

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Appellate Case No. 2012-213587

RECEIVED

OCT 19 2015

SC Court of Appeals

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.

PETITION FOR WRIT OF *CERTIORARI*

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Pursuant to Rule 242, S.C.A.C.R, the Petitioner petitions for the issuance of a writ of *certiorari* to review the final decision of the Court of Appeals in the matter above.

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

The Petitioner contends that this matter deals with what are, in South Carolina precedent, novel questions of law.

To the extent allowed, the Petitioner restates and by this reference reargues all matter set out in his Briefs and referenced in the Record on Appeal and in the Appendix submitted herewith.

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing herein was made and finally ruled on by the Court of Appeals on September 18th, 2015.

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. The Petitioner alleges the property is and was his residence. 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 followed 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, contemporary documents to the said "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's response to the Respondent Bank's foreclosure action set 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.

FIRST GROUND FOR 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, the Petitioner argues, is 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.33l.] 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 of Appeals evidently concludes, 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 GROUND FOR APPEAL 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 a failure to adhere 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) (West). It failed to offer the Petitioner the right of rescission required by 15 U.S.C. § 1638(b) and Regulation Z § 226.17(b). These facts exist in addition to that evidence set out above in support of the Bank's waiver and subsequent attempt to enforce the mortgage. 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 Court issue its Writ of Certiorari and hear this appeal, and for any other relief to which the Petitioner may be entitled in law or equity.

Respectfully submitted,



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October 15, 2015

Rock Hill, South Carolina

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of whom MICHAEL R. BROWN is Petitioner.

CERTIFICATE OF SERVICE

I certify that on October 15, 2015, I served the Petition for Writ of *Certiorari*, the Appendix, and this Certificate of Service on the following counsel of record, parties or persons:

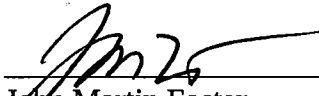
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by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below; or

by hand delivering copies of the same to the following persons, or by leaving the same at that person's office with that person's clerk or some other person in charge thereof, or by leaving it in a conspicuous place therein; of if the office was closed or the person to be served has no

office, by leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein, all pursuant to Rule 233(b), S.C.A.C.R.

October 15, 2015



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