THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2015-001543

The Bank of New York Mellon Trust Company, 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.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Respondent commenced a foreclosure action against Appellant by the filing of a Lis Pendens, Summons and Complaint on May 27, 2014. The Complaint alleged that Appellant, by his attorney-in-fact Twilla D. Cobb, executed a note in the amount of $170,590.00 and corresponding mortgage on July 31, 2009, which were subsequently assigned to Respondent. The Complaint further alleged that Appellant had defaulted on his monthly payments on June 1, 2013 and, after providing all required notices, accelerated the entire balance of the indebtedness pursuant to the terms of the note and mortgage. Appellant filed an Answer and Counterclaim with a jury demand on June 24, 2014, admitting all allegations of the Complaint and alleging that Respondent had violated the terms of the mortgage and the South Carolina Commercial Code. Respondent timely filed a Reply to the Counterclaim on July 23, 2014. Respondent then served its First Interrogatories, Request for Production and Request for Admission, to which Appellant responded on August 12, 2014. Appellant admitted that he did not make all the required payments due and owing under the note and mortgage, and that the balance due and owing under the note and mortgage had not been paid in full.

On August 29, 2014, Appellant filed a separate action against Respondent, generally asserting the same claims as set forth in the Answer. Sometime in September 2014, Appellant tendered the amounts to reinstate his loan in certified funds. Said funds were accepted by Respondent and applied to the account. The foreclosure was subsequently dismissed by Order entered on October 29, 2014; however, the Appellant's counterclaim remained pending.

Appellant filed a Motion to Amend his Counterclaim, including a proposed Amended Answer and Counterclaim for breach of contract on November 24, 2014, which was subsequently granted by the trial court on February 4, 2015. Respondent filed a Reply to the

Amended Answer and Counterclaim on February 2, 2015. The trial court also dismissed the separate action commenced by Appellant by Order entered on February 4, 2015. Appellant filed a Second Motion to Amend Counterclaim on February 20, 2015.

Thereafter, Respondent filed a Motion for Summary Judgment on March 20, 2015, and Affidavit in Support thereof on March 27, 2015. Respondent's supporting affidavit included a copy of the subject note, mortgage, assignment of the mortgage to Respondent, payment history, and notice of default as exhibits thereto. Through its sworn testimony, Respondent attested that Appellant had defaulted on the monthly mortgage payments on June 1, 2013, and that Respondent had sent all required notices of default. Respondent attested that Appellant attempted to reinstate the loan in May 2014, but that the funds were returned to Appellant due to his failure to remit certified funds as required pursuant to the terms of the note and mortgage. Respondent further attested that once Appellant tendered the appropriate amount to bring the loan current in certified funds, the funds were applied to the loan and the foreclosure action was dismissed. In response, Appellant filed an "Affidavit in Support of Jury Trial as Ordered by the Court" executed by Twilla D. Cobb, attesting that Twilla D. Cobb occupied the property with Appellant and had not received a notice of default. After the trial court took Respondent's Motion for Summary Judgment under consideration at the hearing held on April 16, 2015, Appellant filed a "Statement of Consideration" generally disputing that he had received a notice of default and that the balance of the loan had been accelerated.

The trial court granted Respondent's Motion for Summary Judgment on May 13, 2015, and denied Appellant's Second Motion to Amend Counterclaim. Appellant filed a Motion for Reconsideration on May 18, 2015, which was subsequently denied on the grounds that Appellant did not raise any novel issues for the trial court's consideration.

Appellant filed the instant appeal on June 16, 2015.

ARGUMENT

I. THE COURT PROPERLY GRANTED RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BECAUSE NO TRIABLE ISSUE OF FACT EXISTS.

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Connor Holdings, LLC v. Cousins*, 373 S.C. 81, 84, 644 S.E.2d 58, 60 (2007); *Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006); *Bradley v. Doe*, 374 S.C. 622, 649 S.E.2d 153 (Ct. App. 2007), cert. granted, June 12, 2008; *see also Higgins v. Med. Univ. of S.C.*, 326 S.C. 592, 486 S.E.2d 269 (Ct. App. 1997) (a trial judge considering a motion for summary judgment must consider all documents and evidence within the record, including pleadings, depositions, answers to interrogatories, admissions on file, and affidavits).

"If triable issues exist, those issues must go to the jury." *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005); *Mulherin-Howell v. Cobb*, 362 S.C. 588, 608 S.E.2d 587 (Ct. App. 2005). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 611 S.E.2d 485 (2005); *Med. Univ. of S.C. v. Arnaud*, 360 S.C. 615, 602 S.E.2d 747 (2004); *Hackworth v. Greenville Cnty.*, 371 S.C. 99, 637 S.E.2d 320 (Ct. App. 2006); *Rife v. Hitachi Constr. Mach. Co.*, 363 S.C. 209, 609 S.E.2d 565 (Ct. App. 2005).

"The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 377 S.C. 217, 226-27, 659 S.E.2d 213, 217 (Ct. App. 2008) (citing *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003)); *Moore v. Weinberg*, 373 S.C. 209, 217, 644 S.E.2d 740, 744 (Ct.

App. 2007); *Bennett v. Investors Title Ins. Co.*, 370 S.C. 578, 589, 635 S.E.2d 649, 654 (Ct. App. 2006).

"The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." *Wogan v. Kunze*, 366 S.C. 583, 591, 623 S.E.2d 107, 112 (Ct. App. 2005) (citing *McCall v. State Farm Mut. Auto. Ins. Co.*, 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004)); *see also Singleton v. Sherer*, 377 S.C. 185, 197, 659 S.E.2d 196, 203 (Ct. App. 2008). "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings." *Moore*, 373 S.C. at 217, 644 S.E.2d at 744; *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). The nonmoving party must present specific facts showing a genuine issue for trial. *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990); *Moore*, 373 S.C. at 217, 644 S.E.2d at 744; *Rife*, 363 S.C. at 214, 609 S.E.2d at 568.

The entry of summary judgment is mandated by the plain language of Rule 56(c), SCRCP, "after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." *Boone v. Sunbelt Newspapers, Inc.*, 347 S.C. 571, 579, 556 S.E.2d 732, 736 (Ct. App. 2001) (citing *Carolina Alliance for Fair Emp't v. S.C. Dep't of Labor, Licensing, and Regulation*, 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct. App. 1999)); *Baughman v. AT&T*, 306 S.C. 101, 410 S.E.2d 537 (1991). "A complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Id.*

No genuine issue of material fact exists as to Appellant's claim for breach of contract. It

is undisputed that a contractual relationship exists between Appellant and Respondent, and that Appellant was in breach of his payment obligations at the time he attempted to reinstate the loan with personal funds. Pursuant to the terms of the subject note and mortgage, the Lender is required to provide notice to the Borrower prior to acceleration. This notice shall specify

> (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is give to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property.

(Mortgage ¶ 24).

The affidavit in support of Respondent's Motion for Summary Judgment included a copy of the notice of default sent by Respondent on January 31, 2014 as an exhibit. This notice contained the above-cited language, and informed Appellant of his right to reinstate the loan after acceleration and right to assert any defense he may have had in a subsequent foreclosure action. Respondent accelerated the debt upon Appellant's failure to cure his default within thirty days of the January 2014 notice of default. Appellant later attempted to reinstate the loan with a personal check, which was returned by Respondent for failure to remit certified funds as required by the terms of the note and mortgage. Respondent subsequently filed a foreclosure action on May 27, 2014, including notice pursuant to the Fair Debt Collection Practices Act of the debt amount and an opportunity to cure it by June 15, 2014. Appellant reinstated the loan with certified funds and the default was cured in September of 2014.

The trial court properly granted Respondent's Motion for Summary Judgment based upon its demonstration of an absence of a genuine issue of material fact as to Appellant's claim for breach of contract. The record below plainly shows that Appellant was in breach of his payment obligations under the note and mortgage, Respondent provided notice of this default and an

opportunity to cure it, Respondent filed a foreclosure action, and subsequently Appellant Respondent tendered the appropriate amount to bring the loan current in certified funds. Appellant did not offer any evidence in support of his claim that Respondent breached the terms of the note and mortgage, but merely argued that he did not receive a notice of default. Nor did Appellant file a counter-affidavit to Respondent's Motion. Instead, Appellant rested upon his allegations that he did not receive a notice of default and an offered an affidavit from a co-occupant of the property stating that she did not receive a notice of default. Finally, Appellant did not and could not offer any evidence of damages since he admittedly owed Respondent the amounts required to reinstate his loan pursuant to the note and mortgage. As further detailed herein, the foregoing fails to create an issue of material fact and Appellant did not present any other evidence to the trial court with respect to his claim for breach of contract.

Therefore, the lower court properly found no triable issue of fact existed and this Court should affirm the Order Granting Respondent's Motion for Summary Judgment.

II. WHETHER APPELLANT RECEIVED NOTICE OF DEFAULT IS IRRELEVANT TO THE ELEMENTS OF APPELLANT'S CLAIM FOR BREACH OF CONTRACT.

"The elements for a breach of contract are the existence of a contract, its breach, and damages caused by such breach." *S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 491-92, 732 S.E.2d 205, 209 (Ct. App. 2012). "'The general rule is that for a breach of contract the [breaching party] is liable for whatever damages follow as a natural consequence and a proximate result of such breach.'" *Id.* at 492, 732 S.E.2d at 209 (quoting *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)). However, one who seeks to recover damages for breach of a contract must demonstrate that he has performed his part of the contract, "or at least that he was, at the appropriate time, able, ready, and willing to perform it." *Swinton*

Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 487, 514 S.E.2d 126, 135 (1999) (quoting *Parks v. Lyons*, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951)); *see also Hotel & Motel Holdings, LLC v. BJC Enters., LLC*, 414 S.C. 635, 780 S.E.2d 263 (Ct. App. 2015).

Appellant argues that he never received notice of default prior to Respondent rejecting his payment via personal check to bring the account current, and thus that Respondent breached the terms of the note and mortgage. In support of this argument, Appellant offered the affidavit of Twilla D. Cobb, in which she attests that she occupies the property with Appellant and did not receive a notice of default. This argument fails to create a genuine issue of material fact for two reasons. First, Twilla D. Cobb cannot offer competent testimony in support of Appellant's claim for breach of contract because she is not in privity of contract with Respondent. Second, it is irrelevant whether Appellant received notice of his default.

Notice of default is governed by the terms of the note and mortgage which state that "notice . . . shall be deemed to have been given to Borrower when mailed by first class mail . . . ." (Mortgage ¶ 14). Notice of default was mailed via first class mail to Appellant's last known address. The fact that Appellant claims he never received said notice is not relevant because ***receipt*** of the notice of default is not required by the terms of the note and mortgage. Respondent offered evidence that Appellant was in default, which Appellant admitted, that notice of default had been provided, and that Appellant's attempt to cure the default was not made as required by the terms of the note and mortgage. As a result, the payment was properly rejected by Respondent.

The trial court considered the affidavit offered by Respondent, and properly determined it was irrelevant to the breach of contract claim. Therefore, this Court should affirm the trial court's order granting Respondent summary judgment.

III. APPELLANT'S JURY DEMAND WAS NOT STRICKEN.

The South Carolina Constitution preserves the right of trial by jury only in those cases in which parties would have been entitled to it at the time of the adoption of the Constitution. *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). "Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." *Id.* "An action for breach of contract is an action at law." *Electro-Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter*, 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004).

Appellant erroneously argues that the trial court ordered a trial of this matter. That is simply incorrect, and the record is devoid of any such ruling. Here, Appellant filed a legal counterclaim for breach of contract in response to Plaintiff's foreclosure action. After a dismissal of the foreclosure portion of the action only, the case remained on the jury trial roster as a result of Appellant's counterclaim. The court subsequently granted Respondent's Motion for Summary Judgment, thereby ending the case. However, Appellant's jury demand was not stricken at any point in the proceedings.

This Court should reject Appellant's argument that he was improperly denied a jury trial, because the trial court did not strike Appellant's jury demand and the case was properly adjudicated by dispositive motion.

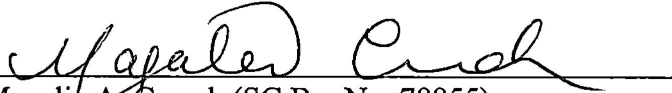
CONCLUSION

For all the reasons set forth herein, this Court should affirm the trial court's order granting summary judgment in favor of Respondent.

(SIGNATURE PAGE FOLLOWS)

Bank of New York Mellon Trust v. Cornell Riley
Appeal from Dorchester County Court of Common Pleas
Appellate Case No. 2015-001543

Respectfully submitted,



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February 3, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

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Appellate Case No. 2015-001543

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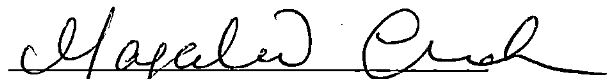
v.

Cornell Riley, Appellant.

PROOF OF SERVICE

I certify that I have served the *Respondent's Initial Brief and Designation of Matter* by depositing a copy of same in the United States Mail, postage prepaid, on February 3, 2016, addressed to Appellant of record, Cornell Riley, 100 Madison Ave., Ladson, South Carolina 29456.



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REPLY TO:
CHARLESTON LITIGATION

February 3, 2016

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The Honorable Jenny Abbott Kitchings
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RE: The Bank of New York Mellon Trust Company, N.A., not in its individual capacity but solely as trustee on behalf of the FDIC 2013-N1 Asset Trust v. Cornell Riley
Appellate Case No.: 2015-001543
Our File No.: 65050.48466

Dear Ms. Kitchings:

Enclosed for filing is the *Respondent's Initial Brief and Designation of Matter* and related *Proof of Service* in the above-referenced case, along with six (6) copies, which we kindly ask you to file and return in the attached, self-addressed, stamped envelope.

Should you have any questions concerning this matter, please do not hesitate to contact our office at your earliest convenience.

With kind personal regards, we are

Yours very truly,

FINKEL LAW FIRM

Magalie A. Creech

CC: Cornell Riley

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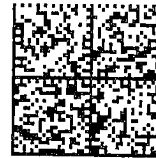

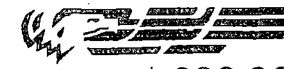

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