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SC Court of Appeals

STATE OF SOUTH CAROLINA **FILED** IN THE COURT OF COMMON PLEAS

COUNTY OF BERKELEY 16 JAN 26 PM 3:09 DOCKET NO. 2010-CP-08-03514

Branch Banking and Trust Company **MARY P. BROWN  
CLERK OF COURT  
BERKELEY COUNTY, S.C.**

v.

Wilton H. Cain; Cassandra M. Durrah-Cain;  
Liberty Hall Residential Property Owners  
Association, Inc.;

Defendants.

**ORDER CONFIRMING  
DEFICIENCY JUDGMENT AND  
DENYING DEFENDANTS  
MOTION TO ALTER, AMEND,  
OR RECONSIDER**

(501335-02111 EL1)

This matter came before me on January 14, 2016, for a status conference and hearing as to Defendants Wilton H. Cain and Cassandra M. Durrah-Cain's ("Defendants") Motion to Dismiss Deficiency Judgment filed on December 29, 2015. Pursuant to discussion at the hearing, the Court is treating Defendants motion as a Motion to Alter, Amend, or Reconsider the Order Reducing Deficiency Judgment filed on December 4, 2015, pursuant to Rule 59(e) of the *South Carolina Rules of Civil Procedure*.

**FACTS/ PROCEDURAL HISTORY**

1. Plaintiff filed its foreclosure action against Defendants on October 4, 2010, regarding a Mortgage on real property located in Berkeley County, South Carolina, more fully described as follows ("Subject Property"):

All that certain piece, parcel or lot of land, situate, lying and being in County of Berkeley, State of South Carolina, shown and designated as Lot 704, on a plat entitled "Subdivision Plat Showing Phase 10A, (39.298 AC), Mulberry Park, A Portion of Tract E1 of The Liberty Hall Tract, Property of Centex Homes, A Nevada General Partnership, located in the City of Goose Creek, Berkeley County, South Carolina" made by Trico Engineering Consultants, Inc., dated June 9, 2006, and recorded January 3, 2007, in Plat Cabinet R, Pages 243-A and 243-B, in the RMC Office for Berkeley County, South Carolina. Said lot having such size, shape, dimensions, buttings, boundings and location as will by reference to said plat more fully appear. Said property is subject to all applicable covenants, conditions, restrictions, limitations, obligations and easements of record. This being the same property conveyed to Wilton H. Cain and Cassandra M. Durrah-Cain by deed of Centex Homes dated September 19, 2007 and

recorded on September 20, 2007 in Book 6868 at Page 155 in the Office of the ROD for Berkeley County, South Carolina.

TMS # 244-03-04-016

Property Address: 259 Clayburne Drive  
Goose Creek, SC 29445

2. The Mortgage includes a provision regarding Mortgage Insurance which reads, in part:

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

3. Defendants were served with the Lis Pendens, Summons, and Complaint, and an Order of Default was entered on December 8, 2010, holding the Defendants in default in the action<sup>1</sup>.

4. The matter was referred to the Master in Equity on the same date, December 8, 2010.

5. A hearing was set for March 22, 2011, and Defendant Wilton H. Cain appeared at the hearing. The hearing was continued by Judge Watson at that time on order to allow Plaintiff to produce a live witness for cross-examination.

6. Defendants then filed a late answer on March 28, 2011, although already in default.

7. A second hearing was held on June 16, 2011, and Plaintiff produced Richard Miller ("Mr. Miller") from BB&T as a witness. Mr. Miller testified as to the loan documents, the payment history, the default of the loan by the Defendants, and the debt amount. Mr. Miller also

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<sup>1</sup> An Amended Affidavit of Default and Non-Military Service was filed on December 29, 2010, to withdraw the order of default as to Liberty Hall Residential Property Owners Association, Inc. as that entity was inadvertently held in default after filing an answer.

testified regarding the mortgage insurance policy between BB&T and the mortgage insurance carrier.<sup>2</sup>

8. A Judgment of Foreclosure and Sale was entered on June 30, 2011, with a judgment amount of \$201,660.89.

9. The judicial sale of the property was finalized on September 2, 2011, and the Subject Property sold to the Plaintiff for the sum of \$121,500.00.

10. Subsequently, a deficiency judgment was entered on September 19, 2011, in the amount of \$83,893.82, representing the difference between the judgment amount plus post-judgment interest and supplemental costs and the final sales price, pursuant to S.C. Code Ann. § 29-3-660.

11. Thereafter, Defendants filed a Petition and Proposed Order for Appraisal, and on September 28, 2011, The Honorable Kristi Lea Harrington signed the Order. It was filed the next day, September 29, 2011.

12. On October 21, 2011, Judge Harrington *sua sponte* issued a Form 4 Order rescinding her prior Order for Appraisal.

13. Defendants filed a Motion to Reconsider on November 1, 2011, which was denied by Judge Harrington on November 9, 2011, without hearing or participation from Plaintiff or its counsel.

14. Defendants filed a Notice of Appeal on December 8, 2011. Following a lengthy appeals process, the South Carolina Court of Appeals vacated the Order of Judge Harrington and remanded the case for an order containing the specific factual findings and conclusions of law as

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<sup>2</sup> While it is believed that the topic of mortgage insurance was discussed at the time of the hearing, the transcript of the hearing is no longer available from the court reporter and, thus, Plaintiff cannot accurately report the extent of the discussion at hearing.

to whether the Defendants were entitled to exercise their appraisal rights. The Order was entered on September 24, 2014. A Remittitur was issued on October 17, 2014.

15. On May 29, 2015, a Form 4 Order was entered, reinstating the September 28, 2011, Order for Appraisal.

16. On December 4, 2015, after the appraisal process was completed, this Court entered an Order Reducing Deficiency Judgment.

17. The Court determined the value of the Subject Property as of the date of the judicial sale to be \$168,000.00 and therefore reduced the deficiency judgment to \$37,393.82, which reflected the total after final judgment amount (including post-judgment interest and additional costs) less the newly determined value of the Subject Property.

18. Defendants objected to the entry of the deficiency judgment on the basis of alleged mortgage insurance and alleged payment of said insurance to Plaintiff. *Defendants did not object to this Court's valuation of the subject property.* *De*

19. Defendants' Motion to Dismiss Deficiency Judgment was filed on December 29, 2015.

20. Defendants did not present any evidence or affidavits regarding his position prior to or at the hearing.

21. Plaintiff's Brief Regarding Deficiency Judgment was filed on January 7, 2016, containing the arguments and evidence presented by the Plaintiff.

#### CONCLUSIONS OF LAW

1. I find that "[T]he general rule is 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." *Am. Gen. Fin. Servs., Inc. v. Brown*, 376 S.C. 580, 583, 658 S.E.2d 99, 100 (2008), citing *Perpetual Bldg. and Loan Ass'n of Anderson v. Braun*, 270 S.C. 338, 340, 242 S.E.2d 407, 408 (1978).

2. The law regarding deficiency judgments and the appraisal process in South Carolina is governed by statute. *S.C. Code Ann. § 29-3-660* 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 ...

3. Further:

In any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked, whether he has theretofore appeared in the action or not, may within thirty days after the sale of the mortgaged property apply by verified petition to the clerk of court in which the decree or order of sale was taken for an order of appraisal.

*S.C. Code Ann. § 29-3-680.*

4. Once the appraisal process has been completed and the return of the appraisers made, the deficiency judgment is to be confirmed, altered, or extinguished based upon the Court's finding after review of the return:

If the value returned after deduction therefrom of the amount of the price at which the property was sold under direction of the court be equal to or exceed the amount of the deficiency remaining upon the judgment after application of the net proceeds of sale the judgment shall be thereupon extinguished and cancelled of record by the clerk and if such returned value, after deduction of the amount of the sale price, be less than the deficiency the latter shall be abated and deemed paid, pro tanto, and be thereafter enforceable for only the remainder, the amount of which will be determined by the clerk and stated in a proper order from which any party may appeal within ten days after notice of filing thereof to the court or any judge thereof in accord with the procedure prescribed in § 29-3-750.

*S.C. Code Ann. § 29-3-740.*

5. The statute does not contemplate any other considerations in the confirmation, reduction, or cancellation of a deficiency judgment entered, other than the value as returned by the appraisers.

6. I find that, pursuant to the law outlined above, the Plaintiff is entitled to a deficiency judgment unless it is waived. Plaintiff in this case specifically demanded deficiency from the filing of the complaint and has made no waiver of this right.

7. Further, the statute governing deficiency judgments and the appraisal rights of the borrower provides for specific considerations in the setting of the deficiency judgment entered against the borrower or the reduction of such a judgment following the appraisal process; third party insurance payments or other sources of recovery by the Plaintiff are not contemplated by the statute and, therefore, will not be considered by this Court in entering an award in favor of Plaintiff.

8. Additionally, I find that South Carolina also recognizes the "collateral source rule" as to an award of damages. While the collateral source rule is typically used in tort actions, the theory can be translated to the context of a deficiency judgment and payment of mortgage insurance by a third party insurance company.

9. The collateral source rule provides that compensation received by an injured party from a source wholly independent of the wrongdoer will not reduce the amount of damages owed by the wrongdoer. *Rattenni v. Grainger*, 298 S.C. 276, 379 S.E.2d 890 (1989); *Young v. Warr*, 252 S.C. 179, 165 S.E.2d 797 (1969); *Powers v. Temple*, 250 S.C. 149, 156 S.E.2d 759 (1967).

10. "A source is wholly independent of the wrongdoer when the wrongdoer has not contributed to it and when payments to the injured party were not made on behalf of the

wrongdoer.” *Mount v. Sea Pines Co.*, 337 S.C. 355, 357, 523 S.E.2d 464, 465 (Cl. App. 1999), citing *Citizens & S. Nat'l Bank v. Gregory*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995).

11. This rule has been liberally applied in South Carolina to preclude the reduction of damages. See *Otis Elevator v. Hardin Construction Co.*, 316 S.C. 292, 450 S.E.2d 41 (1994) (holding that a contractual right to indemnification is not defeated by fact that loss was actually paid by an insurance company).

12. A wrongdoer should not be able to take advantage of a contract between an injured party and a third person, no matter what the source of the funds received. *Johnston v. Aiken Auto Parts*, 311 S.C. 285, 287, 428 S.E.2d 737, 738 (Cl.App.1993).

13. “A benefit that is directed to the injured party should not be shifted to result in a windfall for the [wrongdoer]... It is the [wrongdoer]'s responsibility to compensate the injured party for all the harm that he causes, not the net loss the injured party receives.” *Dixon v. Besco Eng'g, Inc.*, 320 S.C. 174, 182, 463 S.E.2d 636, 640 (Cl. App. 1995), see also 22 *Am.Jur.2d Damages* § 566 (1988).

14. I find that, as a matter of equity, the tenets of the collateral source rule should be applied in this scenario, and that the rule as applied does not contemplate a reduction in the award to Plaintiff.

15. Defendants are responsible for the debt they incurred and the judgment entered against them. Payment of a third party insurance contract does not obviate their responsibility for the debt.

16. Defendants argue that they paid mortgage insurance premiums as part of their mortgage payments and therefore the insurance should be considered in a reduction of the award entered against them. However, in the mortgage contract, it is made clear that the Defendants are

not party to the insurance and are not the beneficiaries of such a policy. The payment of the mortgage insurance was a condition precedent to the Defendants obtaining the loan with the terms as outlined, but any payments made by the third party mortgage insurance company were not made on behalf of the Defendants.

17. Defendants further argued that if the award to Plaintiff was not reduced or extinguished, Defendants would be subject to an attempt at double recover from the Plaintiff and the mortgage insurance company due to the contract between the two entities. However, Plaintiff and the mortgage insurance company at issue have a subrogation agreement whereby the mortgage insurance company is subrogated to the recovery rights of the Plaintiff with regard to the deficiency judgment. Even if a claim is paid pursuant to the insurance policy, that payment does not absolve the Defendants of their responsibility for the debt as the Plaintiff or the mortgage insurance company can seek to collect on that deficiency judgment pursuant to the agreement.

18. A copy of the Mortgage Insurance Policy (without endorsements) is attached to this Order as Exhibit A, for reference.

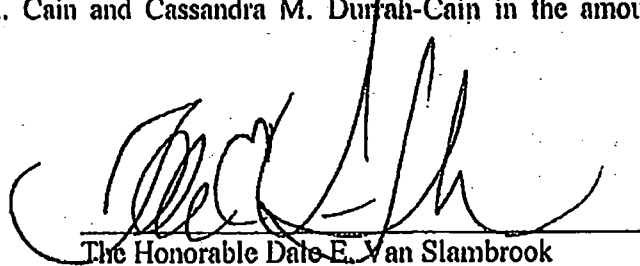
Based upon the foregoing and the arguments of counsel for the Plaintiff and Mr. Cain, it is hereby ordered that:

1. Defendants' Motion to Dismiss Deficiency Judgment filed on December 29, 2015, and treated as a Rule 59(e) Motion to Alter, Amend or Reconsider, is denied.
2. The Order Reducing Deficiency Judgment filed on December 4, 2015, is confirmed.

*{continued on next page}*

3. Subject to the Order Reducing Deficiency Judgment, Plaintiff is entitled to a personal judgment against Wilton H. Cain and Cassandra M. Durrah-Cain in the amount of \$37,393.82.

**IT IS SO ORDERED.**



The Honorable Dale E. Van Slambrook  
Master in Equity for Berkeley County

1/25, 2016  
Moncks Corner, South Carolina

