THE STATE OF SOUTH CAROLINA
In The Court of Appeals
1220 Senate St Columbia, SC 29201

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APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Diane S. Goodstein, Circuit Court Judge

Case No. 2014-CP-18-1007(Court of Common Pleas)
Case No. 2015-001543 (SC Court of Appeals)

Bank of New York Mellon Trust Co. N.A..not in its individual capacity but Solely as Trustee on behalf of the FDIC 2013-N1 Asset Trust, Respondent,

v.

CORNELL RILEY, Appellant.

APPELLANTS' INITIAL BRIEF

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v.

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APPELLANTS' INITIAL BRIEF

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Judge Diane S. Goodstein
Court of Common Pleas 5200 E Jim Bilton Blvd St George SC 29477

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STATEMENT OF ISSUES ON APPEAL

1. Did the court below err in ruling in favor of a Summary judgement for the respondent in Lack of consideration of Minter v. GOCT, Inc., 322 S.C. 525, 527, 473 S.E.2d 67, 69 (Ct. App. 1996). Of which the evidence and all reasonable inferences must be viewed in The light most favorable to the nonmoving party. Appellant believes that he has presented Evidence that shows more than reasonable inferences?

2. Did the court err in considering the affidavit of the respondent's employee that notice of default or acceleration was submitted in the mortgage file, while not considering enough the affidavit by appellant's spouse that no such notice of default or acceleration was ever received by mail or any other form of delivery?

3. Did the court below err in reversing its ruling to grant appellant a jury trial due to the respondent's lack of evidence during the hearing to show that such default notice or acceleration was mailed according to the mortgage contract?

STATEMENT OF THE CASE

Appellant Cornell Riley (Riley) is a citizen of Dorchester County. Respondent is The Bank of New York Mellon Trust Co. N.A..not in its individual capacity but Solely as Trustee on behalf of the FDIC 2013-N1 Asset Trust. In April 2014 Riley sent a personal check in the amount of $16,607.51to respondent for the mortgage of property noted as 100 Madison Ave Ladson SC for full up-to-date payment including all charges and fees. Respondent in turn did not send the check to Riley's bank for payment instead they sent the original check back to Riley with a letter claiming that certified funds were required. On 5/12/2015 Riley sent a Qualified Written Request in accordance with Real Estate Settlement Procedures Act (RESPA) 12U.S.C 2605(e), requesting an explanation for rejecting payment and letting them know that the mortgage contract only allow certified funds if any payment was rejected from appellant, the contract also states that certified funds will only be required if after acceleration has been commenced which my QWR did not state. In violation of (RESPA) Respondent have not until this current date and time of this initial brief responded to the appellant's QWR. As a direct result of the respondent's violation of the federal Act and breach of contract by not excepting appellant's payment toward the mortgage balance, but instead a month later on May, 27 2014 filed foreclosure proceedings. Not accepting my contractual payment caused appellant to file for a $36,000 dollar second mortgage with South Carolina Help of which payment or a five year agreement to stay in the home and not have the freedom to act as appellant would like to without being restricted by the second mortgage. Appellant has always claimed that no notice of right to cure required S.C SECTION 37-5-110 or S.C. SECTION 37-5-111 cure of default and no notice of acceleration according to the Mortgage contract section 1 and 18 Appellant mistakenly took the foreclosure

documents received in July 2014 as a notice of acceleration document and or default and it was the first time appellant notice any concern of default or acceleration the first time appellant received any notice of acceleration or default was submitted with the documents respondent submitted to the courts with its Motion for Summary judgement. Appellant filed a Motion to reconsider siting respondent's lack of compliance with RESPA and the fact that the Respondent took from the time of the QWR in April of 2014 until March of 2015 to finally produce two letters of default and or acceleration of which Appellant claims are fabrications and additions to the mortgage record after the payment was rejected in April of 2014 and why there was never a proper and legal response to appellant's QWR which conforms a breach of contract causing financial harm to appellant including all cost of this action. Appellant filed a separate action case no: 2014-CP-18-1634 this case in transcript for November 19, 2014 covered also case no 2014-CP-18-1007 of which the lower court ruled in favor of Appellant for a trial by jury and deemed that the breach of contract was raised and that it was a jury issue. The trial court granted summary judgement in favor of respondent on 5/4/2015. This appeal followed.

STANDARD OF REVIEW

The court below ruled as a matter of law that it granted respondent's motion for summary judgement based on the lower court view that there is no material fact regarding defendant's breach of contract cause of action. (Order of May 4, 2015 p.1) In reviewing the determination of the court below that there is no material fact regarding defendant's breach of contract cause of action, this court is to consider the question without deference to the court below as the South Carolina Court of Appeals as directed in State ex rel, Wilson v. Town of Yamasee, 391 S.C. 565, 707 S.E.2d 402, 405 (2011)

Where, as in the case now before the court, the appellate court is reviewing grant of a motion for summary judgment in a suit for breach of contract against respondent in failing to except a personal check for the amount of $16,607.51 which would have brought the mortgage account current. Appellant submits that

"In ruling on motions for directed verdict or judgment notwithstanding the verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions." Steinke v. S.C. Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). "The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt." Id. "This Court will reverse the trial court only when there is no evidence to support the ruling below." Welch v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408, 418 (Ct. App. 2000) (citing Steinke, 336 S.C. 373, 520 S.E.2d 142 (1999); Creech v. S.C. Wildlife & Marine Res. Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997)).

ARGUMENT

I. THE COURT BELOW ERRED IN RULING IN FAVOR OF RESPONDANT SUMMARY JUDGEMENT TO DISMISS THE CASE BASED ON EVIDENCE SUBMITTED TO THE COURT NEARLY ONE YEAR AFTER SUCH EVIDENCE WAS REQUESTED BY APPELLANT, AND OVER FOUR MONTHS AFTER THE LOWER COURT ASKED RESPONDANT IF IT COULD PRODUCE SUCH EVIDENCE.

Appellant maintains that respondent did not send a notice of default or notice of acceleration of the mortgage loan before rejection legal tender payment to bring the account current as required by S.C. Section 37-5-110, and in accordance with S.C. Code Ann SECTION 37-22-190 Mortgage Next Lending Appellant did submit evidence to the lower court a QWR (Qualified Written Request) according to the standards of Real Estate Settlement Procedures Act (RESPA) 12U.S.C 2605(e) Appellant sent and was confirmed received by letter from respondent's loan servicer Seneca Mortgage Servicing LCC. While Respondent did sent a letter acknowledging receipt of appellant QWR respondent as of December 2015 have not respondent to appellant's QWR regarding why it rejected payment to current, in doing so violated both S.C. Code Ann SECTION 37-22-190 Mortgage Next Lending and (RESPA) 12U.S.C 2605(e) of which all evidence was submitted to the lower court. Appellant have raised the question to the lower court also within the motion to reconsider summary judgement that from May 2014 to March 2015 respondent could not or refused to supply appellant with such default notification or acceleration notice in reply to appellant QWR and to support respondent's claim that Mortgage Contract section 18 between Appellant and Respondent concerning certified funds being required after acceleration. Appellant maintains that no such notice was sent prior to rejection of payment and

argues that if such notice was a part of the mortgage file since January 2013 as claimed by respondent it should not have taken nearly a year to produce such evidence before it was sent with the summary judgement motion filing in March of 2015. During a hearing in November 2015 the lower court asked respondent if they had proof of such notice of which respondent replied that it did not have it at the current time, as a result the lower court granted appellant a jury trial set for jury roster, again raising a reasonable question as to if such notice did exist at the time and could lead to the question as to why such notice was not provided even after appellant inquired in his QWR which to this day have not been replied to. This question should be an issue for a jury to decide if there was a breach in not accepting payment, and causing appellant finical harm in doing so.

II. THE COURT BELOW ERRED IN CONSIDERING THE AFFIDAVIT OF RESPONDANT'S EMPLOYEE SUBMITTED NEARLY ONE YEAR AFTER A QWR SUBMITTED BY APPELLANT IN ACCORDANCE WITH RESPA 12U.S.C 2605(e) AND BY NOT EQUALLY CONSIDERING THE AFFIDAVIT OF THE APPELANT'S SPOUSE AND ALSO APPELANT'S ATTORNEY IN FACT AT MORTGAGE SIGNING IN JULY 2009.

Appellant submitted a sworn affidavit to debut the affidavit submitted by respondent's loan servicer's employee stating that a notice of default was sent and placed in the mortgage file. Appellant's spouse which is a witness as to any postal mail being received at appellant's address of record. Appellant's spouse affidavit was not given the same consideration of respondent's affidavit in the light of respondent failure to reply to appellant's QWR. As to the issue of evidence that may have been considered by the lower court according to Baughman v. American

Telephone and Telegraph Company, 306 S.C. 101, 410 S.E.2d 537 (1991). Summary judgment is a drastic remedy and should be granted only upon clear and convincing evidence. Additionally, even where there is no dispute as to the evidentiary facts, but only as to the conclusions are inferences to be drawn from them, summary judgment should not be granted. The mere fact that respondent submitted an affidavit attesting that it sent a notice, and producing a notice dated for January 2014, and March 2014 should not be considered convincing evidence when the respondent could not and did not provide such evidence until nearly a year latter of which it claims was in the mortgage file long before rejection of appellant's payment. With the appellant's contention that the notice was not sent by respondent and was never a part of the mortgage file prior to appellant's payment and is evident by respondent's lack of response to the QWR and subsequently not producing any such evidence until nearly a year later which add to the appellant's contention that such evidence was added after payment submitted in May 2014 which should be a matter for a jury to decide according to ." Minter v. GOCT, Inc., 322 S.C. 525, 527, 473 S.E.2d 67, 69 (Ct. App. 1996). "If more than one inference can be drawn from the evidence, the case must be submitted to the jury." Appellant maintains that the time associated with submitting claimed evidence to the court, lack of submitting discovery with said evidence in time required by statute and lack or full response to QWR concerning its failure to respond to appellant until this date gives way to the "more than one inference test".

III. THE COURT BELOW ERRED IN REVERCING IT'S DECISION TO GRANT APPELLANT A JURY TRIAL TO DETERMIN IF RESOPNDANT DID BREACH THE MORTAGE CONTRACT, AND BY SO CAUSING APPELLANT UNDUE FINANCIAL AND A CONTRACTUAL FIVE YEAR SECOND MORTGAGE AS A RESULT OF THEIR BREACH

The lower court did grant appellant a jury trial in the light that respondent could not produce evidence during the November 2015 hearing that such notice was sent or placed in the mortgage file prior to appellant's payment and therefore as quoted by the lower court regarding respondent's motion to dismiss in November 2015 "I'm going to deny your motion to dismiss. There's got to be proof on each and every element because, you know, in a motion to dismiss I've got to accept the allegation as being true" Appellant maintains that the foreclosure filing and serving in July 2014 was the first that appellant was aware of any acceleration of the mortgage loan even if:

Farmers' Bank & Trust Company v. Fudge, 113 S.C. 25, 100 S.E. 628 (1919), the Court recited the rule that where acceleration clauses do not provide for acceleration "without notice" (i.e., there is silence regarding the right to notice of default), initiation of a civil action constitutes adequate "notice of acceleration." Id. at 140, 355 S.E.2d at 274.

Applies as to notice of default and acceleration the payment was sent and received prior to foreclosure proceeding and in the light that appellant claims that no notice was given prior payment which seems to be supported by the fact that respondent took nearly a year to provide evidence it claims was on record prior to payment and the fact that appellant still have not received a reply to why the payment was rejected if section 1 para 1 was not violated in the QWR sent to respondent, it would seem prudent for respondent to send a simple reply as required by law stating that payment was rejected due to section 18 of the mortgage contract in the time allotted by (RESPA) 12U.S.C 2605(e)

CONCLUSION

The court below erred in ruling granting summary judgement to respondent without due consideration in favor of the non-moving appellant considering appellant's argument and witness affidavit that no notice was given of default or acceleration, and that such a claim by the appellant is at least supported in the fact that responded is still in violation of S.C. Code Ann SECTION 37-22-190 Mortgage Next Lending and (RESPA) 12U.S.C 2605(e) respondent as still to this day not replied to the inquiry within the QWR submitted by appellant and confirmed received by respondent in over a year with no full reply. Further that as a fact that it has taken respondent n over 11 months to submit claimed evidence that was stated to be a part of the mortgage file for over a year but did not produce it until nearly a year latter this action leads to a reasonable inference that such evidence did not exist prior to appellant's submitting payment to respondent prior to acceleration and that payment should have been excepted and not rejected according to the mortgage contract. By not accepting appellant's payment and forcing appellant to engage in a five year contract regarding his property to except a loan for $36,000 dollars of which must be paid back in order to be relived of the contract as well as cost associated with this case. The respondent's actions and lack of action warrants reversal and remanding of the summary judgement to the Dorchester County court for jury roster to determine whether respondent did breach the contract by rejection of payment without cause and causing harm to appellant.

Respectfully Submitted

Cornell Riley, Pro Se _____ 12 / 06 /2015
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