

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

David B. Powell and Carol Ann Powell,)
)
Plaintiffs,)

v.)

SunTrust Bank a/k/a/ SunTrust Mortgage,)
Inc., Midland Funding LLC, and Pavilion)
Place Property Owners' Association, Inc.,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2012-CP-10-7842

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JUL 18 2016

ORDER

SC Court of Appeals
FILED
JUL 18 9:59 AM
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CHARLESTON

This matter came on for hearing on the cross-motions of the parties for summary judgment. Present at the hearing were David Athell Collins, for Plaintiffs, and Sean Foerster, for Defendant SunTrust Bank. For the reasons that follow, the Plaintiffs' motion for summary judgment is GRANTED, and the Defendant's motion is DENIED.

The parties are in substantial agreement as to the facts underlying the action. Consequently, the Court finds those facts to be demonstrated.

On March 15, 2006, Plaintiff David Powell borrowed the principal sum of \$720,000 from SunTrust, and executed a Promissory Note for the full amount. The funds were used for the purchase of a parcel of real property, referred to as the Longmarsh property. In order to fully secure the loan, Plaintiffs gave Defendant a second mortgage on an additional property located on the Isle of Palms, which is referred to as the Beach property. The mortgage on the Beach property contained a provision that "[i]n the event the loan for [the Longmarsh property] actually closes, upon the principal thereon having been paid down by \$144,000.00 . . . Lender will satisfy of record the said second mortgage on [the Beach property]."

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On November 1, 2008, Plaintiffs defaulted on the Promissory Note, and SunTrust filed a foreclosure, on the Longmarsh property only, on August 11, 2009. Although it later indicated that it had not waived its right to pursue foreclosure of the Beach property as well, SunTrust did waive any personal or deficiency judgment against Plaintiffs. SunTrust took title to the Longmarsh property, and eventually sold it for \$260,000, leaving it with net proceeds of \$246,223.54. SunTrust indicated that it intended to proceed against the Beach property in order to recover the remainder of its loan balance; Plaintiffs filed this action seeking to have the second mortgage against that property satisfied.

In seeking to foreclose on the Beach property, Defendant relies on S.C. Code § 29-3-310, which provides that a mortgage holder is required to enter a satisfaction of mortgage, within three months of demand, once it has received "full payment or satisfaction or to whom a legal tender has been made of his debt..." It argues that as it has not received "full payment" of the obligation, it is entitled to pursue the second mortgage. SunTrust also relies upon *Lever v. Lighting Galleries, Inc.*, 374 S.C. 30, 647 S.E.2d 214 (2007) for the proposition that until it has received such satisfaction, the waiver of deficiency does not prohibit it from continuing to proceed, in a separate action, against any collateral it holds.

The Court finds *Lever* inapplicable to this case. In *Lever*, the mortgage holder had initially filed suit only upon the promissory note; it had not sought relief pursuant to the mortgage. It had not asked for foreclosure of its property interest, but simply obtained a judgment that it was owed the outstanding balance of its note. As Plaintiffs point out in their cross-motion, attempting to collect twice, in separate actions, for the same cause of action, for the same obligation, against the same parties, is impermissible under the Rules of Civil

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Procedure. The initial foreclosure action brought by SunTrust operates as *res judicata* as to any further attempts to collect under its mortgage.

The Rules of Civil Procedure require that all actions against the same parties and arising from the same transaction be brought at one time. S.C.R.C.P. 13. "*Res judicata* bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between these parties. . . *Res judicata* prevents a litigant 'from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.'" *Nelson v. QHG of S.C., Inc.*, 354 S.C. 290, 304, 580 S.E.2d 171, 178 (2003)(citations omitted). Unlike the bank in *Lever*, SunTrust both sought collection on its Note and the foreclosure of its security, and it waived any deficiency judgment; it is barred from continuing to seek the same relief in a second action.

Furthermore, as Plaintiffs note in their memorandum in support of their cross motion for summary judgment, allowing SunTrust to pursue the second property, despite having waived its right to a deficiency judgment, would be inequitable. Had SunTrust sought a deficiency judgment, Plaintiffs would have been entitled to have the property already sold appraised prior to the sale, and they would have been protected to the full extent of the appraised value of this tract, rather than merely the sales price. It is, at this late date, impossible to determine what the value of that land would have been at the time of the foreclosure.¹

Plaintiffs executed a Promissory Note, secured by not one but two separate and distinct parcels of property. SunTrust brought an action to collect on the Note and foreclose the property, waiving any deficiency judgment and thereby avoiding the statutory safeguards regarding the appraisal of the collateral. It received everything it requested in its complaint, and

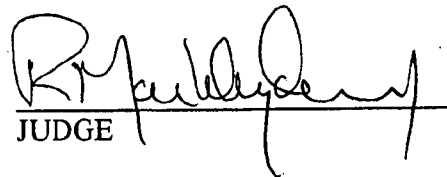
¹ The Court notes that the sales price after the foreclosure was approximately one-third of the value at the time Plaintiffs purchased the property, a period of only four years. Although this time period spans the recession and consequent depreciation in property values generally, it is difficult to imagine a reduction this great.

RMDA 3

received a judgment in its favor on the Note, and the foreclosure of the property. Now, despite having fully obtained everything to which it could have been entitled in its suit, it essentially seeks to reopen a portion of that action in order to foreclosure on the remainder of the collateral. This is an identical action to the first, involving the same parties, and arising out of the same transaction; foreclosure of the second parcel is simply an additional remedy it both failed to pursue and at least to some degree waived during the original proceeding. Defendant's motion for summary judgment is, consequently, DENIED, and Plaintiffs' cross-motion for summary judgment is GRANTED.

In addition to summary judgment, Plaintiffs argued during the course of the hearing that they were entitled to their fees and costs, and an award of damages of Twenty-Five Thousand (\$25,000) Dollars, pursuant to S.C. Code § 29-3-320, for SunTrust's failure to enter a satisfaction of the mortgage on the second property. The Court finds that under the circumstances of this action such an award would be inappropriate, and Plaintiffs' motion for fees and damages is therefore DENIED.

IT IS SO ORDERED!


JUDGE

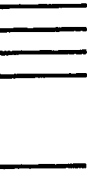
April 27, 2016
Charleston, SC

RMOJ/A

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SEAN MATTHEW FOERSTER
PO BOX 100200
COLUMBIA SC 29202-3200

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC

Order/Plntffs' mot for fees & damages is denied etc

CASE NO: 2012CP1007842

David B Powell , plaintiff, et al VS SunTrust Bank , defendant, et al

This judgment was entered on the 03th day of May, 2016, and notice mailed first class on Thursday, May 05, 2016, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at <http://clerkofcourt.charlestoncounty.org> or obtain a copy in person at the Clerk of Court's Office during regular Charleston County business hours.