

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS
THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS
HON. CORDELL MADDOX. CIRCUIT COURT JUDGE

Branch Banking and Trust Company, Respondent,
v.
Sarah L. Gray, Jeffery Gray, Suntrust Bank, West Union
Development, LLC, and Bank of Anderson, N.A.,
Defendants,
Of Whom Jeffery Gray is the Petitioner

Opinion No. 2015-UP-439 (S.C. Ct. App. Filed August 26, 2015)

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on October 30, 2015.

QUESTION PRESENTED

Did the Court of Appeals err in not finding that there are genuine issues of material fact as to whether or not Respondent is an exempted creditor within the meaning of the Federal Fair Debt Collection Practices Act.

STATEMENT OF THE CASE

On or about July 29, 2003, Appellant made, executed and delivered a certain Note ("Note") in the principal sum of \$180,00.00, payable in monthly installments. This loan transaction was incurred by Appellant primarily for personal, family or household purposes. Record P. 124.

In order to secure the payment of the Note according to the terms and conditions thereof, Appellant made, executed and delivered unto Mortgage Electronic Registration Systems (MERS) a certain real estate mortgage ("Mortgage"), covering the following described property and any and all improvements to the property;

All that certain piece, parcel or lot of land, lying and being situate in the State of South Carolina, County of Oconee, being shown and designated as Lot Number Fifteen (15) of the Summit Phase I, as shown and more fully described on a plat thereof prepared by R. Jay Cooper, PE & LS #4682 of Clemson Engineering Services, dated June 23, 1997 and recorded in the Office of the Clerk of Court for Oconee County, South Carolina in Plat Book A508 at Page 5. The metes, bounds, courses and distances as shown upon said plat are incorporated herein by reference thereto. Reference being invited to said plat for a fuller more accurate description of the above described property.

This being the same property conveyed unto Jeffery A. Gray and Sarah L. Gray herein by deed of Laura Leigh Zane, Trustee of the Revocable Living Trust of Laura Leigh Zane dated November 1, 2001 and recorded on December 3, 2001 in the Office of the Oconee County Register of Deeds in Book 1186 at Page 305. Thereafter, this being the same property conveyed to West Union Development, LLC by deed from Jeffery A. Gray and Sarah L. Gray dated November 24, 2010 and recorded November 29, 2010 in Book 1805 at Page 289.

TMS NO. 209-08-01-013

Property address: 202 S Summit Drive Seneca, SC 29672 ,Record PP. 124 – 125.

This action was initiated when Respondent filed and served a foreclosure complaint claiming Appellant failed to make payments due from and after May 1, 2011. Record P. 22 ¶ 13.

Attached to the foreclosure complaint was document titled ASSIGNMENT OF REAL ESTATE MORTGAGE which provided:

"FOR VALUE RECEIVED, the sufficiency of which is hereby acknowledged, Mortgage Electronic Registration Systems, Inc. as nominee for Branch Banking and Trust Company

of South Carolina, its successors and assigns, hereby sells, assigns, transfers and sets over unto Branch Banking and Trust Company, that certain Mortgage dated July 29, 2003, executed by Sarah L. Gray and Jeffery Gray, which said mortgage is in the original principal amount of \$180,000.00 and is recorded in the Office of the Clerk of Court/Register of Deeds for Oconee County, State of South Carolina, recorded on August 13, 2003 in Book 1727 at Page 136, together with the certain note(s) described therein, with all interest, all liens, and any rights due or to become due thereon." Record P. 28.

A person claiming to be Ivan Hobbs, a an alleged VP for MERS executed the ASSIGNMENT OF REAL ESTATE MORTGAGE. Record P. 28.

After Appellant was served with the foreclosure complaint Appellant telephoned MERS on or about January 9, 2012, and Appellant asked the person working at MERS if an Ivan Hobbs was employed by MERS. Record P. 125. Appellant was informed by MERS' agent that there was no one employed by MERS by that name. Record P. 125.

To the contrary, a person claiming to be Ivan Hobbs executed an affidavit stating that he was one of Respondent's officers who was "appointed" by MERS as a signing officer by a corporate resolution dated March 27, 2011. Record PP. 105 – 106. L. 9.

Further, according to the foreclosure complaint, the Respondent claimed Appellant was in default on the payments at the time the mortgage was assigned to the Respondent. Record P. 125; Record P. 22 ¶ 13.

Further, according to the foreclosure complaint, the Respondent claimed Appellant was in default on the payments at the time the mortgage was assigned to the Respondent. Record P. 125; Record P. 22 ¶ 13.

According to the Mortgage which is the subject of this action, the Plaintiff was the Lender and MERS, a separate corporation, and was Plaintiff's nominee in the transaction and served as Mortgagee in the transaction. Record P. 125; Record P. 112.

According to Ivan Hobbs, MERS is a separate company that provides a service to mortgage lenders and servicers who, as "members" of MERS, have a contractual relationship whereby MERS serves as the mortgagee of record for home mortgage loans. Record P. 106, L. 6.

"With reference to proof of agency, the general rule is well settled, of course, that the declarations of an agent alone as to his agency are insufficient to prove agency, but if there are other corroborating facts, agency then becomes a question for the jury." *City Of Greenville v. Wash. Am. League Baseball Club*, 205 S.C. 495, 32 S.E.2d 777 (S.C., 1945). "Usually, whether an agency relationship exists and the scope of the alleged agent's authority are questions of fact for the jury." *Holmes v. McKay*, 334 S.C. 433, 513 S.E.2d 851 (S.C. App., 1999).

Further, both Respondent and MERS failed to timely furnish Appellant with required servicing disclosures required by 12 USCS § 2605 after the assignment purportedly occurred on December 9, 2011. Record P. 127.

Appellant was unaware that MERS had purportedly assigned the Mortgage to Respondent until Appellant was served with the Summons and Complaint in this action. Record P. 127.

Appellant claims that Respondent is not a holder in due course. Record P. 36 ¶ 9.

Appellant has alleged that Respondent violated the Federal Fair Debt Collections Practices Act. Record PP. 42 – 43, ¶¶ 33 – 41.

After a hearing, the Court signed an Order granting Respondent's motion for Record P. 9. The Court of Appeals affirmed the judgment of the circuit court. Branch Banking and

Trust Company, Respondent, v. Sarah L. Gray, Jeffery Gray, Suntrust Bank, West Union Development, LLC, and Bank of Anderson, N.A., Defendants, Of Whom Jeffery Gray is the Appellant. Opinion No. 2015-UP-439 (S.C. Ct. App. Filed August 26, 2015). Petitioner seeks a writ of certiorari to review that decision.

ARGUMENT

THE COURT OF APPEALS ERRED IN NOT FINDING THAT THERE ARE GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER OR NOT RESPONDENT WAS AN EXCEMPTED CREDITOR WITHIN THE MEANING OF THE FEDERAL FAIR DEBT COLLECTION PRACTICES ACT.

Appellant initiated a claim for statutory and actual damages caused by Counter-Defendant's violations of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692 *et seq.*, which prohibits a debt collector from engaging in deceptive, unfair and/or unconscionable debt collection practices. Record P. 42 ¶ 34.

Appellant has alleged that the Respondent is a debt collector within the meaning of the FDCPA. Record P. 42 ¶ 35.

The FDCPA defines a debt collector as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects . . . debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). Excluded from the definition are those entities who collect or attempt to collect "any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person." § 1692a(6)(F). **"The legislative history of section 1692a(6) indicates conclusively that a debt collector does not include the consumer's creditors, a mortgage servicing company, or an assignee of a debt, as long as the debt was not in default at the time it was assigned."** *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985); *see also Solomon v. HSBC Mortg. Corp.*, 395 F. App'x 494, 495 (10th Cir. 2010) (*unpublished*); *Kee v. R-G Crown Bank*, 656 F. Supp. 2d 1348, 1355 (D. Utah 2009) ("a loan servicer such as Fifth Third is only a 'debt collector' within the meaning of the FDCPA if it acquires the loan after it is in default"). *Lewis v. JP Morgan Chase Bank, N.A.*, 2014 U.S. Dist. LEXIS 38420, 27-28 (D. Colo. Mar. 24, 2014). (Bold Added).

According to the mortgage instrument, MERS had the right to collect the underlying debt in this action by foreclosure or otherwise. Record P. 71. Appellant had conveyed his interest in the subject to property to MERS to secure payment. Record P. 71.

Clearly, from the record it is apparent that the mortgage was in default when it was assigned from MERS to Respondent. Record P. 125; Record 22 ¶ 13. Thus Respondent is a debt collector within the meaning of the FDCPA. MERS is a distinct and separate corporate entity from the Respondent. Record P. 125; Record P. 112; Record P. 106, L. 6. Further the mortgage instrument itself represents that MERS is the Mortgagee under the Security Instrument. Record P. 68.

There have been no facts set forth by Respondent that MERS or Respondent have merged into a single corporate entity.

Neither Respondent nor MERS timely furnished Appellant with the required servicing disclosures required by 12 USCS § 2605. Record P. 127. Appellant was unaware that MERS had purportedly assigned the Mortgage to Respondent until Appellant was served with the Summons and Complaint in this action. Record P. 127.

12 USCS § 2605(c) provides:

(c) Notice by transferee or loan servicing at time of transfer.

(1) Notice requirement. Each transferee servicer to whom the servicing of an federally related mortgage loan is assigned, sold, or transferred shall notify the borrower of any such assignment, sale, or transfer.

(2) Time of notice.

(A) In general. Except as provided in subparagraphs (B) and (C), the notice required under paragraph (1) shall be made to the borrower not more than 15 days after the effective date of transfer of the servicing of the mortgage loan (with respect to which such notice is made).

Respondent is the transferee with regard to the Assignment of the mortgage from MERS to Respondent.

Violations of consumer protection statutes set forth a basis for alleging violations the FDCPA. *Fontell v. Hassett*, 870 F. Supp. 2d 395 (D. Md. 2012) and the FDCPA encompasses foreclosure under a deed of trust. *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 376 (4th Cir. 2006).

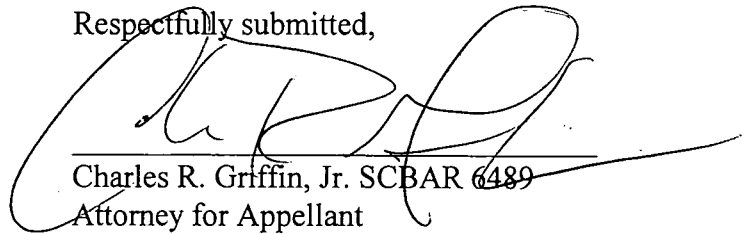
Appellant has alleged that the Respondent's violations of the FDCPA include: Threatening to take action that cannot legally be taken or that was not intended to be taken as prohibited by 15 U.S.C. § 1692e(5); Engaging in conduct which had the natural consequence of harassing, oppressing, or abusing Appellant in connection with the collection of a debt in violation as prohibited by 15 U.S.C. § 1692d; Falsely representing the character, amount or legal status of the debt as prohibited by 15 U.S.C. § 1692e(2)(A); and Generally using a false representation or deceptive means to collect a debt as prohibited by 15 U.S.C. § 1692e(10).

Appellant has alleged statutory violations of the FDCPA. Generally, whether or not a statutory violation has occurred is a question of fact for the jury. See *Cooper by Cooper v. County of Florence*, 306 S.C. 408 (S.C. 1991). (The determination of whether a motorist statute has been violated is ordinarily a question of fact for the jury.)

CONCLUSION

For the reasons stated, petitioner asks the Court to grant the petition for a writ of certiorari.

Respectfully submitted,



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November 24, 2015

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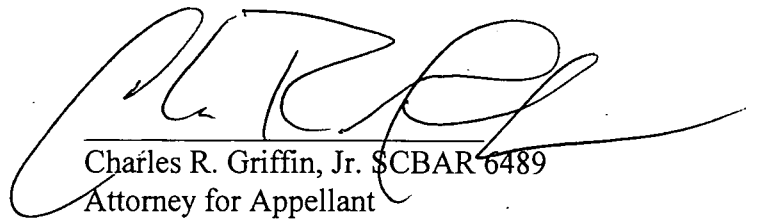
PROOF OF SERVICE

I hereby certify that on November 24, 2015 a copy of Appellant's Petition for a Writ of Certiorari to the Court of Appeals was served by regular United States Mail by depositing with the United States Mail a copy of same with postage prepaid and addressed to:

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The Honorable Jenny Abbott Kitchens
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Dated: November 24, 2015