

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Dale E. Van Slambrook Master of Equity

Case No. 2010-CP 08-3514

Appellate Case No. 2016-000292

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JUL 15 2016

SC Court of Appeals

Branch Banking and Trust Company -----Respondent,
v.

Wilton H. Cain: Cassandra M. Cain-----Appellants

Amended Appellants Initial Brief

Please accept this amended Appellant Brief I am in hopes that it does meet the standards of rule 208 of the SCACR.



**WILTON H. CAIN AND CASSANDRA M. CAIN
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TABLE OF AUTHORITIES

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)

MOUNT V. SEA PINES CO. 337, S.C. 355, 357, 523 S.E. 464,465 CT. APP. 1999

JOHNSON V. AIKEN AUTO PARTS, 311 S.C. 285,287,428 S.E. 2D 737, 738 CT APP. 1993

PERPTUL BLDG AND LOAN ASSOCIATION OF ANDERSON V. BRAUN S.C.S.C 338,340

CALVERT FIRE INS. CO. V. JAMES 236, SC 431-435 S.E. 2D 832.834 (1960)

SC SUPREME COURT NATIONAL BANK V. BUNCOMBE PROFESSIONAL PARK LLC CASE # 2014-000915

STATUTES

S.C CODE OF LAW TITLE 29 SECTION 29-3-10 THRU 750

S.C. CODE OF LAW TITLE 38 SECTION 38-12 - 70

S.C. CODE OF LAW TITLE 38 SECTION 38- 71-190

S.C. CODE OF LAW TITLE 15 SECTION 15-39-610 THRU 760

EQUITABLE SUBROGATION LAW UNDER S.C. CODE OF LAW

S.C. RULES OF CIVIL PROCEDURES RULES 59, 71, 225

STATEMENT OF ISSUES ON APPEAL

1. What is the exact amount of insurance paid by the PMI insurer Republic Mortgage insurance company to BB&T.
2. **The correct amount of deficiency judgment owed after appraisal, before insurance payment.**
3. Does Attorney have legal authorization from mortgage company to represent BB&T or is case closed and they represent a third party.
4. Does pmi insurance payment reduce the loss of the plaintiff and or amount owed in a foreclosure as this case.
5. Does BB&T represent the insurer RMIC.
6. Does the mortgage have a right under SC CODE OF LAW to enrichment in a foreclosure case.
7. Is the Mortgage company (BB&T) required under SC CODE OF LAW to give proper and timely notice to defendant that they represent the insurer a third party in a Subrogation action and is notice in Jan 2016 proper and timely on this case filed in 2010.
8. Is a foreclosure action under SC CODE OF LAW a tort action is there a injury as cover under collateral resource rule is the default considered and accident and defendant a wrong doer.
9. Is PMI wholly independent of appellant who paid premiums and was a part of loan agreement.
10. Did Court Err in not dismissing deficiency judgment against Appellant in regards to BB&T mortgage co who received PMI payment to reduce

STATEMENT OF THE CASE

This matter came before Hon. Dale E. Van Slambrook on January 14, 2016. The Defendants appeal the order denying the Dismissal, Alter, Amend or Reconsider of deficiency judgment also Order Granting Plaintiff a personal judgment of 37,393.82 against Defendants.

The plaintiff stated the judgment of foreclosure sale was the amount of 201,660.89 that value would indicate that if there is a remaining balance it would be $201,660.89 - 168,000 = 33,660.89$ not 37,393.82. Defendants ask value be corrected.

In reporter report the Plaintiff argument in court is clear line 1-19 referring to collateral Source Rule is a TORT action which a foreclosure is not a TORT action, there was no accident or injury involved there there is no wrong doer as outlined in a TORT action as well as the Statute is clearly made on behalf of wrong doer who is **TOTALLY INDEPENDENT OF INSURANCE PAYMENT**, defendant is not wholly

independent of insurance a play of words by plaintiff, fact is insurance premium was paid by defendant.

Further appellant argument on page 3 line 22 insurance based on home loan contract with appellant and lender where under agreement and SC CODE OF LAW PMI could be canceled by appellant.

Plaintiff argument on page 21-22 that PMI insurance is a fatal error.

Fact appellant received a letter from BB&T on March 29, 2011 stating that the only agreement that they have with RMIC (PMI) company Quote ; the only agreement we have with the pmi companies is that they will insure our loans as long as we pay the premiums; there is no mention in fact it denies there is a subrogation agreement with BB&T.

Fact SC CODE OF LAW 29-3-740-750 states if the value returned after deduction there from 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 deficiency remaining upon the judgment after application of net

proceeds of sale the judgment shall be there upon extinguished and cancelled of record by clerk. The SC law does not allow enrichment in foreclosure action. In fact any amount over judgment is returned to court for a decision.

Further this case started on Oct 4, 2010 and not until 2016 was there any mention that BB&T represented RMIC, no notice to defendant or the court. The timeliness of the notice is over five years therefore untimely. Also there has been no contact by RMIC with defendants or court.

Plaintiff received payment from PMI therefore have no loss and any payment to BB&T would be enrichment, BB&T are the first party and RMIC would be the third party in this suit.

The Master of Equity did error in his decision to apply the Collateral Source Rule to a foreclosure procedure which resulted in a balance of the deficiency judgment against Defendants by not counting and even ruling that no payment by a third party specifically PMI insurer should or will be considered in reducing lost which occurred to Plaintiff BB&T servicer for Lender in a foreclosure procedure. The Master erred by not considering the insurer payment to reduce Plaintiffs lost by providing and giving the opportunity for Enrichment (profit), which is not allowed under Title 29 Code of Law, the Law allows payment of debt not damages for a default on a loan.

Sec 29-3-10 Provide Mortgagee is entitled to recover lost for money lent not profit or be enriched.

Collateral Resource Rule is a Tort. Tort is a civil wrong someone suffers , a harm by a legally recognizable cause of harm, a Tort (direct invasion of some legal right of the individual, the infraction of some public duty by which special damage occurs to the individual)! The plaintiff failed to show how they suffered an injury by default of the defendants to pay a loan. In the State of South Carolina there is no Law that imprisons or where damages is awarded for failure to pay a loan.

In each of the cited cases by the Plaintiff filing December 2015 intended to prove the third party payment by PMI Insurer should not be considered in reducing deficiency judgment actually show that payment must be included. The Collateral Source Rule

provides that compensation received by an injured party from a source Wholly Independent off Wrongdoer will not reduce the amount of Damages owed by the wrongdoer. Cases cited (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), Mount V. Sea Pines Co. 337, S.C.355,357,523 S.E.464,465 Ct App 1999, Johnston V. Aiken Auto Parts, 311 S.C. 285,287,428 S.E.2d 737,738 Ct App 1993 , each case state for insurance not to reduce amount owed Must be Wholly independent of the wrongdoer, (in this case the defendants).This PMI insurance which covers Plaintiff fails to be independent of Defendants or even separable from defendants, facts PMI insurance is paid based on defendants default, default is when defendants fail to pay loan, defendants secured the loan in reference, PMI insurance can be canceled under HUD act by defendants, PMI insurance was issued as a result of defendants not meeting a 20% down payment, the PMI insurance was paid for monthly by defendants by agreement with lender and defendants. Further the alleged Master policy submitted by Plaintiff is proof PMI insurance is not Wholly Independent of Defendants item 1.16, 1.17, 1.25, 2.4 (2b), 4.1 5.1 page 173 borrower shall pay for (mortgage insurance). Therefore Collateral resource Rule fail to apply in this case and must not be used. Insurance payment must be considered a part of lost reduction.

The Defendants further proof that PMI insurance is for the purpose of Plaintiff to reduce or offset there loses in case of default, as stated in Plaintiff owe letter dated March 29, 2011 to Defendants quote " PMI coverage provides BB&T with the option of filing a claim to offset our losses" exb 1 further Plaintiff also notified Defendants quote "Private mortgage insurance carrier has been notified that the loan is delinquent and in default" Letter attached exb 2, please see attached payment schedule of mortgage insurance payment by Defendants of \$97.70 on a monthly bases. Exb 3

Defendants further claim private mortgage insurance is for Default and is a RISK insurance under S.C Code of Law 38-12-70, further Defendants claim a mortgage represent a security for a obligation but not full payment "Perptul Bldg and Loan Association of Anderson v. Braun 270 S.C.S.C. 338, 340 therefore Defendants further contend Tort does not apply and PMI payment must reduce lose and that reduction must be considered in determination of Deficiency Judgment against Defendants.

DEFENDANTS fail to see where in the mortgage contract where it is clear Defendant are not a party to PMI only that Defendant do not receive payment in event of their default as stated by Plaintiff.

The Plaintiff in their filing has affirmatively stated that the plaintiff (Freddie Mac) or more specifically mortgagee has a Subrogation agreement with subrogation rights, plaintiff have made that agreement an issue by quoting it in their action therefore do

to the fact that Defendants are affected by that agreement, defendant demand Court Order Plaintiff supply Defendants with a signed, copy of said agreement.

Further Defendants request the Court to issue an Order preventing the PMI Company from suing Defendants under Equitable Subrogation Laws under South Carolina Code of Laws or any Court rule for any payment to Plaintiff.

The Defendants further state the Plaintiff nor any other party has ever notified defendants or this Court in over 4years in fact since the beginning of this action that Plaintiff also represent third party insurer RMIC. That also bring to question has there been proper and timely notice under South Carolina Court Rules and Laws. To bring a subrogation action against Defendants.

Equitable Subrogation is covered by SC Code of Laws and is under proper condition a right of third party (insurer) question is as a matter of Law are those right transferable to a servicer of a loan or lender Defendants believe they are not transferable therefore Plaintiff have no right to bring suit for Insurer being RMIC under subrogation.

Defendants are concerned this alleged agreement (subrogation) might be an attempt to bypass Court Rules to allow a subrogation suit, which has not been mention or filed at any time during this case.

Also of major concern to Defendants is Defendants executed mortgage with CTX Mortgage Company September 19, 2007 said was recorded September 20, 2007 book 6868 at page 186 PMI agreement was included in loan agreement, Loan was not assigned to Branch Banking & Trust until June 13, 2011 over three years nine month later. Seems impossible for BB&T to have a subrogation agreement with PMI insurer signed over three years earlier, Defendant again request Court to order Plaintiff to produce original document showing said agreement that was apart of Defendants loan.

Further how do defendants know that the exhibit of Master Policy dated 02/08/1991 applies to Defendants?

Defendants request the Court to Order Plaintiff to present and supply defendants and this Court with the exact amount of PMI paid Plaintiff in this action and as a result foreclosure. There are a number of reason for the need to know to determine if Plaintiff received more than entitled more than loss, they received payment before appraisal results which reduced loss by \$46,500 dollars, further reason to know the amount paid by insurer is Plaintiff sold property for the sum of 154,000m dollars on 10/03/2012 exb attached. Also any subrogation rights would be affected by payment, to insure any surplus is handled under rule 71 for S.C. rules of Civil Procedures.

Further BB&T sued under SC Code of Law as first party (lender), requested and received payment from insurer of PMI and therefore are not entitled under Equitable Subrogation SC Code of Laws title 15-39-610-760, 38-71-190, 29-3-310-740 cases Calvert Fire Ins. Co. v. James 236 SC 431-435 S.E. 2d 832, 834 (1960) SC Supreme Court National Bank v. Buncombe Professional Park LLC case # 2014-000915 BB&T received payment from insurer as result of default and foreclosure.

Further fact and reason PMI payment must be included in considering plaintiff loss and Defendants deficiency is during a foreclosure hearing the Honorable Judge Watson the original Master of Equity hearing case requested plaintiff in court how much of the loan was covered by PMI the plaintiff response was 25% Judge Watson Noted it in his file, during hearing before Judge Dale E. Van Slambrook mention the 25% was mention in court file. The loan was 174,988.00 therefore 25% would come to 43,747.00, the Defendants have requested from RMIC representative Teresa Roberts the sum only to be referred to BB&T with no results

Defendants are deeply concerned about is this case properly before this Court reason all personal inquiries to lender Freddie Mac and BB&T each state the case is inactive and closed and in achieve defendants concern is who has directed Attorney to pursue action are they acting alone?

Based on foregoing and the arguments of Defendants and PMI payment to Plaintiff that Defendants deficiency Judgment is reduced by the amount paid Plaintiff by

CONCLUSION

Based on foregoing and the arguments of Defendants and PMI payment to Plaintiff that Defendants deficiency Judgment is reduced by the amount paid Plaintiff by RMIC (PMI) the insurer, if sufficient cancel and dismiss Deficiency Judgment Plaintiff has no loss.

Further ordered that Foreclosure action is not a tort action, that default on a mortgage loan does not require or permit damages as allowed under tort action.

Further it is ordered that under Rule 225a SCACR any and all collection effort by Plaintiff against Defendant are placed on hold during appeal.

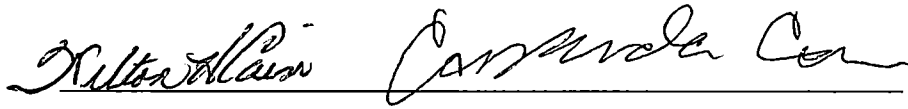
Furthered that personal judgment against Defendants is canceled.

Further order that proper and timely notice was not given by Plaintiff that Plaintiff was legal representative for RMI insurer a third party under SC CODE of Law (republic Insurance).

Further order Plaintiff does not represent RMI insurer.

Further order that this RMI insurance payment is not Wholly independent of Defendants.

Further order Plaintiff to give notice of amount of RMI insurance paid to Plaintiff.

Handwritten signature of Wilton Cain and Cassandra Cain in cursive script, written over a horizontal line.

Wilton Cain and Cassandra Cain

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July 13, 2016

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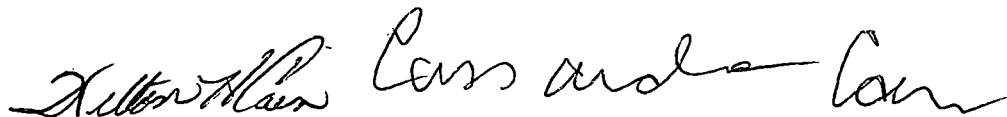
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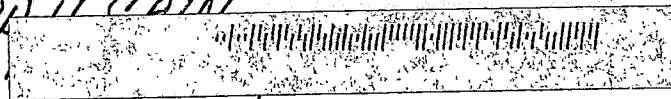
I Wilton and Cassandra Cain certify that we have served a copy of the Amended Appellants Initial Brief which also includes the Designation of Matter upon Branch Banking & Trust at PP box 2027 Greenville, SC 29602, and Roger Townsend & Thomas at 220 Executive Center Drive PO Box 100200 29202 Columbia SC on this Date July 13,2016.



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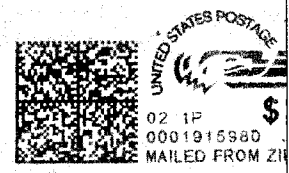
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