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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM Horry COUNTY
Court of Common Pleas

MAR 10 2016

The Honorable George C. James, Jr., Circuit Court Judge
SC Court of Appeals

Civil Action No. 2011-CP-26-09199
Appellate Case No. 2014-001285
Opinion No. 2016-UP-067

National Security Fire and Casualty Company.....Plaintiff,

v.

Rosemary Jenrette, a/k/a Rosemary Long Jenrette,
and Horry County State Bank.....Defendants,

of whom

Rosemary Jenrette, a/k/a Rosemary Long Jenrette,Appellant,

v.

Horry County State Bank.....Respondent.

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, Rosemary Jenrette a/k/a Rosemary Long Jenrette ("Jenrette") hereby petitions for rehearing of this Court's February 17, 2016 Opinion No. 2016-UP-067 ("the Opinion") in the above-captioned appeal. See *National Security Fire and Casualty Company v. Rosemary Jenrette a/k/a Rosemary Long Jenrette, et. al.*, Op. No. 2016-UP-067 (S.C. Ct. App. filed February 17, 2016). The Court should grant rehearing and issue a revised

opinion in favor of Jenrette reversing the trial court's order finding an equitable lien in favor of the Respondent on the subject insurance proceeds on the grounds set forth below.

Introduction

This Court affirmed the trial court's finding (1) of the existence of an equitable lien in favor of the Respondent on the subject insurance proceeds; (2) that Jenrette was bound by a covenant in the subject mortgage to insure the subject property; and (3) that the assignment provision in the subject mortgage survived cancellation of the mortgage. The Court's holding overlooks the prior decisions of our appellate courts pertaining to equitable liens and mortgages which establish that no equitable lien exists unless the debt claimed is between the parties.

First, the Court erred in utilizing *Blackwell v. State Farm Mut. Auto. Ins. Co.*, 237 S.C. 649, 118 S.E.2d 701 (1961), to affirm the trial court's order awarding the subject insurance proceeds to the Respondent mortgagee even though the debt due to Respondent was not a debt or obligation of the insured mortgagor, Jenrette. The \$117,546.89 deficiency judgment sum owed by Cajun Carolina, LLC ("Cajun Carolina") and Michael Brooks Quickel ("Quickel") represents the residue of the debt in favor of the Respondent remaining unsatisfied after the foreclosure sale of the mortgaged real property, including the subject property insured and owned by Jenrette. This unpaid amount of the debt owed to the Respondent by Cajun Carolina and Quickel is the debt on which the trial court relied in imposing an equitable lien upon the subject insurance proceeds. As demonstrated by the applicable cases determining the existence of an equitable lien, the debt claimed must exist between the parties for an equitable lien to be imposed upon Jenrette's property, which in this case are the subject insurance proceeds payable to Jenrette under an insurance policy she purchased to insure her real property. The Court did not determine

whether the Respondent was required to show a debt between it and Jenrette to establish an equitable lien. This oversight necessitates rehearing.

Second, the Court erred in utilizing *Jones v. Equicredit Corp. of S.C.*, 347 S.C. 535, 556 S.E.2d 713 (Ct. App. 2001), to affirm the trial court's order awarding the subject insurance proceeds to the Respondent. The trial court analyzed the elements required for the imposition of an equitable lien, but did not find the existence of a debt between Jenrette and the Respondent. The trial court concluded that an equitable lien arose under a covenant in the subject mortgage, and erroneously found that the \$117,546.89 deficiency judgment sum owed by Cajun Carolina and Quickel attached to the subject insurance proceeds. As demonstrated by the applicable foreclosure statutes and the cases pertaining to foreclosures of mortgages secured by real property, a mortgagee cannot attach a deficiency judgment owed by a third party to property belonging to a mortgagor who is not obligated to pay the debt secured by the mortgage. The Court overlooked this in its Opinion and fashioned a remedy not authorized by statute or South Carolina case law.

Third, the Court failed to properly address the ruling of the trial court that Jenrette's reliance upon S.C. Code Ann. § 29-3-660 ("the Deficiency Statute") was misplaced. The statutory mechanism through which a mortgagee can obtain payment for the money due under a mortgage contract is by foreclosure and sale and deficiency judgment. A deficiency judgment is incident to a foreclosure as it ensures full payment of the mortgage debt. The Respondent was unable to obtain a deficiency judgment against Jenrette following the foreclosure and sale of the subject property since she was neither the maker of the promissory note nor the guarantor of the payment of the promissory note secured by the subject mortgage. The trial court concluded that an equitable lien arose under a covenant in the subject mortgage, and erroneously found that the

\$117,546.89 deficiency judgment sum owed by Cajun Carolina and Quickel attached to the subject insurance proceeds. The trial court's conclusion that an equitable lien in favor of the Respondent arose under a covenant in the subject mortgage was erroneously based on a contractual obligation.

This Court's Opinion, if not altered, would mean that a mortgagee may recover monies otherwise payable to an insured mortgagor who is not obligated for a debt secured by a mortgage in every foreclosure action in South Carolina wherein a deficiency judgment is sought against parties other than the insured mortgagor who are obligated for the payment of the mortgage debt. The statutory remedy of foreclosure and sale does not permit a mortgagee to obtain payment for money due under a mortgage contract through the imposition of an equitable lien upon the insurance proceeds of a mortgagor who is not personally liable for the mortgage debt. This oversight and the potential unintended consequences in supplemental proceedings and post-judgment executions necessitate rehearing.

Law/Analysis

I. For an equitable lien to arise there must be a debt between the parties.

The Court erred in affirming the trial court's finding of the existence of an equitable lien in favor of the Respondent on the subject insurance proceeds. In reaching its conclusion, the Court relied upon *Blackwell*, 237 S.C. at 653, 118 S.E.2d at 704 ("It is well settled that if the mortgagor is bound by covenant in the mortgage or otherwise to insure the mortgaged premises for the better security of the mortgagee, the latter will have an equitable lien upon the money due on a policy taken out by the mortgagor to the extent of the mortgagee's interest in the property damaged or destroyed."). The Court relied upon *Blackwell* in error as the facts of that case involved an insured who was obligated on a promissory note that was secured by a chattel

mortgage. In *Blackwell*, the insured purchased an automobile and borrowed money to pay the unpaid portion of the purchase price and the insurance premium. *Id.* at 650, 118 S.E.2d at 702. The loan was evidenced by a note that was secured by a chattel mortgage on an automobile. *Id.* at 651, 118 S.E.2d at 702. The bank immediately applied to the insurer for automobile coverage and paid the premium at the time the loan was made. *Id.* at 651, 118 S.E.2d at 703. An equitable lien in favor of the bank was imposed upon the insurance proceeds to the extent of the chattel mortgage debt. *Id.* at 653, 118 S.E.2d at 704. However, the South Carolina Supreme Court did not discuss or analyze the elements required to impose an equitable lien in rendering its decision.

“For an equitable lien to arise, there must be a debt, specific property to which the debt attaches, and an expressed or implied intent that the property serve as security for the payment of the debt.” *Chase Home Fin., L.L.C. v. Risher*, 405 S.C. 202, 209, 746 S.E.2d 471, 475 (Ct. App. 2013) (quoting *Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 250, 715 S.E.2d 348, 353 (Ct. App. 2011)). The debt required to give rise to an equitable lien must be between the parties. *First Union Commer. Corp. v. Nelson, Mullins, Riley, & Scarborough (In re Varat Enters.)*, 81 F.3d 1310, 1315 (4th Cir. 1996). On appeal, the issue in *Chase Home Fin., LLC v. Risher* was whether any deficiency remaining after foreclosure of the mortgage encumbering the defendant’s husband’s one-half interest in their real property would attach to the defendant’s one-half interest. *Chase Home Fin.*, 405 S.C. at 210, 746 S.E.2d at 475. The Master-in-Equity required the plaintiff to show a specific debt owed from the defendant, and found that a showing of a debt from the defendant was necessary for the claimed equitable lien to attach. *Id.* at 208-09, 746 S.E.2d at 475. This Court held that the Master-in-Equity was correct in determining that the plaintiff failed to establish an equitable lien. *Id.*

In the instant action, the Court affirmed the trial court's finding of the existence of an equitable lien in favor of the Respondent even though the debt which the trial court relied upon in imposing an equitable lien was the \$117,546.89 deficiency judgment sum owed by Cajun Carolina and Quickel. (R. pp. 18-20.) However, the trial court found that Jenrette obtained insurance coverage for her own benefit, (R. p. 9.), and that she was neither an obligor under the promissory note nor a guarantor thereof. (R. p. 12.) In affirming the trial court, however, this Court did not cite or analyze *Chase Home Fin., LLC* and *First Union Comm. Corp.*, nor did it determine whether the Respondent was required to show a debt between it and Jenrette to establish an equitable lien.

Accordingly, rehearing is necessary in this matter because the Opinion does not comport with South Carolina law. The Court should issue a revised opinion reversing the trial court's order that found the existence of an equitable lien in favor of the Respondent.

II. The debt owed by Cajun Carolina and Quickel cannot attach to the subject insurance proceeds belonging to the insured Jenrette.

The Court affirmed the trial court's erroneous conclusion that the deficiency judgment owed by Cajun Carolina and Quickel attached to the subject insurance proceeds. In reaching its conclusion, the Court incorrectly applied *Jones*, 347 S.C. at 543-44, 556 S.E.2d at 717-18 (stating that when a foreclosure sale does not satisfy the mortgage debt, the mortgagee is entitled to collect insurance proceeds if the unpaid amount of the mortgage is in excess of the insurance proceeds). The Court relied upon *Jones* in error as the facts of that case involved a dispute between a mortgagor who was obligated for the payment of a debt secured by a mortgage and a loan servicer of a mortgagee as to whether the loan servicer held an insurable interest. The loan servicer was listed as the named insured on endorsements to the insurance policy, and the declarations provided that a loss shall be payable to the loan servicer. *Id.* at 541-42, 556 S.E.2d

at 716. The insurable interest of the loan servicer arose from its obligation under a servicing agreement with the mortgagee to maintain insurance, and the loan servicer's contractual liability could be triggered upon its failure to obtain the disputed insurance proceeds. *Id.* at 542-43, 556 S.E.2d at 717. This Court found that the loan servicer had an insurable interest in the mortgaged property because it was exposed to liability to the mortgagee for any losses incurred on the mortgage, and that, unlike a mortgagee's interest, the loan servicer's insurable interest "would not be extinguished even if the mortgage indebtedness is satisfied." *Id.*

The rule espoused in *Jones* which the Court relied upon in affirming the decision of the trial court has no application to an action wherein a mortgagee who is not named as an insured or loss payee seeks the imposition of an equitable lien upon insurance proceeds paid under an insurance policy obtained by a mortgagor who is not obligated to pay a debt secured by a mortgage. Unlike *Jones*, the instant action does not involve the issue as to whether the Respondent has an insurable interest under Jenrette's policy following foreclosure and sale. Rather, the Respondent claims an equitable lien on the subject insurance proceeds otherwise payable to Jenrette. (R. p. 19.) Jenrette insured the subject property and obtained coverage for her own benefit. (R. pp. 8-9.) The endorsements to Jenrette's policy did not name the Respondent as a loss payee, and her policy's declarations did not provide that a loss shall be payable to the Respondent. (R. p. 13.) Jenrette was joined as a defendant in the prior foreclosure action as the record owner of the subject real property and as a mortgagor. (R. p. 4.) The \$117,546.89 deficiency judgment in favor of the Respondent was not entered against Jenrette because she was neither an obligor under the note nor a guarantor thereof. (R. p. 12.) However, the trial court concluded that the Respondent was entitled to entire sum of the subject insurance proceeds since the difference between the foreclosure bid and the debt was greater than the

proceeds. (R. p. 18.) The trial court also concluded that the deficiency judgment owed by Cajun Carolina and Quickel attached to the subject insurance proceeds under paragraph 3B of the subject mortgage, (R. p. 19), and that paragraphs 3A and 3B of the subject mortgage stood on their own regardless of whether Jenrette was obligated under the note and no deficiency judgment was obtained against her. (R. p. 18.)

In South Carolina, “a mortgagee’s rights under a fire insurance policy are dependent upon the existence of a secured debt owed [to] the mortgagee by the mortgagor-insured.” *Ft. Hill Fed. Sav. & Loan Asso. v. S.C. Farm Bureau Ins. Co.*, 281 S.C. 532, 537, 316 S.E.2d 684, 687 (Ct. App. 1984). However, the rule espoused in *Jones*, 347 S.C. at 543-44, 556 S.E.2d at 717-18, which this Court relied upon was applied to the instant action even though Jenrette did not owe a debt to the Respondent, and the Respondent was not a named insured or loss payee under her policy. Hence, there is no need for application of the rule espoused in *Jones* to determine whether the Respondent held an equitable lien on the subject insurance proceeds. Accordingly, rehearing is necessary in this matter because the Opinion does not comport with South Carolina law as a result of its application of the rule espoused in *Jones* to the instant action.

III. The Court did not address the trial court’s ruling that Appellant’s reliance upon the Deficiency Statute was misplaced. It should reverse the trial court’s ruling on this issue.

The trial court determined that Jenrette’s reliance upon the Deficiency Statute was misplaced since the Respondent was not seeking a deficiency judgment against her. (R. p. 19.) However, the trial found that an equitable lien arose under a covenant in the subject mortgage and directed payment of the subject insurance proceeds to the Respondent even though the proceeds were payable to Jenrette under an insurance policy she obtained for her own benefit. The imposition of an equitable lien in favor of the Respondent on the subject insurance proceeds

directly conflicts with the Deficiency Statute as Jenrette was not personally liable for the mortgage debt. The Deficiency Statute does not permit a court to adjudge and direct payment by Jenrette of the residue of the mortgage debt remaining unsatisfied after the foreclosure sale because she was not personally liable for the debt.

The Court relied upon *Jones v. Equicredit Corp. of S.C.* in error to affirm the trial court's erroneous conclusion that the Respondent's "recovery of insurance proceeds is the amount of the mortgage debt less the amount . . . bid at the foreclosure sale." (R. p. 18.) This rule, relied upon by this Court and the trial court, is "that when the foreclosure sale does not satisfy the mortgage indebtedness, the mortgagee is entitled to collect insurance proceeds if the unpaid amount of the mortgage is in excess of the insurance proceeds." (R. p. 15.) The Court also relied upon *Blackwell v. State Farm Mut. Auto. Ins., Co.* in error to affirm the trial court's conclusion that an equitable lien in favor of the Respondent arose out of a covenant in the subject mortgage. This rule, relied upon by this Court and the trial court, is "that if the mortgagor is bound by a covenant in the mortgage or otherwise to insure the mortgaged premises for the better security of the mortgagee, the latter will have an equitable lien upon the money due on a policy taken out by the mortgagor to the extent of the mortgagee's interest in the property is damaged or destroyed." *Blackwell*, 237 S.C. at 650-51, 118 S.E.2d at 702. The trial court's conclusion that an equitable lien in favor of the Respondent arose under a covenant in the mortgage is based on a contractual obligation. This conclusion defies the long-standing statutory provisions governing foreclosure proceedings.

The rule relied upon by this Court and espoused in *Blackwell* was applied in that case to an action wherein the insured automobile owner was obligated on a promissory note that was secured by a chattel mortgage. *Id.* *Blackwell* did not involve a real estate mortgage, an analysis

of the elements required to impose an equitable lien, or the statutory mechanism through which a mortgagee can obtain payment for money lent or due under a real estate mortgage. However, the trial court relied upon *Blackwell* to find an equitable lien arising from a covenant in the subject mortgage. (R. p. 19.) The rule relied upon by this Court and espoused in *Jones v. Equicredit Corp. of S.C.* was applied in that case to an action which involved a determination of whether the insurable interest of a loan servicer of a mortgagee arising from its obligation under a servicing agreement with a mortgagee survived foreclosure. *Jones*, 347 S.C. at 542-43, 556 S.E.2d at 717. This Court and the trial court relied upon *Jones* to find that the Respondent was entitled to the subject insurance proceeds since the bid submitted at the foreclosure sale was less than the balance due on the debt secured by the mortgage. (R. p. 18.) However, *Jones* did not involve a claim for an equitable lien, or the application of the statutory mechanism through which a mortgagee can obtain payment for money lent or due under a real estate mortgage.

South Carolina courts have found “that if the mortgaged premises are sold under a foreclosure decree and fail to bring a sufficient amount to satisfy the debt, the mortgagee is entitled, absent any statutory limitation or waiver on his part, to a personal judgment for the remaining deficiency.” *Perpetual Bldg. & Loan Asso. v. Braun*, 270 S.C. 338, 340, 242 S.E.2d 407, 408 (1978). Prior to 1791, South Carolina adhered to the common law principle of mortgages whereby an action to foreclose a mortgage was regarding strictly *in rem*. *Perpetual Bldg. & Loan Asso.*, 270 S.C. at 341-42, 242 S.E.2d at 409, a real estate mortgage foreclosure proceeding was a proceeding *in personam* as well as *in rem*, meaning that a deficiency judgment could be awarded in a foreclosure action. *See, e.g., Anderson v. Pilgram*, 30 S.C. 499, 9 S.E. 587 (1889) (holding that an action for foreclosure was a proceeding in personam as well as in rem). “The right to a deficiency judgment is provided by statute,” *Am. Gen. Fin. Servs. v. Brown*, 376

S.C. 580, 583, 658 S.E.2d 99, 100 (2008), and permits a court in a mortgage foreclosure action to issue a deficiency judgment for the residue of the mortgage debt remaining unsatisfied after judicial sale in cases in which a mortgagor or other person is personally liable for the mortgage debt. S.C. Code Ann. § 29-3-660. This structure exists under the current version of the South Carolina Code and provides that a mortgagee:

shall be deemed the . . . owner of the money lent or due and the mortgagee shall be entitled to recover satisfaction for such money out of the land by *foreclosure and sale according to law*.

S.C. Code Ann. § 29-3-10 (emphasis added). In codifying these rights, the General Assembly then established the mechanism—“according to law”—through which a mortgagee can obtain payment for the money lent or due under a mortgage contract—foreclosure sale and deficiency judgment. The General Assembly empowered the court with the duty to determine whether payment for any remaining indebtedness is owed by a mortgagor or guarantor. The Code states:

In actions to foreclose mortgages the court may adjudge and direct the payment by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises *in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage* and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such person a party to the action and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person and may enforce such judgment as in other cases.

S.C. Code Ann. § 29-3-660 (emphasis added).

Respectfully, this Court overlooked the above statutes in its Opinion. This Court instead affirmed the trial court’s decision attaching the deficiency judgment owed by Cajun Carolina and Quickel to the subject insurance proceeds under a covenant in paragraph 3 of the subject mortgage. The South Carolina Supreme Court has “explained that a mortgage represents security for an obligation, [but] not full payment thereof.” *Am. Am. Gen. Fin. Servs.*, 376 S.C. at

583, 658 S.E.2d at 100. As a result, the deficiency judgment becomes an incident to the foreclosure to ensure full payment of the debt obligation. *Perpetual Bldg. & Loan Asso.*, 270 S.C. at 340, 242 S.E.2d at 408. In the instant action, the Respondent was unable to obtain a deficiency judgment against Jenrette following the foreclosure and sale of the subject property since she was neither the maker of the promissory note nor the guarantor of the payment of the promissory note secured by the subject mortgage. (R. p. 12.) However, the trial court found that the Respondent held an equitable lien on the insurance proceeds because the successful bid submitted by the Respondent at the foreclosure sale was less than the balance of the debt secured by the subject mortgage. (R. p. 18.)

As shown above, the foreclosure and sale of the subject property and subsequent deficiency judgment against Cajun Carolina and Quickel was awarded to the Respondent under the statutory mechanism through which the Respondent, as mortgagee, could obtain payment for the money lent or due under the subject mortgage. The Deficiency Statute does not permit a court to adjudge and direct the payment by Jenrette of the residue of the mortgage debt remaining unsatisfied after the foreclosure sale since she is not personally liable for the debt secured by the subject mortgage. Thus, the statutory remedy available to the Respondent was by foreclosure of the subject mortgage and judicial sale of the subject property. By finding the existence of an equitable lien in favor of the Respondent, the trial court applied the deficiency judgment against Cajun Carolina and Quickel to direct payment of insurance proceeds that were payable to Jenrette under an insurance policy she obtained for her sole benefit. This ruling essentially transforms Jenrette into a deficiency judgment debtor even though a deficiency judgment cannot be rendered against her under South Carolina law in an action to enforce the subject mortgage. Therefore, Jenrette's reliance upon the Deficiency Statute is not misplaced.

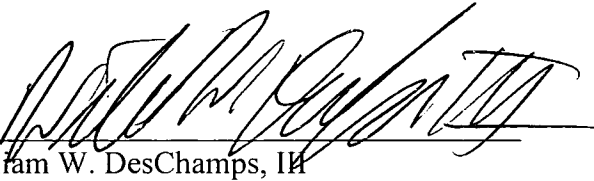
Accordingly, the imposition of an equitable lien in favor of the Respondent on the subject insurance proceeds directly conflicts with the Deficiency Statute as Jenrette was not personally liable for the mortgage debt.

Conclusion

Rehearing is necessary in this matter. Based on the above, the Court should issue a revised opinion reversing the order of the trial court imposing an equitable lien on the subject insurance proceeds in favor of Respondent.

Respectfully submitted,

DESCHAMPS LAW FIRM

By: 

William W. DesChamps, II
SC Bar No. 77150
E-Mail: trey@deschampsllaw.com
William W. DesChamps, Jr.
SC Bar No. 01658
E-Mail: wwd@deschampsllaw.com
1357 21st Avenue North, Ste. 102
Myrtle Beach, SC 29577
(843) 448-2391

Attorneys for Rosemary Jenrette

Myrtle Beach, South Carolina
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PROOF OF SERVICE

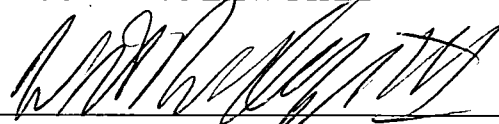
I certify that I have served one (1) copy of the Appellant's Petition for Rehearing upon counsel for Respondent Horry County State Bank depositing a copy of the same in the United States Mail, postage prepaid, on March 09, 2016, to the following address:

Randall K. Mullins, Esquire
Jarrod E. Ownbey, Esquire
Mullins Law Firm
Post Office Box 585
N. Myrtle Beach, SC 29597

[SIGNATURE ON THE FOLLOWING PAGE]

Dated: March 09, 2016

DESCHAMPS LAW FIRM



William W. DesChamps, Jr.
William W. DesChamps, III
Attorneys for Appellant Rosemary Jenrette
a/k/a Rosemary Long Jenrette
1357 21st Avenue North, Suite 102
Myrtle Beach, South Carolina 29577
(843) 448-2391
E-mail: wwd@deschampsfirm.com
trey@deschampsfirm.com