

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Cordell Maddox, Circuit Court Judge

Case No: 2011-CP-37-1250
Supreme Court No: 2015-002414

Branch Banking and Trust Company,.....Respondent,

v.

Sarah L. Gray, Jeffery Gray, Suntrust Bank,
West Union Development, LLC, and Bank of Anderson, N.A.
Of Whom Jeffery Gray is.....Petitioner.

**RESPONDENT BRANCH BANKING AND TRUST COMPANY'S RETURN TO
JEFFERY GRAY'S PETITION FOR WRIT OF CERTIORARI**

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. DOES THE PETITION FOR WRIT OF CERTIORARI MEET THE STANDARD FOR GRANTING A REVIEW?
2. DID THE COURT OF APPEALS PROPERLY AFFIRM THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT TO THE RESPONDENT WHEN THE PETITIONER PRESENTED NO ADMISSIBLE EVIDENCE CREATING GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER RESPONDENT WAS A DEBT COLLECTOR UNDER THE FAIR DEBT COLLECTION PRACTICES ACT (FDCPA)?

COUNTER-STATEMENT OF THE CASE

This case is a foreclosure action brought against Sarah L. Gray and Jeffery Gray relating to a promissory note made, executed and delivered to Respondent on July 29, 2003.¹

The Promissory Note was in the amount of \$180,000.00 requiring monthly payments over 30 years at the fixed interest rate of 5.5%. In order to secure the repayment of the loan, the Petitioner signed a mortgage in which Mortgage Electronic Registration Systems, Inc. (MERS) was the mortgagee as nominee for the Respondent. MERS serves as the mortgagee of record for certain residential loans originated by the Respondent and did not purchase the loan or have any interest in the loan. MERS is used for the purpose of facilitating the sale and transfer of mortgage loans on the secondary market since MERS maintains a register of the ownership of loans for which it serves as mortgagee of record. In this case, however, the Respondent did not sell the loan but kept it in-house and serviced the loan since its origination. (Miller Affidavit, Paragraph 5, App'x 000163). The mortgage is a first lien on the real property with improvements described at App'x 000117.

¹ Sarah L. Gray was not an Appellant in the Court of Appeals. Only Jeffery Gray was an Appellant and is the only Petitioner in this matter.

Prior to filing the foreclosure action, MERS assigned the mortgage to the Respondent so that the Respondent became the mortgagee of record on the loan and the real party in interest. The assignment of the mortgage was executed by Ivan Hobbs, a BB&T employee designated as an authorized signing officer of MERS. (App'x 000152 - 000161).

The Petitioner filed a Counter-Claim to the foreclosure Complaint alleging Respondent violated the Fair Debt Collection Practices Act (FDCPA). 15 U.S.C.A. § 1692, *et seq.* The Respondent filed a Motion for Summary Judgment as to the counter-claims and also sought an Order referring the foreclosure action to the Master-In-Equity for Oconee County. The trial court granted the Respondent's Motion by an Order dated August 13, 2013 and filed with the Clerk of Court for Oconee County on August 16, 2013. (App'x 000050 – 000056).

The Court of Appeals affirmed the trial court in its unpublished Opinion No. 2015-UP-439. (App'x 000004 – 000006).

ARGUMENTS

1. DOES THE PETITION FOR WRIT OF CERTIORARI MEET THE STANDARD FOR GRANTING A REVIEW?

Petitioner has moved this Court to issue a Writ of Certiorari pursuant to Rule 242(b), SCACR. A Writ of Certiorari “is not a matter of right but of sound judicial discretion and will be granted only where there are special and important reasons.” Rule 242(b), SCACR.

Petitioner does not articulate the character of reasons which the Court should consider in granting review. Rule 242(b), SCACR, provides a list of five (5) categories which the Court may consider as character of reasons but those reasons are not controlling

or fully measuring the Court's discretion or power to grant a review in general. However, a review of the five (5) listed categories indicate that the Petitioner has failed to present any basis for meeting the criteria as follows:

1. There are no novel questions of law raised or presented in the case.
2. There is no dissent in the decision of the Court of Appeals.
3. The Petitioner has not shown that the unpublished decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
4. There are no constitutional issues, substantial or otherwise, directly involved in the case.
5. Even though the Petitioner alleges violations of the FDCPA, the Petitioner does not assert or demonstrate that the decision of the Court of Appeals is in conflict with a decision of the United States Supreme Court.

The Petitioner, in essence, asserts before this Court arguments presented to the trial court and the Court of Appeals relating to the FDCPA and those arguments are legally insufficient to support his Petition for a Writ of Certiorari.

2. DID THE COURT OF APPEALS PROPERLY AFFIRM THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT TO THE RESPONDENT WHEN THE PETITIONER PRESENTED NO ADMISSIBLE EVIDENCE CREATING GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER RESPONDENT WAS A DEBT COLLECTOR UNDER THE FAIR DEBT COLLECTION PRACTICES ACT (FDCPA)?

The FDCPA is only applicable to debt collectors. *Neff v. Capital Acquisitions & Management Com.*, 352 F.3d 1118 (7th Cir., 2003). Merely alleging an entity is a "debt collector" is by itself insufficient. *Swain v. CACH, LLC*, 699 F. Supp. 2d 1109, 1112 (N.D. Cal. 2009).

Respondent is not a debt collector because Respondent falls within the creditor exemption of the FDCPA. 15 U.S.C.A. § 1692(a)(6)(A)&(F). Creditor is defined as "any person who offers or extends credit creating a debt or to whom a debt is owed." 15 U.S.C.A. § 1692(a)(4). The promissory note signed by the Petitioner created a debt to the Respondent. (App'x 000112). The mortgage given by the Petitioner to MERS as nominee for Respondent clearly identifies the Respondent as the lender. (App'x 000116).

Petitioner attempts to label Respondent a debt collector by asserting that Petitioner's debt was in default at the time MERS assigned the mortgage to Respondent preparatory to the initiation of the foreclosure action. MERS was never Petitioner's lender or creditor. MERS acted as the nominee for Respondent because MERS serves as the registry of residential mortgages and facilitates a transfer of the security in the event Respondent sold Petitioner's loan in the secondary market. However, Respondent never sold the loan in question. It was kept in-house and serviced completely by Respondent. (Miller Affidavit, Paragraph 5, App'x 000163).

A mortgage is a contract. *Adams v. Fellers*, 88 S.C. 212, 213, 70 S.E.2d 722, 723 (1911). The freedom to contract allows parties to a mortgage to contract for MERS to

serve as a mortgagee as the nominee for the lender. (The use of a nominee in real estate transactions, and as a mortgagee in a recorded mortgage, is a long-standing practice.) *Deutsche Bank Nat'l Trust Co. v. Pietranico*, 928 N.Y.S. 2d 818, 833 (N.Y. Sup. Ct. 2011). A “nominee” is a person designated to act in place of another usually in a very limited way. *Black's Law Dictionary*, 1076 (8th ed. 2004). A “nominee” means a party who holds fair legal title for the benefit of others or a “person designated to act in the place of another.” *Kiah v. Aurora Loan Services, LLC.*, 2011 WL 841282, at *8 (D. Mass. March 4, 2011).

The reason MERS assigned the mortgage to Respondent was to place Respondent in the status of being the real party in interest and having the requisite legal standing to bring the foreclosure action. *Bank of Am. N.A. v. Draper, MERS, et al.*, 405 S.C. 214, 746 S.E.2d 478, 482 (Ct. App., 2013). In that case, MERS was the nominee for the lender and assigned the mortgage to the lender. The Court, in addition to finding the note and mortgage holder was the real party in interest, also held that the “assignment of the note secured by a mortgage carries with it an assignment of the mortgage, but...the assignment of the mortgage alone does not carry with it an assignment of the note.” *Hahn v. Smith*, 157 S.C. 157, 167, 154 S.E.2d 112, 115 (1930).

Petitioner also asserts that Respondent did not make certain disclosures relating to serving of the loan as required by 12 U.S.C.A. § 2605. Petitioner recites in his Petition several sections of 12 U.S.C.A. § 2605 but conveniently leaves out the definitional portions of the statute. There is a requirement that a servicer of a loan must notify the borrower of any assignment, sale or transfer but MERS was never the servicer of Petitioner's loan. 12 U.S.C.A. § 2605(i) proves as follows:

- (i) Definitions
For purposes of this section:

- (2) Servicer
The term “servicer” means the person responsible for servicing of a loan (including the person who makes or holds a loan if such person also services the loan).
- (3) Servicing
The term “servicing” means receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan including amounts for escrow accounts described in § 2609 of this Title and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan.

MERS never served in the capacity as servicing the loan. As statutory defined, Respondent was the entity “responsible for servicing of” the loan (including the entity who makes or holds the loan). As a result, no disclosure was required by either MERS or the Respondent relating to the assignment of the mortgage by MERS to the Respondent. Accordingly, there were no violations of any consumer protection statute that would serve as a basis for alleging violations of the FDCPA.

Petitioner also asserts that he has alleged statutory violations of the FDCPA and cites a South Carolina case for the proposition that whether or not a statutory violation has occurred, as a general rule, is a question of fact for the jury. The case of *Cooper by Cooper v. County of Florence*, 306 S.C. 408, 412 S.E.2d 417 (1991) was an automobile accident case and the issue involved was whether the violation of the South Carolina Motor Vehicle Code constituted evidence of a lack of due care. The Court, in a split decision, concluded that issues dealing with standard of care in an automobile accident case should be decided by a jury. In the instant case, the mere allegations that Respondent violated the FDCPA without more does not raise any jury issues.

Finally, Respondent attempts to raise factual issues by referring to his Affidavit submitted on the day of the Summary Judgment hearing in the trial court in opposition to

Respondent's Motion for Summary Judgment. The Affidavit was never served on the Respondent and the trial court ruled that Petitioner's attempted service of the Affidavit by facsimile was incorrect. (App'x 00204). The Affidavit Petitioner attempted to serve by facsimile was sent to the office of one of the attorneys for the Respondent within two (2) days of the hearing in violation of Rule 56(c), SCRPC. Any Affidavit must be served not later than two (2) days before the hearing. There is no certificate of service in compliance with Rule 5(b)(1), SCRPC.

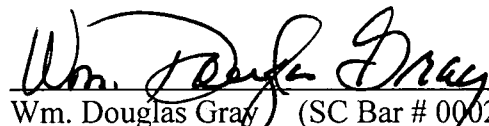
Additionally, Petitioner's Affidavit contained blatant hearsay and is in violation of Rule 56(e), SCRPC. Petitioner's purported Affidavit recites that after he was served with the foreclosure Complaint, he telephoned MERS and asked the person working at MERS if Ivan Hobbs was employed by MERS and was informed by MERS's agent that there was no one employed by MERS by that name. Those recitations are blatant hearsay and would not be admissible in evidence. "Hearsay is a statement other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted." Rule 801(c), South Carolina Rules of Evidence. The only purpose the Petitioner had in reciting his alleged telephone conversation with an unknown person at MERS and a review of the MERS website was to offer those events into evidence to prove the truth of the matters asserted. There are no exceptions under Rule 803 of the South Carolina Rules of Evidence which are applicable. Since those statements in the purported Affidavit would not be admissible into evidence, the Affidavit should not have been considered by the trial court for any purpose and the Respondent's objections to the admissibility of the Petitioner's purported Affidavit should have been sustained.

In summary, Petitioner created a debt to the Respondent by signing a promissory note. A mortgage securing the repayment of the note was given by the Petitioner to MERS as nominee for the Respondent. MERS was never the Petitioner's creditor. MERS assigned the mortgage to the Respondent prior to the initiation of the foreclosure action but MERS was never the Petitioner's lender. Respondent always serviced the loan in-house and was never a debt collector under the Fair Debt Collection Practices Act.

CONCLUSION

The Petitioner has not demonstrated that his Petition meets the criteria for a Writ of Certiorari under Rule 242, SCACR and has also failed to set forth any admissible evidence showing there was a genuine issue of material fact relating to whether the Respondent was a debt collector under the Fair Debt Collection Practices Act (FDCPA).

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December 22, 2015.

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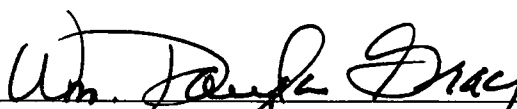
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West Union Development, LLC, and Bank of Anderson, N.A.
Of Whom Jeffery Gray is.....Petitioner.

CERTIFICATE OF SERVICE

I, Wm. Douglas Gray, hereby certify that I have, on the date indicated below, served counsel below with Respondent Branch Banking and Trust Company's Return to Jeffery Gray's Petition for Writ of Certiorari, by mailing a copy of same via United States Main, postage pre-paid and return address clearly indicated on said envelope, to counsel at the following address:

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