

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEE COUNTY
Court of Common Pleas

W. Jeffrey Young, Presiding Judge, Third Judicial Circuit

Appellate Case No. 2014-0002451

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SC Court of Appeals

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 Grove, Inc., and David H.
Lucas,

Appellants.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUE ON APPEAL

- I. The circuit court erred in granting Respondents' Motion for Summary Judgment on Appellants' claim for violation of S.C. Code § 37-10-102 because Respondents did not satisfy their statutory burden to demonstrate that they ascertained the Appellants' preference of the legal counsel to represent Appellants in the subject transaction prior to the closing.

STATEMENT OF THE CASE

The Respondents, Ernestine N. Palmer, as Trustee of the Article IV Trust created under the Will of Mary Denman Newman, deceased, Ronald O. Palmer, and Ernestine N. Palmer, as Trustee of the Article IV Trust created under the Will of James E. Newman, deceased (hereinafter "Plaintiffs" or "Respondents") filed this foreclosure action on July 9, 2013, against the Appellants, David Lucas and Hatcham Grove, Inc. (hereinafter "Defendant Lucas" and together with Hatcham Grove, Inc. ("Appellants")). R. pp. 8-9. The Appellants, through counsel, answered, raising affirmative defenses and counterclaims for (1) an Accounting; (2) Violation of the Attorney Preference Statute, S.C. Code § 37-10-102 (1976); (3) Breach of Contract; (4) Breach of Contract Accompanied by a Fraudulent Act; (5) Promissory Estoppel; (6) Violation of South Carolina Trade Secret Act, S.C. Code Ann. §§ 39-8-20, *et seq.*; (7) Tortious Interference with Contractual Relations; (8) Intentional Interference with Prospective Advantage; and (9) Theft of Corporate Opportunity. R. pp. 29-35.

On May 22, 2014, Respondents filed a Motion for Summary Judgment (the "Motion")¹ on Appellants' counterclaim for violation of S.C. Code § 37-10-102 (the "Attorney Preference Statute"). Respondents subsequently served their responses to Appellants' First Request for Admission on July 25, 2014, and responses to Appellants' First Interrogatories and Requests for Production on August 15, 2014. During a hearing held on September 12, 2014, Respondents proffered Appellant David Lucas' deposition transcript as evidence in support of their Motion and read a portion of the transcript into the record. R. pp. 148-149. The court then ruled from the bench that Respondents' Motion for Summary Judgment as to Appellants' counterclaim for violation of S.C. Code Ann. § 37-10-102 was granted, and a corresponding Order was filed on

¹ Respondents captioned the Motion as one for "Partial Summary Judgment" since it only addressed one of Appellants' counterclaims; however, Respondents requested an order granting summary judgment as to this claim in its entirety.

October 15, 2014. Appellants filed a Notice of Appeal on November 10, 2014.

STANDARD OF REVIEW

Summary judgment is proper if, viewing the evidence and inferences to be drawn therefrom in a light most favorable to the nonmoving party, the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRPC; Quail Hill, LLC v. County of Richland, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010). Under Rule 56(c), the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Baughman v. American Tel. and Tel. Co., 306 S.C.101, 115, 410 S.E.2d 537, 545 (1992). With respect to an issue upon which the nonmoving party has the burden of proof, this initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the nonmoving party's case. Id. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000).

ARGUMENT

- I. **The circuit court erred in granting Respondents' Motion for Summary Judgment on Appellants' claim for violation of the Attorney Preference Statute because Respondents did not satisfy their burden to demonstrate that they ascertained the Appellants' preference of the legal counsel to represent Appellants in the subject transaction prior to the closing.**

Under the South Carolina Consumer Protection Code, when a loan is secured by a lien on real estate, creditors must ascertain a borrower's preference of the legal counsel employed to represent them in the transaction prior to the closing. See S.C. Code § 37-10-102(a). Compliance may be established through the provision of an attorney preference form submitted to the borrowers either accompanying or following the credit application, or 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. See S.C. Code § 37-10-102(a)(1)-(2). A primary purpose of the Consumer Protection Code is to "protect consumer buyers, lessees, and borrowers against unfair practices by some suppliers of consumer credit, having due regard for the interests of legitimate and scrupulous creditors." See S.C. Code § 37-1-102(2)(d). A creditor need only show substantial compliance to satisfy this provision, such as providing a clear and prominent request for the information. Davis v. Nations Credit Fin. Servs. Corp., 326 S.C. 83, 86, 484 S.E.2d 471, 472 (1997) ("[W]e conclude that a lender substantially complies with section 37-10-102 if the borrower receives a clear and prominent disclosure of the statutorily required information."). In deciding Davis, the Court held that "a lender may deviate from section 37-10-102 by assessing the borrower's preference for legal counsel on a separate piece of paper, provided the disclosure is "clear and prominent" and made contemporaneously with the actual loan application." King v. Am. Gen. Fin., Inc., 386 S.C. 82, 89, 687 S.E.2d 321, 324 (2009).

Here, the only evidence Respondents offered to demonstrate compliance with the provisions of the Attorney Preference Statute was Appellant Lucas' deposition testimony. Both forms of compliance set forth in S.C. Code § 37-10-102 (a) and (b), and the holding in King contemplate that the information will be presented to the borrower in writing, despite the qualifying language that those forms of compliance 'may' constitute compliance with the statute. Appellant's testimony intrinsically cannot and does not show that Respondents provided Appellants a clear and prominent request for the statutorily required information prior to the closing. The use of Appellant Lucas' testimony in support of Respondents' Motion cannot satisfy the statute and improperly shifted the burden to Appellants to show whether they exercised their right to select an attorney to represent them at the closing. That is not the purpose of the statute or what the plain language of the statute requires. Instead, the statutory burden falls on Respondents, as the creditors in the closing transaction, to demonstrate that they notified Appellants of this right prior to the closing.

While Respondents denied that they failed to ascertain Appellants' attorney preference prior to the closing of the transaction, the loan closing file produced by Respondents does not contain any documentation to show that Appellants received a clear and prominent disclosure of the statutorily required information before the closing. R. pp. 163; 197 – 254.² Furthermore, Respondents admitted that they do not possess an attorney preference form executed by Appellant Lucas in connection with the closing. R. p. 196.

In Respondents' proffer of Appellant Lucas' deposition at the hearing, Respondents both mischaracterized his testimony and confounded the requirements of the Attorney Preference Statute. R. pp. 135-137. Assuming, *arguendo*, that Appellant Lucas' testimony could be used as

² Plaintiffs' Responses to Defendants' Request for Production from Palmer-0001 through Palmer-0462 are not relevant to this appeal.

evidence to show Respondents' compliance with the Attorney Preference Statute, it simply does not. In fact, the entire line of questioning during Appellant Lucas' deposition failed to elicit any testimony to show that Respondents provided Appellants with the requisite statutory information prior to the closing. Specifically, Appellant Lucas testified that the closing attorney, Mr. Segars, "did not represent [Appellant] on this [transaction]." R. p. 135. Appellant Lucas also testified that he had recommended Segars to Respondents R. p. 135. However, there is no indication that Appellant Lucas' recommendation was made in connection with the subject closing transaction. Instead, all that Appellant Lucas' testimony shows is that he had prior dealings with Segars, and had recommended Segars to Respondents at some point in the past. Moreover, when asked whether he wanted someone else to represent him in the closing, Appellant Lucas testified that "[i]t was presented to him as a *fait accompli*" R. p. 135, which Black's Law Dictionary defines as "a deed accomplished." See FAIT, Black's Law Dictionary (10th ed. 2014). Significantly, even if Appellants had recommended Segars to close the transaction at issue and wanted Segars to represent Appellants in the transaction, that is irrelevant to determining whether Respondents notified Appellants of their right to select an attorney to represent them in the transaction and cannot be considered evidence of Respondents' compliance with the Attorney Preference Statute.

The Respondents have failed to provide any evidence of their compliance with S.C. Code § 37-10-102, *et seq.*, and there can be no dispute that Appellants were not provided the requisite attorney preference form either prior to or at the subject loan closing. Similarly, Respondents have failed to establish any other evidence of compliance with the provision, let alone the stringent substantial compliance standard set forth in the statute. As is evident from Appellant Lucas' deposition transcript, he was presented no opportunity to select an attorney of his choice to represent Appellants in the closing as is required by the statute. Instead, the evidence shows

that Appellants were not provided any opportunity to indicate their attorney preference in this loan transaction and thus S.C. Code § 37-10-102 was not satisfied. For these reasons, the ruling of the circuit court for partial summary judgment should be reversed as to Appellants' claim for violation of the Attorney Preference Statute. See Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004).

CONCLUSION

Respondents have not demonstrated substantial compliance to satisfy the provisions of S.C. Code § 37-10-102(a). This Court should reverse the order of the circuit court.

Ernestine N. Palmer v. Hatcham Grove, Inc. et al.
Case No. 2013-CP-31-00130
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Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that I have served the Final Brief of Appellants and Reply Brief of Appellants on Ernestine N. Palmer by depositing a copy of it in the United States Mail, postage prepaid, on June 18, 2015, addressed to her attorney of record, Kyle B. Parker, Pope & Hudgens, P.A. 1508 College Street, Newberry, South Carolina 29108.

June 18, 2015



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