

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

The Hon. Robin B. Stilwell

Case No. 2014-CP-23-4097

First Citizens Bank and Trust  
Company, Inc.

Respondent,

v.

Ronald D. Taylor and Ted D.  
Smith,

Appellants.

BRIEF OF APPELLANT

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850 Wade Hampton Blvd  
Greenville, South Carolina 29609  
(864) 232-0026  
Attorney for Appellants

Other Counsel of Record:  
Joey R. Floyd  
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Columbia, SC 29260  
Attorney for Respondent

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### STATEMENT OF THE CASE

This action was commenced by the filing of a verified complaint wherein the Plaintiff alleged that on or about May 22, 2008 Defendants executed a promissory note in favor of the Plaintiff in the amount of \$52,526.07. The complaint alleged one cause of action against the Defendants being "breach of contract-promissory note". The complaint specifically did not allege that the note was executed contemporaneously with a mortgage, was secured by a mortgage nor was a mortgage attached to or incorporated into the complaint.

The Defendants answered acknowledging and admitting the execution of the note and the default thereof but specifically raising the statute of limitations as an affirmative defense.

Plaintiffs and Defendants ultimately entered into a consent order stating, "the parties hereto have agreed to file cross-motions for summary judgment and allow this court to determine the outcome of this case based on the pleadings of record filed with the Greenville County Clerk of Court, memoranda in support of their respective positions and affidavits, if any, filed by the parties hereto."

No further affidavits were filed. The parties submitted their memoranda's in support of the motions for summary judgment in accordance with the terms of the order.

For the first time the Plaintiff alleged in its memorandum in support of its motion for summary judgment that the note was secured by a mortgage.

The trial court found that the appropriate statute of limitations, based upon the allegation related to the mortgage, was 20 years and found in favor of the Plaintiffs.

## **EXCEPTIONS**

**I. The trial court erred in receiving arguments and evidence which were both outside the scope of the pleadings and directly contrary to the consent order to decide case on cross-motions for summary judgment the error being that the Defendants were denied procedural due process.**

EXCEPTIONS

## ARGUMENT

**The trial court erred in accepting and considering evidence outside the scope of the pleadings and outside the scope of the clear language of the consent order.**

The Plaintiff knowingly and consciously plead a single legal cause of action upon what it styled a promissory note. The complaint is devoid of any allegation that the promissory note was secured by a mortgage on real property.

Based upon the allegations of the complaint the Defendant asserted only one affirmative defense, that the complaint was barred by the applicable statute of limitations.

Given that this was the only issue, counsel for the respective parties consented to cross-motions for summary judgment based only upon "pleadings of record filed with the Greenville County Clerk of Court, memoranda in support of their respective positions and affidavits, if any, filed by the parties hereto."

Upon filing the memoranda required by the consent order the Plaintiff, for the first time, attached a copy of a mortgage and alleged and argued that the note was secured by a mortgage and therefore the 20 year statute of limitation applied.

Despite this being completely contrary to the agreed upon terms contained within the consent order it also deprived the Defendants of a number of affirmative defenses and factual issues that could have, and likely would have, been raised had the Plaintiff originally plead and alleged that the note was secured by a mortgage. Specifically, presumably some action on the original mortgage had resulted which could have required additional affirmative defenses such as accord and satisfaction, set off, laches, res judicata or waiver. Additional factual circumstances could have given rise to a determination that some or all of the note balance had previously been repaid by resort to the security. Even the issue of statute of limitations may still have been raised as a defense had the securing of the note by a mortgage been plead since, if it had indeed been foreclosed, the date of foreclosure would be relevant as to whether the note remained secured by a mortgage and for what period of time. S.C.R.C.P. Rule 8(b) and (c) mandate the denials and affirmative defenses being made to each cause of action asserted in the pleadings. The Rule does not require the responding party to aver facts or plead affirmative defenses to claims or causes of action which the Plaintiff

could have made. Here the Plaintiff elected to bring a single claim for the breach of a commercial promissory note and pursuant to S.C.R.C.P. Rule 8 the Defendant was obliged only to admit or deny those allegations and set forth any affirmative defenses which would apply to those allegations.

Obviously if any of those above scenarios had occurred the Defendant would have not consented to motions for summary judgment on the pleadings.

The Order to which the Defendants agreed required that the motions for summary judgment be determined on the pleadings and the trial court erred in allowing and considering evidence outside the scope of the pleadings.

Notwithstanding the patent error in exceeding the scope of the parties' agreement for determination of the issues raised by the pleadings, the consideration of issues not raised by the pleadings deprived the Defendants of procedural due process. "Procedural due process requires that a litigant be placed on notice of the issues which the court is to consider." Cameron & Barkley Co. v. South Carolina Procurement Review Panel, 317 S.C. 437, 454 S.C. 2<sup>nd</sup> 892 (1995). "The Court is limited by the scope of due process, and the rule that pleadings are to be liberally construed would not be stretched so as to permit the judge to award relief not contemplated by the pleadings." Mullaine v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865, 873 1950).

The circumstances here are analogous to the criteria which would be applied to amendment of the pleadings pursuant to S.C.R.C.P. Rule 15. At the conclusion of the trial they could be amended only if they were tried by expressed or implied consent of the parties but only if no prejudice occurs to the opposite party. That scenario clearly does not apply under these facts. If they had been amended pursuant to S.C.R.C.P 15(a) then the Defendant would have had an opportunity to file an amended answer setting forth any new or other affirmative defenses which may have been available based upon the new allegations set forth by the Plaintiff. Here the Defendant received no opportunity to object to the *de facto* amendment to conform the evidence to the pleadings, show prejudice or respond appropriately to an amended complaint. Each of which deprived the Defendant of notice of the issues to be presented both before and after the negotiation of the consent order to decide the case on motions for summary judgment as well as to raise the necessary defenses to the claims. There is no question here that the issue of the promissory note being secured by the

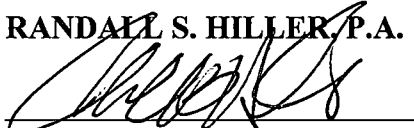
mortgage was impliedly consented to by the Defendant. Up to and through the signing of the consent order there had never been a mention of a mortgage. Indeed, the Defendants memorandum in support of its motion for summary judgment argued exclusively what the Plaintiff had indicated its position was with regards to the statute of limitations. Whether the three year contained within Title 15 or the six year contained within Title 36 applied.

If the Plaintiff wished to modify or amend its claim then it was incumbent for the Plaintiff to move to do so pursuant to S.C.R.C.P. Rule 15 prior to entering into an agreement to decide the case solely on the existing pleadings.

**CONCLUSION**

The order of the trial court should be reversed for exceeding the scope of the consent order agreement between the parties and/or depriving the Defendants of their procedural due process in being fairly apprised of the issues presented such that they may appropriately respond.

**RANDALL S. HILLER, P.A.**



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The order of the trial court should be reversed for exceeding the scope of the consent order

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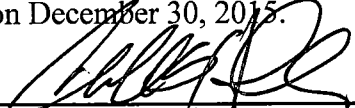
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Smith,

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PROOF OF SERVICE

I certify that I have served the Appellant's Brief on Joey R. Floyd, Esq. by depositing a copy of it in the United States Mail, postage prepaid, on December 30, 2015.

December 30, 2015

  
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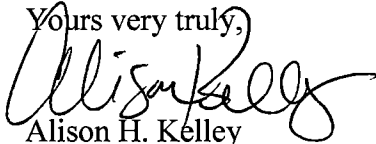
SC Court of Appeals  
Attn: Clerk  
1015 Sumter St.  
Columbia, SC 29201

**Re: First Citizens Bank and Trust (Respondent) v. Taylor and Smith (Appellants)**  
**2014-CP-23-4097**

Dear Madam Clerk:

Please find enclosed one original and two copies of Appellants' Initial Brief and Designation of Matter regarding the above. Please file the original and return the stamped copies to me in the envelope provided.

By copy of this letter I am providing opposing counsel with same.

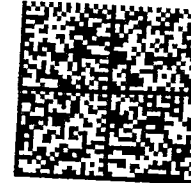
Yours very truly,  
  
Alison H. Kelley  
Paralegal to Randall S. Hiller

/ak

Enclosures.

Cc: Joey R. Floyd, Esq.

Please find enclosed one original and two copies of Appellants' Initial Brief and



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