

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Master in Equity

Case No. 2016-00-0152

Jean P. Elliott, aka Betty Jean Elliott,
Individually and as Personal Representative
Of the Estate of Ervin W. Elliott

Respondent

V.

Alberto Alvarez, J. Guadalupe Ledesma-Martinez,
And Estela Gutierrez-Garcia, of whom Alberto
Alvarez is the Appellant.

Appellant

INITIAL BRIEF OF THE RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Appellant properly execute a Note and Mortgage to the Respondent?
2. Did the Appellant violate the terms of the Note and Mortgage?
3. Did the Court err in granting the foreclosure against the Appellant?

STATEMENT OF THE CASE

The Appellant is appealing the foreclosure ordered by Judge Charles B. Simmons, Master in Equity for Greenville County S.C., filed January 6, 2016. The Foreclosure lawsuit was heard in part on November 5, 2015 and then was completed on December 15, 2015 at the Greenville County Court of Common Pleas. The matter was referred by Order of Reference signed by The Honorable Perry H. Gravely, Presiding Judge for Greenville County, on September 9, 2015 and recorded on September 10, 2015 in the Office of the Clerk of Court, Greenville County. Plaintiff Jean P. Elliott (Elliott) appeared and was represented by C. Richard Stewart. Defendants Alberto Alvarez, J. Guadalupe Ledesma-Martinez and Estela Gutierrez-Garcia appeared pro se: Defendants Ledesma-Martinez and Gutierrez-Garcia were in Default. At the continuation of the hearing on December 15, 2015, by Order of the Court, Defendants Alvarez, Ledesma-Martinez and Gutierrez-Garcia were assisted by Spanish language interpreters.

The Notice of Intent to Appeal was filed on January 22, 2016, and the Appellant Brief on April 25, 2016.

STATEMENT OF THE FACTS

Respondent testified and the following evidence was admitted without objection: Respondent and her husband, Ervin Elliot previously owned the property which is the subject of the litigation, 14 Henderson St., Greenville, SC, and that Ervin Elliott is deceased and Respondent is the personal representative of his estate. On October 21, 2013, Respondent, herself and as Attorney-in-fact for Ervin Elliott, deeded the subject property to Appellant Alvarez by deed recorded at Deed Book 2433, page 2603, Greenville ROD.

As a part of the consideration for the purchase of this property Appellant gave Respondent and Ervin Elliott a promissory note in the principal sum of \$53,500.00, a copy of which was admitted into evidence without objection. To secure payment on this note, Appellant gave to the Respondent a mortgage, duly signed and probated and recorded at Mortgage Book 5235 at Page 4419, Greenville ROD, on October 21, 2013. This Note and Mortgage were prepared by the Appellant's attorney, Andy White, who represented the Appellant. This Note was admitted into evidence without objection as Plaintiff's exhibit number 2 Transcript(11/5),P5,Line 11. and Mortgage as Plaintiff's exhibit number 3. Transcript (11/5) P.6,L 1-12..

Thereafter, without the knowledge or permission of Respondent or Ervin, Appellant sold the property to Ledesma-Martinez and Gutierrez-Garcia by quitclaim deed filed at Deed Book 2436, Page 5064, recorded December 13, 2013 at the Greenville ROD, a copy of which was admitted into evidence without objection as Plaintiff's exhibit number 4. Transcript (11/5) P.7,L.1-25.. This sale of the property without paying off the note and the mortgage or obtaining the Respondent's permission, violated section 2.7 of the mortgage. Furthermore, the Appellant in fact stopped making monthly payments in August, 2014, constituting defaults on the Note and Mortgage. Transcript (11/5)P.8, L1-11..

Defendants Ledesma-Martinez and Gutierrez-Garcia testified they had made payments of approximately \$650.00 per month on the subject property to the Appellant since 2013, and were up to date with their payments as required under the quitclaim deed to Appellant, a fact verified by the Appellant's testimony. Although Appellant has received over \$10,000.00 from the other defendants since August, 2014, Appellant has not paid any of that money to Respondent. Upon inquiry by the Court, the Appellant had no explanation for either why he had not paid the Respondent, or what he had done with the money. Transcript (12/15)P.48 L.1-16, P.49 P.50.

Pursuant to the Foreclosure Order of January 6, 2016, the property was sold on February 1, 2016 to the Respondent.

ARGUMENT

Did the Appellant properly execute the Note and Mortgage to the Respondent? The Respondent entered into evidence as exhibit two, the executed Note of the Appellant, prepared by his attorney, Andy White, showing that he was indebted to the Respondent in the amount of Fifty-Three Thousand Five Hundred and 00/100 (\$53,500.00) Dollars, payable in equal monthly installments of Six Hundred Sixty-Nine and 00/100 Dollars (\$669.00), beginning August 5, 2013, and continuing for 131 months. As Exhibit number three, Respondent entered the Mortgage which had been properly executed and recorded at Greenville County Mortgage Book 5235 Page 4419-4425 on October 21, 2013, both documents prepared by Andy White as attorney for the Appellant. The Appellant admits that the signatures on both documents are his, but claims that his attorney defrauded him. Transcript (12/15) P.17 L.14-25. The Attorney Andy White gave a complete explanation of the transaction which the Court found credible, in his testimony beginning on page 38 through page 45 of the transcript(12/15 Hearing). From the record, the documents were prepared at the Appellant's request by Mr. White in his representation of the Appellant. Extra precautions were apparently taken to explain to the Appellant the documents he knowingly signed. Transcript ((12/15), P.38-45. Clearly, the Appellant signed the Note and Mortgage and the Mortgage was properly recorded.

Did the Appellant breach the terms of the Note and Mortgage given to the Respondent? Paragraph 2.7 of the mortgage provided that the Appellant had to have the permission of the Respondent to sell the mortgaged property unless he paid the balance of the Note and Mortgage. Plaintiff Exhibit 3. Conveying the Appellant's interest in the property without the permission of the Respondent in any way would be a breach of the mortgage, but this in no way prohibited the Appellant from selling the property if he paid the balance owed. This provision is a normal provision in mortgage and an accepted business practice. The Plaintiff's exhibit number 4 is the Quit Claim Deed recorded in Greenville County ROD Deed Book 2436 Page 4419 conveying the Appellant's interest to Ledesma-Martinez and Gutierrez-Garcia. The Appellant freely admits that he conveyed the property, and that he received payments from his purchasers on a monthly basis. Transcript (12/15) P.5 L.24. The respondent testified that she never gave the Appellant permission to sell the property in question. Transcript (11/4) P7 L 12-19.

The Appellant also freely admits that he quit paying the Respondent in August, 2014, but claims he was justified in doing so because he disagreed the terms of the Mortgage which his lawyer had drawn. Transcript (12/15) P.19 L.11-20. When the Court inquired of the Appellant what he had done with the over ten thousand dollars he had collected from Gutierrez-Garcia and Ledesma-Martinez but refused to pay to the Respondent, Appellant had no explanation or excuse. Transcript (12/15) P48 L.17-P50 L12. Clearly, the Appellant violated the terms of the Note and Mortgage by non payment of the monthly installments for over fourteen months, and he did so without any excuse or remorse.

Did the Court Err in granting the foreclosure? From the testimony and evidence presented, the Court was clearly justified in granting the foreclosure for non payment of the monthly installments for over fourteen months and for violating the non conveyance clause of the mortgage. Clearly, the Note and Mortgage were prepared by Andy White, attorney for the Appellant, and properly recorded in the Greenville County ROD.

The Note and Mortgage provided for monthly installments to be paid to the Respondent. The Mortgage clearly provided that there could be no conveyance or assignment of the Appellant's interest in the property without the Respondent's approval. By his own testimony and the overwhelming evidence in the record, the Appellant violated both those provisions of the Note and Mortgage which provided foreclosure as a remedy for the Respondent. The Appellant clearly had no excuse for violating the terms of the mortgage. Any complaints he had with his lawyer, Andy White, were totally irrelevant to the terms of the mortgage or the repayment of the Note and Mortgage. His reckless, malicious and intentional disregard for the terms of the note and mortgage, the rights of the Respondent or the rights of his innocent victims Ledesma-Martinez and Gutierrez-Garcia provoked this foreclosure action and the Appellant should be held accountable for actions and this frivolous appeal.

SC Code 29-3-10 clearly states the rights of the mortgagee to foreclose on the property secured by the mortgage of the mortgagor for violation of the terms of the mortgage. In State v. Leach, 378 S.E. 2nd 267, 282 S.C. 178 (SC1984), the Court ruled ... "the mortgagor is the owner of the land and the mortgagee is the owner of the money lent or due, and the mortgagee is entitled to recover satisfaction out of the property by foreclosure and sale."

SC Code 29-3-650 further provides that the Court may render judgment and Order the sale at the same time. In Federal Land Bank of Columbia v. Davant 355 S.E. 2nd 293, 292 S.C. 172 (SC App. 1987), the Court ruled that "Section 29-3-650 Code of Laws of S.C. authorizes the Court to render judgment against the parties liable for payment of the debt secured by a mortgage and direct at the same time the sale of the mortgage premises."

The Appellant's claim that the Court violated SC Code Ann. Section 15-27-155 is also totally unfounded. The Appellant's claim that his right to due process was denied because his interpreter was not present at the hearing on November 4, 2015 is without merit. At the beginning of the Hearing, the Court inquired of the Appellant if he understood the proceedings and the Appellant said "Yes" and that his English was adequate. Transcript (11/4) P. 2 L 17-25. The Appellant then proceeded to participate in the Hearing as his own attorney, asking relevant questions. The problems the Appellant demonstrated were procedural and not indicative of a language barrier. Any question of due process violation became moot with the second Hearing on December 15, 2016 where the Court had the services of two state certified interpreters, Transcript (12/15) P. 3 L 10 - 25, P. 4 L 1 -25. The Court inquired through the interpreters if the Appellant or any of the defendants understood the proceedings and the procedures. Transcript (12/15) P.5L.6 - P.7 L.19. and was assured that they did.

The facts on which Melton v. Olnik, 664 S.E. 2nd 488, 379 S.C. 45 (2008), is based are quite different from the case at hand. In Melton, the Court failed to provide interpreters for litigants who were clearly unable to comprehend the proceedings or communicate their thoughts in English. The Appellant demonstrated his comprehension of English in the November 4, 2016 hearing through his participation in the hearing. Any complaint the Appellant had became moot when two certified interpreters participated in the December hearing. Evidence of non payment by the Appellant, and his conveyance of the property in violation of the mortgage was presented at the December 15, 2016 hearing by the Appellant and translated through the services of state certified interpreters.

Simply stated, the Appellant, who had provided the original Bond for Title, asked the Respondent to replace it with a Mortgage and Note prepared by his own attorney. He sold the property to innocent purchasers and when he discovered that he had violated the Mortgage terms prepared by his own attorney, his solution was to discontinue paying the monthly installments required by the Note and Mortgage to the Respondent, while he continued to collect payments from the innocent third party purchasers. His excuse was that the Respondent refused to re-negotiate with him. Meanwhile the innocent victims are "out" more than ten thousand dollars and their home and the Appellant has neither refunds nor apologies. The Appellant wants to blame the Respondent, or his attorney or the Court, but the fact is that the Appellant alone was responsible for the foreclosure. The Appellant was given an opportunity to present his case through interpreters and the facts remain that he deliberately refused to make mortgage payments after August, 2014, and he sold the property without permission.

The Foreclosure was properly granted and should be Affirmed by the Court.

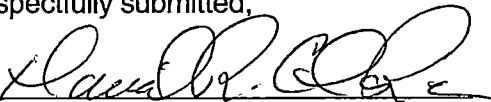
CONCLUSION

The Appellant retained the services of his own attorney, Andy White to prepare a Note and Mortgage to replace a Bond for Title which he had in place to finance his purchase of property located at 14 Henderson Street in Greenville, SC. The Appellant had already prepared and executed the Bond for Title. The Bond for Title was terminated and replaced by a Note and Mortgage on the property to secure the original Note. Transcript (12/15) P.38-45. The Appellant admitted under oath that he had signed the Note and Mortgage, although he questioned their validity, and the Mortgage was duly and properly recorded in the Greenville County ROD. The Note and Mortgage clearly provided for the monthly installment payments to be paid by the Appellant to the Respondent, which the Appellant admitted he quit paying in August 2014. The Appellants' justification was to force the Respondent to modify the Mortgage terms. However, the Appellant freely admitted that he continued to collect the monthly installments from the people to whom he had sold the property in violation of the terms of the mortgage. The Appellant offered neither a refund, an explanation or an apology for refusing to pay the collected funds to the Respondent.

The Appellant's claim that the Court failed give him due process because of his language barrier is baseless. The Court clearly inquired if he understood the proceedings in the November Hearing and the Appellant not only assured the Court that he understood, but he also participated in the trial. His examination of the witnesses clearly showed that he understood the proceedings. This issue becomes moot because the Appellant had two licensed interpreters at the second hearing, and the Court inquired if each of the parties understood the proceeding and did they have questions? The Appellant and each of the defendants assured the Court they understood the proceedings. The December hearing produced more than enough evidence to sustain the foreclosure ruling, and any issue of "due process" became moot.

The statutes are clear that the Note and Mortgage provide the terms for the repayment of the Note, and a violation of the terms provides for the Mortgagee to seize the encumbered property toward payment of the debt. The record of the Hearings clearly shows that the Note and Mortgage were properly executed and recorded, and that the Appellant violated the terms by failing to pay the monthly installments after August, 2014, and by conveying his interest in the property without the consent of the Respondent in December, 2013. The Court acted properly in granting the Respondent's foreclosure against the Appellant.

Respectfully submitted,

By 

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