

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

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Charles B. Simmons Jr., Master in Equity

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Case No. 2016-00-0152

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

Respondent

V.

Alberto Alvarez

Appellant

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**MEMORANDUM FOR MOTION TO DISMISS**

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In the recent SC Court of Appeals decision, Harris V. Titex International Ltd., Case No. 2014-000902, Opinion No. 5418, June 29, 2016, the Court discussed the standard of proof required for a Summary judgement to be granted. "When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP, Fleming v. Rose, 350 S.C. 488, 567 S.E.2nd 857,860 (2002). Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to a

material fact and that the moving party is entitled to a judgment as a matter of law.' Rule 56(c), SCRPC. 'When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party.' Flelming, 350 S.C. at 493-94, 567 S.E.2nd at 860." Harris v. Titex International Ltd., S.C. Appellate Opinion No. 5418 (2016) at p. 60.

The undisputed facts in this instant case, after a review of the pleadings, exhibits, testimony of the witnesses, written motions of the Appellant, and the Appellant's own written arguments are as follows:

- 1) That the Appellant purchased a house and lot from the Respondent located at 14 Henderson St. Greenville, S.C. on October 21, 2013, by deed recorded at Deed Book 2433, Page 2603, Greenville ROD.
- 2) That as a part of the consideration for the purchase of this property, the Appellant gave the Respondent and her deceased husband, Ervin Elliott, a promissory note in the principal sum of \$53,500.00, a copy of which was admitted into evidence without objection.
- 3) To secure payment on the note, Appellant granted to the Respondent and her deceased husband, Ervin Elliott, a mortgage which was duly signed and probated and thereafter recorded at Mortgage Book 5235 at Page 4419, Greenville ROD, on October 21, 2016 This mortgage was also entered into evidence without objection.
- 4) That thereafter, on December 23, 2013, the Appellant sold by quitclaim deed, filed at Deed Book 2436, Page 5064 at the Greenville ROD the property to Ledesma-Martinez and Gutierrez-Garcia. A copy of the quitclaim deed was admitted into evidence without objection.
- 5) That this sale violated section 2.7 of the Mortgage which provided that the Appellant could not sell the property without first satisfying the mortgage, or obtaining the Respondent's permission.
- 6) That the Appellant intentionally refused to make payments required under the Note and Mortgage to the Respondent after August, 2014, and at the date of the December 15th Hearing was sixteen (16) months in arrears, and in Default as provided by the Note and Mortgage.

While the Appellant has filed motions , pleadings and arguments full of vitriol towards his attorney who prepared the Note, Mortgage and Deed as well as other documents to perfect this transaction, these facts remain uncontested. When considered in a light most favorable to the Appellant, there can be no other conclusion of law except that the Respondent was entitled to the order of foreclosure as Ordered by the Honorable Charles B. Simmons Jr., Master in Equity. The filing of an appeal by the Appellant in light of his admissions, both in his testimony and his arguments to the Appellate Court indicate that the Appeal was filed as a frivolous attempt to abuse the Respondent through the court system. The Appellant's conduct violates SCRPC Rule 11, and "the court should not hold a layman to any lesser standard than is applied to an

attorney." Goodson v. American Bankers Ins. Co. 295S.C. 400, 403,368 S.E.2nd 687, 689 (1988).The Court ruled that "under Rule 11 (a), SCRPC, a party and/or the party's attorney may be sanctioned for filing a frivolous pleading, motion or other paper, or by making frivolous arguments. The party and/or attorney may also be sanctioned for filing a pleading, motion, or other paper in bad faith whether or not there is good ground to support it." Ex Parte Gregory, 378 S.C.430, 437-38, 663 S.E 2nd 46,50 (2006).

The Respondent asks the Court to consider the fact that the Respondent previously waived the deficiency judgment against the Appellant which she was entitled to, in spite of the Appellant's misconduct. The Appellant rewarded the Respondent's kindness by further delaying the Respondent's ability to sell the property in question through a frivolous appeal which caused further legal expenses and costs.

The Respondent prays that the Appellate Court dismiss the appeal of the Appellant and impose sanctions against the Appellant to include costs and attorney fees of the Respondent and any other relief and/ or sanctions the Court deems appropriate.

A handwritten signature in black ink, appearing to read "David R. Clarke", is written over a horizontal line.

David R. Clarke S C Bar 7143  
3609 stoney Ridge Trail  
Midlothian, VA 23112  
804-878-6060  
Attorney for the Respondent

RECEIVED  
SEP 12 2016  
SC Court of Appeals

September 8, 2016

The Honorable Jenny Abbott Kitchings  
Clerk of South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

Re: Motion to Dismiss, Elliott vs. Alvarez, et al.: Case Number 2016-00-0152

Dear Ms. Kitchings

Enclosed please find an original and six copies of my Motion to Dismiss the above captioned case. I am also enclosing a money order to the Clerk of Court for \$25.00 filing fee. I am sending one copy to Mr. Alvarez by US Mail, postage prepaid, as indicated by my affidavit of service.

If you have any questions, please call me.

Thank you for your cooperation and help.

Sincerely,



David R. Clarke  
Bar number - 7143



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David C Wake  
3609 Stoney Ridge Trail  
M. Dorton VA 23112

**RECEIVED**

SEP 12 2016

SC Court of Appeals Honorable Jenny Abbott Kitchings  
Clerk of S.C. Court of Appeals  
PO Box 11629  
Columbia, S.C. 29211