

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

REC

J. Michael Baxley, Circuit Court Judge

NOV 16 2015

Appellate Case No. 2015-002167

S.C. SUPREME COURT

American Community Bank, a division of Yadkin Valley
Bank and 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 which Michael R. Brown is the Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

Counter-Statement of the Case1

Arguments2

 I. The Petition does not present novel issues of law in
 accordance with the requirement of Rule 242(b)(1), SCACR.2

 II. The Court of Appeals was correct that Petitioner
 presented no evidence that Respondent waived its rights
 to enforce the terms of the Note and Mortgage..3

 III. The Court of Appeals was correct in holding there
 was no evidence that the claims of Petitioner
 impacted the public interest..4

Conclusion5

COUNTER-STATEMENT OF THE CASE

This Return is filed pursuant to Rule 242(f), SCACR. Petitioner served Respondent with a copy of the Petition for Writ of Certiorari (the “Petition”) on October 15, 2015. Therefore, this Return is timely filed on November 13, 2015. With this Counter-Statement of the Case, Respondent seeks to focus the Court’s attention on a few facts omitted from Petitioner’s Statement of the Case.

On December 29, 2000, Petitioner signed in favor of Respondent a promissory note in the amount of \$150,000 (the “Note”).¹ (R. p. 387) The Note defines default to include, among other things, Petitioner’s failure to make any payments when due, failure to perform any term, obligation, covenant or condition thereof, insolvency, or a material adverse change in his financial condition. (R. p. 290) Upon default, Respondent may declare the entire unpaid principal balance of the Note and all accrued, unpaid interest immediately due and payable. (R. p. 290)

As security for the Note, Petitioner executed in favor of Respondent a mortgage dated December 29, 2000, recorded January 2, 2001 in Book 346 at Page 431, with the Clerk of Court, Chesterfield County, South Carolina, (Mortgage) encumbering real property there, together with appurtenances and other property located thereon, along with other rights and interests as set forth therein (collectively, the “Subject Property”). (R. p. 388) The Mortgage also states that upon default by Petitioner, Respondent may “declare all sums secured by this

¹Although there are nine modifications to the Note that Petitioner denies signing, Respondent seeks only to recover the original principal amount of \$150,000 plus interest accruing after demand was made upon Petitioner on February 23, 2010, based upon the original or unmodified note which Petitioner admits signing. (R. pp. 23, 236, 387) The nine modifications are not in issue.

mortgage immediately due and payable and proceed with foreclosure thereof.” (R. p. 294)

Petitioner admits he has not paid the principal amount owed under the Note upon demand by Respondent. (R. pp. 388, 393, 399, 404) Respondent never informed Petitioner it did not intend to collect the principal amount due and owing on the Note. (R. pp. 235, 393-94) The amount of \$150,000 remains due and payable on the Note. (R. p. 388)

The 2007 Form 1098 Mortgage Interest Statement (the “Form”) reflects the amount of deductible mortgage interest that may be claimed on Petitioner’s tax return. The Form shows only that \$87,400 in interest was received by Respondent. (R. p. 331) Petitioner admitted that the Form did not show the Note had been paid in full, but showed only the payment of interest. (R. pp. 393-94) He knew the Form was an interest statement for the Note, not a statement marking the Note paid in full. (*Id.*) Specifically, Petitioner testified as to the Form, “That’s not the pay off. . . . That is the interest statement.” (R. p. 393)

ARGUMENTS

I. The Petition does not present novel issues of law in accordance with the requirement of Rule 242(b)(1), SCACR.

In the Petition, the only asserted basis for granting *certiorari* is Rule 242(b)(1), SCACR - novel questions of law. Despite Petitioner’s arguments, neither the showing necessary for a dispute of material fact over waiver of remedies, nor impact to the public interest as a required element of a SC UTPA claim are novel questions of law.

Both of these questions have been examined at length by the appellate courts and federal district courts of this state. *See King v. James*, 388 S.C. 16, 694 S.E.2d 35 (Ct. App. 2010); *Eason v. Eason*, 384 S.C. 473, 480, 682 S.E.2d 804, 807 (2009) (Examining the requirements of a waiver.) *See also Regions Bank v. College Ave. Development, L.L.C.*, 2010

WL 973480, *5 (D.S.C. 2010) (Actions related solely to the individual loan transaction did not impact the public interest and provide grounds for a UTPA claim under South Carolina law.); *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) (Examining what is required to show an impact to the public interest.) This case does not involve any novel issues of law. There is no basis for granting *certiorari*. Therefore, the Petition should be denied.

II. The Court of Appeals was correct that Petitioner presented no evidence that Respondent waived its rights to enforce the terms of the Note and Mortgage.

Summary judgment “is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Cherry v. Myers Timber Co., Inc.*, 404 S.C. 596, 745 S.E.2d 405 (Ct. App. 2013) (Affirming order granting summary judgment on the basis that the only evidence supported movant’s position.); *Fountain v. First Reliance Bank*, 398 S.C. 434, 730 S.E.2d 305 (2012) (Because the plaintiff failed to present a “scintilla of evidence”, summary judgment was proper.); *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 290-91, 701 S.E.2d 742, 750 (2010) (Summary judgment properly granted in part because “neither expert presented evidence to help Harris Teeter survive Respondents’ motion for summary judgment.”); *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 677 S.E.2d 32 (Ct. App. 2009) (Summary judgment properly granted because plaintiff “failed to provide evidence” of a departure from the standard of care.); and *Bass v. Gopal, Inc.*, 384 S.C. 238, 249, 680 S.E.2d 917, 923 (Ct. App. 2009) (Summary judgment properly granted, because plaintiff “presented no probative evidence in opposition.”).

To survive summary judgment on waiver, Petitioner had to come forward with evidence to support each element of his claim that Respondent waived its right to enforce the terms of the Note secured by the Mortgage. *King v. James*, 388 S.C. at 30, 694 S.E.2d at 42. “In order for a party [Respondent] to waive a right, the party [Respondent] must have known of the right and known that the right was being abandoned.” *Id.*

Petitioner has no evidence that Respondent knew of its remedies and chose to relinquish them. Petitioner’s waiver defense is based solely on the Form, which he admitted did not show the Note had been paid in full, but instead showed the payment of interest. (R. pp. 393-94) He knew the Form was an interest statement for the Note, not a statement marking the Note paid in full. (*Id.*) He also knew he had not paid any of the principal of \$150,000 due and owing on the Note. (R. pp. 388, 393-94, 399, 404) He admitted he never received anything in writing from Respondent that if he failed to repay the \$150,000, Respondent would waive its right to foreclose the Mortgage. (R. p. 393-94) Petitioner’s only evidence is that he knew Respondent had not waived its remedies. Petitioner has no evidence that Respondent knew of its remedies and intentionally waived enforcement of the Note secured by the Mortgage.

III. The Court of Appeals was correct in holding there was no evidence that the claims of Petitioner impacted the public interest.

Under South Carolina law, there can be no impact upon the public interest when the alleged acts relate solely to an individual loan transaction. *See Regions Bank v. College Ave. Development, L.L.C.*, 2010 WL 973480 at *5; *Schnellmann*, 368 S.C. at 23, 627 S.E.2d at 746. Absent evidence that the same kind of actions occurred in the past or that some

procedure creates a possibility of repetition in the future, the UTPA element of impact upon the public interest cannot be met.

Petitioner argues two grounds for impact on the public interest. First, he contends the Note was treated as a commercial loan. (Petition, p.5) This argument references only the individual transaction and is not evidence of prior actions by or ongoing procedures of Respondent. Second, Petitioner argues he did not receive preference of legal counsel and a three day right of rescission. This is Petitioner'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 decided by the Trial Court. (R. pp. 3, 10, 12) So neither the TILA claim itself nor the factual basis therefor is a part of this appeal. Even if it were, allegations about Respondent treating the loan as commercial, preference as to legal counsel and the three day right of rescission on a single loan show no prior actions or ongoing procedures. The Court of Appeals correctly ruled that Petitioner demonstrated no grounds for impact upon the public interest.

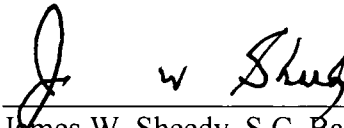
CONCLUSION

The Petition is without merit. It does not raise a novel issue of law as required by Rule 242(b)(1), SCACR, given Petitioner has committed this is his sole basis for seeking *certiorari*. Petitioner has no evidence to support waiver or impact upon the public interest. Nothing in the record could support a finding that Respondent voluntarily and intentionally abandoned or relinquished its right to enforce the terms of the Note secured by the Mortgage. On public interest impact, Petitioner's only evidence relates solely to the Note. He cannot use his TILA claim when it is not before this Court. Petitioner has no evidence of prior actions

or ongoing procedures. The Petition should be denied.

Date: 11/13/15

Respectfully submitted,



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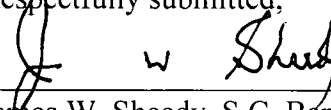
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below he served counsel for Petitioner with a copy of the *Return to Petition for Writ of Certiorari* 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.
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Date: 11/13/15

Respectfully submitted,



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