THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS OF LEE COUNTY
W. Jeffery Young, Circuit Court Judge

Appellate Case No. 2014-0002451

Ernestine N. Palmer, as Trustee of the Article IV Trust created under the Will of Mary Denman Newman, deceased, Ronald O. Palmer, Ernestine N. Palmer, as Trustee of the Article IV Trust created under the Will of James E. Newman, deceased,

Respondents,

v.

Hatcham Gove Inc., and David H. Lucas,

Appellants.

FINAL BRIEF OF RESPONDENTS

Kyle B. Parker
POPE & HUDGENS ATTORNEYS, P.A.
1508 College Street
Newberry, SC 29108
Phone (803) 948-9263
Fax (803) 276-8684

Attorneys for Respondent

Newberry, South Carolina
June 18, 2015

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STATEMENT OF THE CASE

Respondents filed this foreclosure proceeding on July 9, 2013 against the Appellants. Complaint, ¶ 1; R. p. 8. Appellants, in their answer raised several counterclaims, one of which alleged a violation of S.C. Code Ann. § 37-10-102 ("the attorney preference statute"). Answer and Counterclaims ¶¶ 53-55; R. p. 30. Appellants served their answers to Respondents' first set of interrogatories on April 30, 2013. Defendants Answers to Plaintiffs' First Set of Interrogatories; R. pp. 165-183. Therein, Appellants, under oath, conceded that the sole basis of their counterclaim for violation of the attorney preference statute is the fact that no "attorney preference" form was obtained at the closing of the subject loan. Defendants Answers to Plaintiffs' First Set of Interrogatories, ¶¶ 24-25; R. pp. 178-179. Upon receipt of and based on these answers to Respondents' interrogatories, Respondents filed a motion for partial summary judgment in Respondents favor on the Appellants' counterclaim for violation of the attorney preference statute on May 22, 2014. Motion for Partial Summary Judgment; R. p. 42. Thereafter, the deposition of Appellant David Lucas was taken on August 1, 2014. Deposition Transcript of David Lucas, R. p. 54.

A hearing was held on the motion for partial summary judgment, along with other pending motions, on September 12, 2014. Transcript of Hearing, p. 1, R. p. 140. Prior to the hearing, Respondents provided the Court a memorandum in support of Respondents motions. Memorandum in Support of Motion for Additional Time to Respond to Defendants Request for Admission, or, in the Alternative, Motion to Withdraw or Amend Under Rule 36(b); R. pp. 47-51. Attached to the memorandum were the Appellant's answers to Respondents' first set of interrogatories. Exhibit B to Memorandum in Support of Motion for Additional Time to Respond to Defendants Request for Admission, or, in the Alternative, Motion to Withdraw or Amend Under Rule 36(b); R. pp. 48; 165-183. In further support of the motion for partial summary judgment, Respondents read a portion of Appellant David Lucas' deposition into the record at the hearing. Transcript of Hearing, p. 9-10; Deposition Transcript of David Lucas, p. 81, ln. 6 to p. 82, ln. 22; R. pp.148-149; 135-136. Based on these items, the Honorable W.

Jeffrey Young granted Respondents' motion by order dated October 15, 2014. R. pp. 2-7. Appellants, in their opposition to Respondents' motion, pointed Judge Young only to the fact that no attorney preference form was obtained by the closing attorney. Transcript of Hearing, p. 8-9; R. pp. 147-148. Appellants did not file a motion to reconsider. Instead, the Appellants served their notice of appeal on November 6, 2014.

STATEMENT OF FACTS

This proceeding was initiated by Appellant, Ernestine N. Palmer, as Trustee of the Article IV Trust created under the Will of Mary Denman Newman, deceased, as a foreclosure proceeding in her attempt to collect upon a $700,000 mortgage loan made to Appellant Hatcham Gove, Inc. and personally guaranteed by Appellant David Lucas. Complaint, ¶ 1; R. p. 8. Defendant Hatcham Grove, Inc. is a South Carolina corporation owned and controlled by Defendant David H. Lucas. Answer and Counterclaims, ¶¶ 5 and 41; R. pp. 24; 27. As set forth in Defendants' answer, the said Plaintiff and her husband, Plaintiff Ronald O. Palmer, have been close personal friends with Defendant David H. Lucas for over 40 years. Answer and Counterclaims, ¶ 42; R. p. 27. Appellant David Lucas, is an experienced businessman having developed millions of dollars worth of real estate. Deposition Transcript of David Lucas, p. 7, ln. 4 to p. 8, ln. 9; R. pp. 61-62. The mortgage loan to Defendants came about when Plaintiffs became aware of Defendant Lucas' financial difficulties related to Appellant David Lucas' business obligations. Deposition Transcript of David Lucas, p. 13, ln. 22-24; R. p. 67.

Despite asking for and receiving the benefit of Respondents' loan, Appellants now admit that they have failed to make even a single payment toward the repayment of the loan. Transcript of Hearing, p. 7, ln.14-18; R. p.146. Instead, the Appellants have responded to Respondents foreclosure proceeding by denying any obligation to repay the loan and seeking damages against the Respondents, including Appellants claim for violation of attorney preference statute. Answer and Counterclaims; R. pp. 23-37.

Appellants admit that the sole basis of their claim against Respondents for violation of the attorney preference statute is that no "attorney preference" form was obtained at the closing (Defendants Answers to Plaintiffs' First Set of Interrogatories, ¶¶ 24-25; R. pp. 178-179) of the loan notwithstanding the fact that Appellant David Lucas recommended the closing attorney to Respondents (who are from Texas) (Deposition

Transcript of David Lucas, p. 81, ln. 22-24; R. p. 135); that the attorney closing the transaction had represented Appellant David Lucas on numerous occasions prior to the loan closing (Deposition Transcript of David Lucas, p. 81, ln. 13-16; R. p.135); that he never voiced any objection to the attorney closing the transaction (Deposition Transcript of David Lucas, p 82, ln. 25 to p. 83, ln. 2; R. pp. 136-137); and, most importantly, that he did not want anyone else to represent him in the closing. Deposition Transcript of David Lucas, p. 82, ln. 20-24; R. p. 136. Finally, Appellate Lucas testified in his deposition that the purpose of the loan was to satisfy prior business obligations arising from a truck travel plaza. Deposition Transcript of David Lucas, p. 13, ln. 22-24; R. p. 67. These admissions on the part of the Appellants are fatal to their claim for a violation of the attorney preference statute.

STANDARD OF REVIEW

The purpose of summary judgment is to expedite the disposition of cases, which do not require the services of a fact finder. Hoard ex rel. Hoard v. Roper Hospital, Inc., 387 S.C. 539, 694 S.E.2d 1 (2010). Where there are no issues of material fact and the movant is entitled to judgment as a matter of law, summary judgment is appropriate. Rule 56, SCRCP (2010). Moreover, in determining the existence of a question of fact for summary judgment purposes, it is not sufficient that one create an inference or issue of fact that is not reasonable. Main v. Corley, 281 S.C. 525, 316 S.E.2d 406 (1984). Once the moving party has properly supported a motion for summary judgment, the non-moving party may not rest on the mere allegations or denials of his pleading, but must present facts showing that there is a genuine issue of material fact requiring a trial. Thomas v. Waters, 315 S.C. 524, 445 S.E.2d 659 (Ct. App. 1994). Thus, the existence of a mere scintilla of evidence in support of the nonmoving party's position is insufficient to overcome a motion for summary judgment. Id. A party's response to the motion must set forth specific facts, admissible in evidence, showing there is a genuine issue for trial. Dickert v. Metropolitan Life Ins. Co., 306 S.C. 311, 411 S.E.2d 672 (Ct. App. 1991). If he does not so respond, summary judgment should be entered against him. Id. While all facts should be viewed in the light most favorable to the non-moving party, where a verdict is not reasonably possible under the facts presented, summary judgment is proper. Bloom v. Ravoira, 339 S.C. 417, 529 S.E.2d 710 (2000).

ARGUMENT

I. **The Lower Court Correctly Granted Respondents Motion For Summary Judgment on Appellant's Claim of a Violation Of South Carolina Code Ann. § 37-10-102 Because There Are No Questions Of Material Fact Relating To Such Claim And Respondent Is Entitled To Such Judgment As A Matter Of Law.**

Judge Young correctly found that no material questions of fact existed concerning Appellants' claim of a violation of the attorney preference statute and that, based on the record before him, Respondents were entitled to judgment as a matter of law.

A. The Lower Court Correctly Found That the Attorney Preference Statute Does Not Require a Lender to Secure a Form From the Borrower.

Appellants' answers to Respondents interrogatories numbers 24 and 25 which inquire as to the basis of the Appellants' claims under the attorney preference statute state that "[Appellants] base their violation of S.C. Code Ann. § 37-10-102 on [Respondents'] failure to secure an executed Attorney Preference Form from [Appellants] prior to closing of the subject loan." Defendants Answers to Plaintiffs' First Set of Interrogatories, ¶¶ 24-25; R. pp. 178-179. Appellants did not point to any other basis for their claim in the lower court. An issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review. Ellie, Inc. v. Miccichi, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004). The claim is, therefore, based on solely the lack of a form.

S.C. Code Ann. § 37-10-102 provides in pertinent part,

> "Whenever the ***primary purpose*** of a loan that is secured in whole or in part by a lien on real estate is for ***a personal, family or household purpose***: (a) The creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction... The creditor ***may*** comply with this section by:
> (1) including the preference information on or with the credit application so that this information shall be provided on a form substantially similar to a form distributed by the administrator; or
> (2) providing written notice to the borrower of the preference information with the notice being delivered or mailed no later than three business days after the application is received or prepared. If a creditor uses a preference notice form substantially similar to a form distributed by the administrator, the form is in compliance with this section." (emphasis added).

The statute does not require a form to be obtained by a lender. Instead, the statute provides only that a lender "may" comply by obtaining a form[1].

Appellants reliance on the case of King v. American General Finance, Inc., 386 S.C. 82, 687 S.E.2d 321 (2009), is misplaced. King was controlled by and decided upon the language of the attorney preference statute as it existed prior to a 1996 amendment, and turned entirely on the issue of the timing of the attorney preference disclosure. The prior statute required the lender to seek the borrower's preference at the outset in the credit application itself. 1996 Act No. 355, § 1. Following the amendment, this is no longer required, and the lender is only compelled to ascertain the preference "prior to closing". S.C. Code Ann. § 37-10-102(a). Therefore, King has no application to this case.

Rather, the question at bar relates to the current version of the statute. Towards this end, it is important to note that cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Burns v. State Farm Mut. Auto. Ins. Co., 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). If a statute's language is plain, unambiguous, and conveys a clear meaning, then "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Instead, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand statute's operation. First Baptist of Mauldin v. City of Mauldin, 308 S.C. 226, 417 S.E.2d 592 (1992).

Here, the attorney preference statute is unambiguous, and the intention of the legislature is clear. Its use of the term "may" does not connote a requirement on the part of the lender to obtain a form. Instead, "may" is a permissive term. This point is made all the more clear by the legislature's use of the mandatory term "must" in the very same subsection concerning the requirement that the lender ascertain the borrower's preference. S.C. Code Ann. § 37-10-102(a), and by its use of "must" in the prior version of the statute.

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[1] Appellants base their claim for a violation of the attorney preference statute solely on the absence of a form, and, therefore, this brief will not address the notice described in S.C. Code Ann. § 37-10-102(a)(2).

The statutory scheme is clear. The legislature imposed the requirement that a lender ascertain the borrower's preference "prior to closing" and merely allows lenders to obtain a form as but one means of complying with this requirement. S.C. Code Ann. § 37-10-102(a). In other words, the legislature, in enacting S.C. Code Ann. § 37-10-102(a)(1) and (2), created a "safe harbor" for consumer lenders to comply with the statute. The legislature's use of both mandatory and permissive terms within the same subsection of the statute was clearly purposeful. In this context, had the legislature intended to confine compliance with the statute to a form, it would have used the term "must" in relation to the discussion of the form in the current version of the statute. It did not. Therefore, this Court should not entertain the Appellants' invitation to expand the statute beyond its plain terms. The statute simply does not require a form for compliance. As a result, Appellants' reliance on the absence of a form is insufficient to avoid summary judgment, and this Court should affirm the lower court's order.

B. The Lower Court Correctly Found That No Genuine Question of Material Fact Exists With Regard to Appellants' Claim for Violation of the Attorney Preference Statute.

Judge Young astutely found that there is no question of fact regarding the Appellants' attorney preference claim in this case. In addition to pointing to the fact that the statute does not require a form, Respondents pointed to certain discovery response of the Appellants and the deposition testimony of Appellant David Lucas in support of the summary judgment motion. Transcript of Hearing, p. 6, 9-10.

Appellant Lucas testified that he recommended the closing attorney to Respondents (who are from Texas). Deposition Transcript of David Lucas, p. 81, ln. 22-24; R. p. 135. He further testifed that he had known the closing attorney since he was born. Deposition Transcript of David Lucas, p. 81, ln. 8-10; R. p. 135. The attorney closing the transaction had also represented him on numerous occasions prior to the loan closing. Deposition Transcript of David Lucas, p. 81, ln. 13-16; R. p. 135. Moreover, he never voiced any objection to the selection of the attorney closing the transaction. Deposition Transcript of David Lucas, p. 82, ln. 25 to p. 83, ln. 2; R. p. 136. Finally and most damning to his case, Appellant Lucas testified that he did not want anyone else to

represent him in the closing. Deposition Transcript of David Lucas, p. 82, ln. 20-24; R. p. 136.

A party's response to a motion for summary judgment must set forth specific facts, admissible in evidence, showing there is a genuine issue for trial. Dickert, *supra.* However, Appellants pointed to no evidence in opposition to Respondents' motion in the lower court. Transcript of Hearing, p. 6-8; R. pp.145-147. Consequently, the lower court properly entered summary judgment against him. Id.

While Appellants, in their brief, point to certain portions of Appellant Lucas' deposition for the first time on appeal, they do not even attempt to refute the evidence cited by Respondents. Rather, they attempt only to create an inference that either Appellant Lucas did not say what he said or that what he said is somehow insignificant. In determining the existence of a question of fact for summary judgment purposes, it is not sufficient that one seek to create an inference or issue of fact that is not reasonable. Main, *supra.* It is unreasonable to believe that the Respondents, who are from Texas, just happened to pick the very same closing attorney that previously represented Appellant Lucas on numerous occasions and whom he had known since he was born in an effort to deny Appellant Lucas his attorney of preference. On the contrary, it is no wonder he admits that he never voiced any objection to the attorney closing the transaction. There can be only one reasonable conclusion based on this record: Respondents did, in fact, ascertain Appellants preference for the closing attorney prior to closing as required by the statute. After all, Appellant Lucas, himself, testified he did not want anyone else to represent him at the closing. Therefore, summary judgment was proper. Bloom, *supra* (holding that summary judgment is proper where a verdict is not reasonably possible under the facts presented).

Despite the fact that Appellants seek to shift the burden to Respondents in their brief, it is a generally accepted principal of evidence in a civil action that the burden of proof lies with the party who by his pleadings has the affirmative of the issue. *e.g.*, Hoffman v. Greenville County, 242 S.C. 34, 129 S.E.2d 757 (1963); Baker v. Mutual Loan & Inv. Co., 218 S.C. 47, 61 S.E.2d 387 (1950); Baugh & Sons Co. v. Graham, 150 S.C. 398, 148 S.E. 220 (1929); see also, Johnson v. Johnson, 229 N.C. 541, 50 S.E.2d 569 (1948) (holding that the party making an affirmative claim has the burden with

respect to all elements of his claim or cause of action, and must prove what he alleges, and is even required to make proof of his negative allegations if they are essential to establishment of the case); Brown v. Parks, 173 Ga. 228, 160 S.E. 238 (1938) (holding that burden of proving negative is upon person claiming right to which proof of negative is essential). Appellants brought the claim. The burden is theirs to bear, yet they pointed to no evidence in the lower court to rebut the Respondents' motion. Accordingly, summary judgment is proper and this Court should affirm the lower court's ruling. Dickert, *supra.*

C. According to Appellate Lucas' Deposition Testimony, The Primary Purpose of the Subject Loan was not for a Personal, Family Or Household Purpose, and, Therefore, the Attorney Preference Statute does not Apply and Respondents are entitled to Summary Judgment.

Pursuant to Rule 220(c), South Carolina Appellate Court Rules, Respondents request the Court examine the record and affirm the lower court on the grounds that the primary purpose of the subject loan was not for a personal, family or household purpose.

S.C. Code Ann. § 37-10-102 provides that a lender must ascertain the preference of the borrower "[w]henever the primary purpose of a loan ... is for ***a personal, family or household purpose***..." (emphasis added). When asked the purpose of the subject loan, Appellate Lucas testified in his deposition that the purpose of the loan was to satisfy prior business obligations arising from a truck travel plaza. Deposition Transcript of David Lucas, p. 13, ln. 22-24; R. p. 67. Given that the loan was made to Appellant Hatcham Grove, Inc. for business purposes, the attorney preference statute does not apply, and Respondents are entitled to summary judgment. Therefore, this Court should affirm the lower court pursuant to Rule 220(c), SCACR.

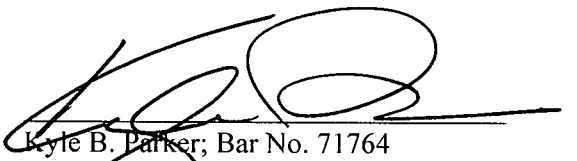
CONCLUSION

The lower court correctly granted Respondents' motion for summary judgment on Appellants' claim of a violation of the attorney preference statute because there are no questions of material fact relating to such claim and respondent is entitled to judgment as a matter of law. The Appellants base their claim solely on the absence of an attorney preference form, and, given that the statute does not require such a form, their claim of a violation of the statute fails. Moreover, Appellant Lucas' admission in his deposition testimony that he did not want anyone else to represent him in the closing of the subject

loan makes clear that there are no genuine issues of material fact remaining which would preclude summary judgment for Respondents. Finally, Appellate Lucas testified in his deposition that the subject loan was for business purposes rather than for a personal, family or household purpose. As a result, the attorney preference statute does not apply to the subject loan. For these reasons, this Court should affirm the lower court.

Respectfully submitted,

POPE & HUDGENS, P.A.



Kyle B. Parker; Bar No. 71764
1508 College Street
P.O. Box 190
Newberry, South Carolina 29108
Phone: (803) 276-2532
Fax: (803) 276-8684
kparker@popeandhudgens.com

Attorneys for Respondents

Newberry, South Carolina
June 18, 2015

Opposing Counsel:

Magalie Arcure, Esq.
Finkel Law Firm
4000 Faber Place Drive
North Charleston, South Carolina 29405
Phone: (843) 577-5460
Fax: (843) 800-7954
marcure@finkellaw.com

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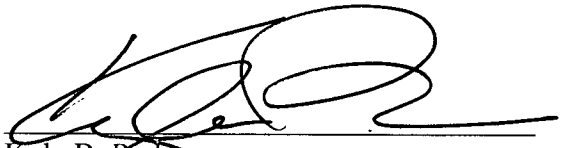
RULE 211(b) CERTIFICATE OF COUNSEL

The undersigned certifies that the Respondents Final Brief filed contemporaneously complies with Rule 211(b) of the South Carolina Appellate Court Rules



Kyle B. Parker
POPE & HUDGENS ATTORNEYS, P.A.
1508 College Street
Newberry, SC 29108
Phone (803) 948-9263
Fax (803) 276-8684

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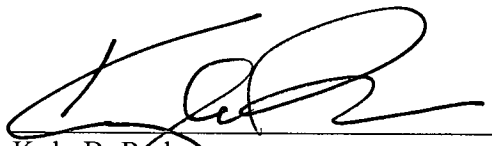
PROOF OF SERVICE

I certify that I have served a copy of the Final Brief of Respondents on the Appellants by mailing a copy of same via regular United States mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below, addressed to its attorney of record, Magalie Arcure, Esq., Finkel Law Firm, 4000 Faber Place Drive, North Charleston, South Carolina 29405.



Kyle B. Parker
POPE & HUDGENS ATTORNEYS, P.A.
1508 College Street
Newberry, SC 29108
Phone (803) 948-9263
Fax (803) 276-8684
Attorneys for Respondents

Newberry, South Carolina
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