown presented no evidence that the Bank waived its right to collect the outstanding balance on its loan. *See Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433,438-39 (2003) ("In reviewing the grant of a summary judgment motion, the [appellate court] applies the same standard as the trial court under Rule 56(c), SCRPC ");

...

2. Brown admitted he never paid off the mortgage; therefore, we find the Bank did not fail to satisfy his mortgage. *See S.C. Code 29-3-310* (2007) . . .

[*American Community Bank v. Brown*, Unpublished Opinion No. 2015-UP-320, p. 1.]

WAIVER AS A QUESTION OF FACT

The Petitioner has presented argument, based upon the Bank's action in sending the Federal Form 1098 [RECORD ON APPEAL, Deposition of Clewis, Exhibit 26, p.331.] to the Petitioner and (on knowledge and information) the Internal Revenue Service and its Bank Examiners, bearing BROWN's address and the account number of the mortgage debt which forms the basis of its present foreclosure action. That Notice shows a zero balance. The Petitioner has contended in his Counterclaim and Brief, that the preparation and sending of this Notice evidences a waiver of debt on the Bank's part. On the basis of that waiver, he has plead a cause of action based upon the Bank's failure to satisfy the mortgage.

In support of the waiver and its effect, the Petitioner has further argued that the Note renewals after this time were signed neither by him, nor by the co-Defendant C.W. HORNE. The Bank has presented no evidence of the validity of those signatures.

The decision of the Court evidently states, as a matter of law, that this evidence is insufficient to constitute a waiver. With respect, the Court cannot logically state that the Petitioner presented "no evidence". The question of waiver is, under our precedent, one of fact. This Court cannot dispose of a what is a documented question of fact by a simple statement of law. *Planters' Bank v. Lummus Cotton Gin Co.*, 132 S.C. 16, 128 S.E. 876, 41 A.L.R. 592 (1925).

SECOND GROUNDS FOR DECISION

The *per curiam* decision of the Court of Appeals panel disposes of the Petitioner's claim of a violation of the South Carolina Unfair and Deceptive Practices Act on the following basis:

3. We find the trial court properly granted summary judgment as to Issue 3 because Brown presented no evidence that his claims impacted the public interest. . . .

[*American Community Bank v. Brown*, Unpublished Opinion No. 2015-UP-320, p. 1.]

The Petitioner has argued the uncontradicted evidence that the Respondent Bank has engaged in the following actions, among others, which he has alleged as a basis for his claim under SCUPTA:

b. Treating the transaction as commercial in nature, despite its knowledge that the subject real property had been, and would be, used by BROWN for his personal, family and household use;

c. Failing to ascertain prior to closing the preference of BROWN as the borrower as to the legal counsel that was to be employed to represent the debtor in all matters of the transaction relating to the closing of the transaction, in violation of S.C. Code § 37-10-102(a) (West);

[RECORD ON APPEAL, Answer, Counterclaims and Crossclaim, p.78-79.]

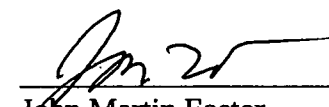
Evidence exists that the Respondent Bank was aware that BROWN occupied the premises to be mortgaged as his residence. This fact was reflected in the language of the Title Policy issued to the Bank. Despite this evidence, it is uncontested that the Bank never offered BROWN his preference of legal counsel, nor provided a three-day right of rescission as required under Federal law.

It is submitted that adherence to the statutory law is or embodies, *prima facie*, a public interest. The Bank failed to comply with S.C. Code 37-10-102(a). It failed to offer him the right of rescission required by 15 U.S.C. § 1638(b) and Regulation Z § 226.17(b). These examples exist in addition to that evidence set out above in support of the Bank's waiver and subsequent attempt to enforce. There is no question in this action of proof of a public interest in the violations of SCUPTA as plead.

CONCLUSION

For all the reasons set out and referenced above, the Petitioner requests that this matter be reheard by the Court of Appeals, and for any other relief to which they may be entitled in law or equity.

Respectfully submitted,



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Attorney for Petitioner

July 15, 2015

Rock Hill, South Carolina

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

The Honorable J. Michael Baxley, Circuit Court Judge

Appellate Case No. 2012-213587

American Community Bank, a division of Yadkin Valley
Bank and Trust, Respondent,

vs.

Michael R. Brown, C.W. Home, Shortt Auction & Realty Co., Inc.,
Bank of America, N.A. and Jaguar Portfolio, I.J.C., Defendants,

Of which Michael R. Brown is the Appellant.

RETURN TO PETITION FOR REHEARING

This Return is filed pursuant to Rule 240(e), SCACR. Because a return has not been requested by this Court, the Return is not mandatory. The Return is submitted as a precatory filing under the Rule. On July 15, 2015, Appellant served Respondent with a copy of the Petition for Rehearing including Memorandum on Petition for Rehearing. Therefore, this Return is timely filed.

A petition for rehearing "shall state with particularity the points supposed to have been overlooked or misapprehended by the court." Rule 221(a), SCACR. Appellant asserts he presented evidence that Bank waived collection of the loan and there was impact on the public interest sufficient for a UTPA claim. To present a question of fact, a party must put

forward evidence of those facts. Appellant did not on either of his grounds for reconsideration.

This Court was correct in its ruling that “Brown presented no evidence that the Bank waived its right to collect the outstanding balance on its loan.” *American Community Bank v. Brown*, Unpublished Opinion No. 2015-UP-320, p.1. The only evidence Appellant presented was a 2007 Form 1098 Mortgage Interest Statement (the “Form”). The Form reflects the amount of deductible mortgage interest that may be claimed on Appellant’s tax return. The Form shows that \$87,400 in interest was received by Respondent. (R. p. 331). The Form is devoid of any language that Respondent was forgiving the loan. (*Id.*).

Appellant admitted the Form did not show the Note had been paid in full. The Form showed the payment of interest. (R. pp. 393-94). Appellant knew the Form was an interest statement for the Note, not a statement marking the Note paid in full. (*Id.*). Specifically, Appellant testified “That’s not the pay off. . . . That is the interest statement.” (R. p. 393). Appellant’s own words show that he knew and understood the content of the Form and that it was not a loan forgiveness.

Whether Appellant signed the loan modification that corresponded with the Form does not mean the original note secured by the mortgage was forgiven. Respondent sued on the original note. Appellant did not produce a Form 1099, which is issued by financial institutions upon forgiveness of a debt to disclose the amount of ordinary income which must be included for tax purposes on an individual’s tax return. The Court was correct - Appellant produced no evidence of waiver.

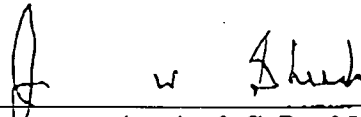
Under South Carolina law, there can be no impact upon the public interest when the acts complained of relate solely to an individual loan transaction. See *Regions Bank v. College Ave. Development, L.L.C.*, 2010 WL 973480, *5 (D.S.C. 2010); *Schnellmann v. Roettger*, 368 S.C. 17, 23, 627 S.E.2d 724, 746 (Ct. App. 2006), *aff'd as modified* 373 S.C. 379, 645 S.E.2d 239 (2007). Absent evidence that the same kind of unfair or deceptive actions occurred in the past or that some procedure creates a possibility of repetition, grounds for a UTPA claim do not exist.

Appellant argues two grounds for impact on the public interest. First, he argues the loan to him was treated as a commercial loan. (Memorandum, p.4). Assuming, *arguendo*, Appellant living at a winery makes the loan not commercial, his point references only the individual transaction and is not evidence of prior actions by or procedures of Respondent. Second, Appellant argues he did not receive preference of legal counsel and a three day right of rescission. This is Appellant's counterclaim under TILA. S.C. Code Ann. § 37-10-102(a) and 15 U.S.C. § 1638(b). The TILA claim was not the subject of Respondent's motion for summary judgment, nor was it ruled upon by the Trial Court. (R. pp. 3, 10, 12). So neither the TILA claim itself nor the factual basis therefor is at issue in this appeal. Even if it were, Appellant's allegations about preference as to legal counsel and the three day right of rescission on one loan shows no impact upon the public interest. This Court correctly ruled that Appellant presented no evidence of impact upon the public interest.

The Petition should be denied. This Court did not overlook or misapprehend the arguments of Appellant. Appellant had no evidence to support his appealed claims.

Date: 7/23/15

Respectfully submitted,



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Attorneys for Respondent

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHESTERFIELD COUNTY
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OCT 19 2015

The Honorable J. Michael Baxley, Circuit Court Judge

S.C. SUPREME COURT

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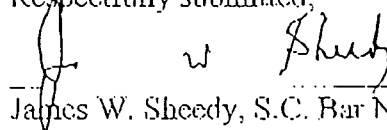
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below he served counsel for Appellant with a copy of the *Return to Petition for Rehearing* by mailing a copy of the same via First Class, U.S. Mail, postage-paid on the date set forth below.

John Martin Foster, Esq.
The Guardian Building
223 East Main Street; Suite 520
Rock Hill, SC 29730

Date: 7/23/15

Respectfully submitted,



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Attorneys for Respondent

The South Carolina Court of Appeals

American Community Bank, a division of Yadkin Valley
Bank & Trust, Respondent,

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Michael R. Brown; C. W. Horne; Shortt Auction &
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Of Whom Michael R. Brown is Appellant.

Appellate Case No. 2012-213587

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul G. Shortt, Jr. J.

James E. ... J.

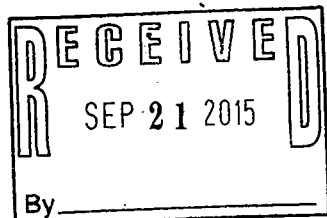
Stephene P. McPherson J.

Columbia, South Carolina

FILED

September 18, 2015

cc:



John Martin Foster, Esquire
James W. Sheedy, Esquire
Susan Elizabeth Driscoll, Esquire
The Honorable J. Michael Baxley