THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Joseph M. Strickland, Master in Equity
Case No. 2010-CP-40-5886

Appellate Case No. 2016-001119

MidFirst Bank, Respondent,

v.

Mahasin K. Bowen as Personal Representative for the Estate of Mary Lee Samuel; Mahasin K. Bowen; Cecil Samuel a/k/a Cecil A. Samuel; Charles Samuel, Jr.; Earl Hassan Samuel; Kenneth Kareem Samuel; Kilgore Marketing Solutions dba RSVP Columbia; Tauheedah Mateen; Raymond Samuel a/k/a Shamsud-din Raymond Samuel; South Carolina Department of Motor Vehicles, Defendants,

Of Whom Mahasin K. Bowen, as Personal Representative for the Estate of Mary Lee Samuel, and individually is the Appellant.

INITIAL REPLY BRIEF

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November 7, 2016

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APPELLANT'S COMMENTS ON RESPONDENT'S STATEMENT OF THE CASE

MidFirst Bank's counsel's comment that Ms. Bowen "chose not to answer questions" at her deposition (R.Brief p. 8) is misleading. The transcript of Mahasin K. Bowen's deposition on August 21, 2013, clearly reflects: (a) that Ms. Bowen appeared at the deposition and requested that the deposition be suspended due to her claim that she was impaired (her mental and emotional condition due to several deaths in her family (R.p. ___) and her feeling "not really well" due to a hospital treatment the day before (R.p. ____)); and (b) that it was mutually agreed by and between MidFirst Bank's counsel and Ms. Bowen that Ms. Bowen would return at a later time to conclude the deposition. The deposition of Ms. Bowen was never reconvened, as MidFirst Bank never pursued the matter.

The hearing on MidFirst Bank's Motion for Summary Judgment was held on June 25, 2015. The Record of Hearing (R.p.___) indicates that only MidFirst Bank's counsel attended the hearing.[1] This is not correct. The Defendant, Kenneth Samuel (the brother of Mahasin K. Bowen), attended, and participated in, the hearing before the Master in Equity.

Importantly, most of the attachments to the Memorandum of Law in Support of the Plaintiff's Motion for Summary Judgment (R.p. ____) are not evidence in this case as they are not supported by affidavit. "Our rules of civil procedure require Appellants to present admissible evidence to the trial judge in the form of affidavits or other "pleadings, depositions, answers to interrogatories, and admissions on file." Rule 56(c), SCRCP. "Affidavits are the principal means of bringing information before the court in a motion for summary judgment." Robertson v. First

1 Neither Respondent's present counsel nor the undersigned counsel for Appellant were involved in this case at any time prior to the foreclosure sale.

Union Nat'l Bank, 350 S.C. 339, 351, 565 S.E.2d 309, 315-16 (Ct.App. 2002).

The only affidavits submitted by MidFirst Bank were the following:

- Affidavit of Indebtedness dated March 27, 2015
- Affidavit of Attorney's Fees dated April 29, 2015
- Affidavit of Attorney's Fees dated June 24, 2015

The Affidavit of Indebtedness was timely served, but it does not constitute proper evidence, as it does not constitute or include a business record and the competency of the affiant is questionable.

The Affidavit of Indebtedness mentions only the following material facts: (a) that MidFirst Bank holds the Note and Mortgage; (b) that the Defendants defaulted under the payment terms of the Note and Mortgage; and (c) that the debt owed on the Note and Mortgage is as stated. It has nothing to say about the mobile home or the request for reformation of the Mortgage.

The second Affidavit of Attorney's Fees was not timely served and should not have been accepted in evidence by the Master in Equity.

Both Affidavits of Attorney's Fees involve only a request for attorney's fees and costs. They have nothing to add with regard to material facts entitling MidFirst Bank to grants of foreclosure, reformation of the mortgage or other remedies.

Therefore, the following attachments to the said Memorandum, which are not supported by affidavit, do not constitute evidence in this case:

- Application of Appointment as Personal Representative for Mahasin K. Bowen for the Estate of Mary L. Samuel (Mot. Summ. J., Ex. 3)
- Copy of Respondent's Requests to Admit, Requests for Production and Interrogatories to Appellant, along with certificate of service (Mot. Summ. J., Ex. 6)

- HUD-1 Closing Statement for subject loan (Mot. Summ. J., Ex. 6)
- Copy of Appraisal from Closing (Mot. Summ. J., Ex. 6)
- Copy of Good Faith Estimate of Settlement Charges from Closing (Mot. Summ. J., Ex. 6)
- Copy of Federal Truth in Lending Disclosure from Closing (Mot. Summ. J., Ex. 6)
- Copy of RESPA Disclosure from Closing (Mot. Summary J., Ex. 6)
- Copy of Notice of Right to Cancel from Closing (Mot. Summ. J., Ex. 6)
- Letter from Sandra F. Braunstein, Director, Division of Community and Consumer Affairs regarding Mortgage Loan Modifications and Regulation B's Adverse Action Requirement
- Article from Consumer Finance Law Quarterly Report on Loan Modification and Equal Credit Opportunity Act

" . . . [F]actual statements of the attorneys, whether made during argument or in written briefs or memoranda, ordinarily may not be considered by the court in determining whether a genuine issue of material fact exists." Higgins v. Medical Univ., 326 S.C. 592, 599, 486 S.E.2d 269, 272 (Ct.App. 1997).

APPELLANT'S COMMENTS ON RESPONDENT'S STATEMENT OF FACTS

The legal description quoted by MidFirst Bank is **NOT** the legal description contained in the subject mortgage. The correct legal description is as follows:

> All that certain piece, parcel or tract of land containing 5.67 acres, more or less, with any improvements thereon, being located near Columbia, County of Richland, State of South Carolina, and being a portion of the property shown on that certain plat prepared for Jo Anne B. Turner by Douglas E. Platt, Sr., RLS, No. 4041, dated 3/9/87, and recorded in the RMC Office for Richland County 3/31/87 in Plat Book 51 at page 5630 and on a plat prepared for Ellie Martin by D. T. Duncan, recorded in the RMC Office for Richland County in Plat Book X page 485. Reference is craved to said plats for a more complete description of boundaries and measurements; be all measurements a little more or less.
>
> TMS#: 22606-01-01 (Portion).

It should be noted that the legal description quoted above is the identical description set

forth in MidFirst Bank's initial Complaint (R.p. ___). This legal description was revised (unilaterally altered) by MidFirst Bank in the Amended Complaint (R.p. ____) and in the Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment (R.p. ___), but the mortgage was never amended. It should also be noted that the legal description was re-revised in the Requests for Admissions (R.p. ___), and this re-revised legal description was carried over to the Master In Equity's Order and Judgment of Foreclosure and Sale (R.p. ____).

The difference between the revised legal description and the re-revised legal description is that, in the Amended Complaint and the Memorandum accompanying the Motion, the legal description does not mention a mobile home, while, in the Requests for Admissions and the subject Judgment, the legal description cites a mobile home.

Again, MidFirst Bank's counsel's statement that, "[a]t the Deposition Appellant refused to answer questions" (R.Brief, p.___) is misleading. (See Appellant's Comments on Respondent's Statement of the Case, supra.)

MidFirst Bank's comment that, "The Requests for Admissions were deemed admitted and essentially established Respondent's case." (R.Brief, p. 11) is not supported by the record. The Record of Hearing (R.p. ___), the Master In Equity's Order and Judgment of Foreclosure and Sale (R.p._____), and the Order Denying Defendant's Motion to Alter or Amend Judgment, Petition to Set Aside Judicial Sale and Points and Authorities (R.p. ___) make no mention whatsoever of the Requests for Admissions.

The argument regarding the Requests for Admission has not been preserved for consideration on appeal. "It is well settled that an issue . . . must have been raised *and ruled upon* by the trial court to be preserved." Pye v. Estate of Fox, 369, S.C. 555, 564, 633 S.E.2d 505 (2006)

(emphasis added).

"In order for an issue to be preserved for appellate review, with few exceptions, it must be raised and ruled upon by the trial judge . . . When a trial court makes a general ruling on an issue, but does not address the specific argument raised by a party, that party must make a Rule 59(e) motion asking the trial court to rule on the issue in order to preserve it for appeal." Cowburn v. Leventis, 366 S.C. 20, 41, 619 S.E.2d 437 (Ct.App. 2005) (internal citations omitted).

REPLY TO RESPONDENT'S ARGUMENTS

1. MidFirst Bank fails to explain why Ms. Bowen's Motion to Alter or Amend, filed on August 10, 2015 (R.p. ____), was ignored. It argues that there was no stay in effect, citing Rule 62(b), SCRCP. While admittedly no motion specifically requesting a stay was filed by Ms. Bowen, she had timely filed a Motion to Alter or Amend, which deserved a prompt consideration and resolution. There is no indication that the Master in Equity was even aware that the Motion to Alter or Amend was pending and required some action until over a month after the foreclosure sale. Ms. Bowen, again, was a pro se litigant, who should have been afforded some guidance in this regard, especially if the sale were to be conducted notwithstanding her timely motion.

2.a. MidFirst Bank's counsel asserts that Appellant was notified of the hearing on the Motion for Summary Judgment but that "Appellant did not attend." (R.Brief, p. 15) This assertion is somewhat misleading. The Defendant, Kenneth Samuel (the brother of Mahasin K. Bowen), attended, and participated in, the motion hearing, standing in for Ms. Bowen. The "canned" Record of Hearing, which does not reflect the appearance by Mr. Samuel or any of the comments/arguments made by him, is all that exists in the record to, even arguably, demonstrate what was brought before the court.

Interestingly, the Record of Hearing contains no mention whatsoever of:

- Requests for Admissions
- Appraisal
- Counterclaims.

2.b. Contrary to MidFirst Bank's comment that Appellant's Motion to Alter or Amend "does not contain a single mention of the reformation cause of action or the mobile home situated on the subject property" (R.Brief p. 16), and that "[a] challenge to the intent of the parties cannot be reasonably read into the Motion to Alter or Amend," Appellant would point out that the Affidavit of Mahasin K. Bowen (R.p. ____), which was attached to said Motion, states the following:

> 5. MidFirst Bank requests additional collateral 1994/Omni Destiny Mobile / Manufactured home clearly not included in the original Note/Mortgage which present genuine material facts.

Pro se litigants are held to a less stringent pleading standard than are lawyers. Haines vs. Kenner, 404 U.S. 519 (1972).

Together, the Motion to Alter or Amend (R.p. ___) and the Motion to Reconsider and to Alter or Amend Order Denying Motion to Alter or Amend Judgment and Petition to Set Aside Judicial Sale (R.p. ____) clearly question and challenge the reformation of the mortgage where findings of material fact were made without proper presentation and support (and even without comment). The following questions were left unanswered in the Court's written Orders (R.pp. ____ and ____) as well as the oral Order:

a. Was the mortgage inconsistent with a prior agreement of the parties to the mortgage?

b. Did the parties to the mortgage intend that the legal description of the mortgaged property contained in the mortgage include reference to a Manufactured Home?

c. Did the parties to the mortgage intend that the legal description of the

mortgaged property include reference to a specific Manufactured Home, to wit: 1994 Destiny Omni Manufactured/Mobile Home bearing VIN Number 036366A&B?

d. Did the parties to the mortgage agree to the amendment of the legal description of the mortgaged property, as cited in the Judgment, which is remarkably different from the legal description contained in the mortgage?

e. Did the parties to the loan intend that the Manufactured Home was already converted to a permanent fixture or would be converted as a part of the loan transaction?

f. Was the failure to include the Manufactured Home in the description of the mortgaged property due to mutual mistake?

g. Did the parties to the mortgage intend to place a lien upon the Certificate of Title to the mobile home?

h. Was any effort made to correct the Certificate of Title of the mobile home, which named Charles Samuel (who died prior to 1999) as one of the owners?

i. Why shouldn't it be inferred from the mortgage that SouthTrust Mortgage Corporation intended for the mortgage not to mention a mobile home in order to conceal the fact that the loan involved a mobile home or for some other reason?

j. Without a showing that the mortgage is ambiguous, how can parol evidence be admitted to add another term to the mortgage?

3.a. MidFirst Bank continues to hammer on the failure of Ms. Bowen, a pro se Defendant, to respond to its Requests for Admissions (rendering the requests admitted), but it fails to explain the absence of any mention whatsoever of the Requests for Admissions in the Record of Hearing (R.p. ___) and the absence of any finding or conclusion (or even a mention) with regard to such admissions in the Master In Equity's Report and Judgment of Foreclosure and Sale (R.p. ____). These documents were prepared by MidFirst Bank's counsel and presented to the Master in Equity at the motion hearing on June 14, 2015 (R.Brief, p. 8). The Requests for Admissions was also not mentioned in the Order Denying Defendant's Motion to Alter or Amend Judgment, Petition to Set Aside Judicial Sale, and Points and Authorities (R.p. ____). In other words, the matter of the unanswered Requests for Admissions was not ruled upon and, therefore, is not preserved for

judicial review.

3.b. There is one point in which Appellant and Respondent are in full agreement: "The Note and Mortgage are direct evidence of the terms and existence of the agreement entered into by Ms. Samuel." (R.Brief, p. 20)

As previously indicated, the appraisal, which is touted by MidFirst Bank as demonstrative of the inclusion of the mobile home as a part of the collateral for the loan, is not in evidence. It is nothing more than an attachment to the Memorandum accompanying the Motion for Summary Judgment. There is no affidavit from any competent witness confirming the circumstances surrounding the appraisal. In Robertson v. First Union Nat'l Bank, supra, the Court refused to admit in evidence at the hearing of a motion for summary judgment an "Appraisal Review," which was unsigned and had not been submitted via affidavit showing "affirmatively that the affiant was competent to testify regarding the matters stated therein."

Without placing the appraisal (or equivalent documentation) in evidence, MidFirst Bank cannot even make a prima facie case that the mobile home was intended by the mortgagee to be mortgaged as a part of the collateral for the loan. Of course, even if the appraisal were in evidence, that alone would not be sufficient to result in a finding that the mortgagors agreed or intended to mortgage the appraised property without any evidence that they were privy to the appraisal.

3.c. With regard to the two Affidavits of Attorney's Fees, it is not possible to ascertain whether the amount of the attorney's fee (requested by MidFirst Bank and awarded by the Master in Equity without comment or adjustment) "is completely reasonable given the facts of this case." (R.Brief, p. 22) Neither Affidavit describes or quantifies the actual work performed, and neither explains-away any unavoidable duplication of work as a consequence of MidFirst Bank's change of

attorneys.

REFORMATION OF MORTGAGE IS IMPROPER

Without abandoning the other issues, Appellant elects to focus in this Reply on the reformation of MidFirst Bank's unambiguous mortgage to include a mobile home, without MidFirst Bank having presented any evidence whatsoever that the parties to the mortgage intended that the collateral for the loan include a mobile home.

Reformation of an ambiguous contract by summary judgment is improper. Reformation of an unambiguous contract using extrinsic evidence is likewise improper.

> Summary judgment is improper where the motion presents a question as to the construction of a written contract, and the language employed in the contract is ambiguous so that intention of the parties as to the legal effect of the contract may not be gathered from the four corners of the instrument. Bishop v. Benson, 297 S.C. 14, 17, 374 S.E.2d 517 (Ct.App. 1988).
>
> Where there is ambiguity, uncertainty or doubt as to proper construction of a contract, intention of the parties becomes a question of fact for the jury to determine. Waters v. S. Farm Bureau Life Ins. Co., 365 S.C. 519, 524, 617 S.E.2d 385 (Ct.App. 2005).
>
> . . . [I]n ascertaining [the grantor's] intention, the deed must be construed as a whole and effect given to every part thereof, if such can be done consistently with law. . . When a deed is unambiguous, any attempt to determine the grantor's intent . . . must be limited to the deed itself and using extrinsic evidence to contradict the plain language of the deed is improper. Penza v. Pendleton Station, LLC, 404 S.C. 198, 204, 243 S.E.2d 850 (Ct.App. 2013) (internal citations omitted).

There is nothing in the mortgage even implying an intention that the collateral for the loan include a mobile home. MidFirst Bank was not a party to the mortgage, so its position or opinion on what was intended by the actual parties to the mortgage is, without more, completely irrelevant.

One mortgagor, Mary Lee Samuel, is deceased (R.p. ___), and the other mortgagor, the

Defendant, Raymond Samuel, made no appearance herein. The mortgagee, South Trust Mortgage Corporation (R.p. ____), made no appearance herein. Raymond Samuel and South Trust Mortgage Corporation are the only surviving parties who could potentially assert that they intended for the mobile home to be included as collateral. MidFirst Bank made no effort to solicit testimony from either Raymond Samuel or South Trust Mortgage Corporation. No documentation regarding a prior agreement between the parties to the loan (i.e. Mary Lee Samuel, Raymond Samuel and South Trust Mortgage Corporation), which agreement indicated that the mortgage was in error by failing to include the mobile home, was placed in evidence by MidFirst Bank.

Importantly, the mobile home (personal property) was titled in the names of **Charles** Samuel and Mary Lee Samuel (R.p. ___). If the mobile home were to be liened (for any reason) in 1999 (when the loan was closed), the mobile home title would, first, have had to be re-issued in the name(s) of the current owner(s), as Charles Samuel had died a year earlier (R.p. ___). Nothing was done to correct the owner's(s') name(s) on the title. The clear inference here is that the mobile home title – which is the proper place to enroll a lien upon a mobile home[2] – was never intended to be liened as a part of the collateral for this loan.

It can only be inferred from the terms of the mortgage and the failure to place a proper lien on the mobile home title that SouthTrust Mortgage Corporation received as collateral for the loan precisely what it required.

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2 The Record of Hearing (R.p. ___) states, "The mortgage loan is properly affixed and noted on the certificate of title to said Manufactured Home in the records and database of Defendant South Carolina DMV." The implication of this statement is that the lien of the Security Pacific House Services, Inc. (which obviously knew the proper way to place a lien upon a mobile home) is properly noted on the certificate of title. If instead the intention is that SouthTrust Mortgage Corporation has a "properly affixed" lien on the certificate of title, such statement would be blatantly erroneous.

Interestingly, no mortgage holder, including MidFirst Bank, asserted any claim of lien upon the mobile home between 1999 and 2013 (when the Amended Complaint was filed) – 13 years after the loan was closed. Even in the initial Complaint (R.p. ___) (which contained the correct legal description from the mortgage), there was no specific request for (or even a mention of) "reformation of the mortgage." The only allegations in the Complaint, which mentioned a mobile home, are the following:

> 13. The Parties intended that the subject loan be secured by the real property and the mobile home located on the real property.
>
> 14. The mobile home which is attached to the real property, as well as the land described in the mortgage, secure the plaintiff's loan.

No effort has been made by MidFirst Bank to demonstrate how the mortgage is inconsistent with some (unidentified) prior agreement, in order to support its argument that there was a mutual mistake in failing to include the mobile home.

No evidence whatsoever was submitted by MidFirst Bank, by proper witnesses, to demonstrate that the parties to the mortgage intended that a mobile home be included as a part of the collateral. No suggestion of mutual mistake, based upon the mortgage being inconsistent with a prior agreement between the parties, was made at the motion hearing. Therefore, the reformation of the mortgage to add a mobile home was improper.

CONCLUSIONS

As argued in the Appellant's Brief and herein, Appellant asserts that:

1. The Master In Equity's Judgment of Foreclosure and Sale was improperly enforced during the pendency of Appellant's Motion to Alter or Amend Judgment.

2. The reformation of the mortgage (which was unambiguous), when no evidence

whatsoever supporting this request was presented by Respondent, would be questionable even upon a trial on the merits; but as it involves a genuine issue of material fact in dispute, reformation would be improper by summary judgment.

3. The Affidavit of Indebtedness and the second Affidavit of Attorney's Fees should not have been accepted in evidence notwithstanding that no objection thereto was made at the motion hearing.

4. The dismissal with prejudice of Appellant's counterclaims was not included in the relief requested in the Plaintiff's Motion for Summary Judgment. The finding of the lower court that the counterclaims should be dismissed with prejudice, especially without any presentation in that regard or any evaluation whatsoever, was improper.

"For summary judgment to be granted, it must be *perfectly clear* that no issue of fact is involved." Davenport v. Island Ford, Lincoln, Mercury, 320 S.C. 424, 426, 465 S.E.2d 737 (Ct.App. 1995). (emphasis added)

Respectfully submitted,

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Of Whom Mahasin K. Bowen, as Personal Representative for the Estate of Mary Lee Samuel, and individually is the Appellant.

CERTIFICATE OF MAILING

I, Kelly McVey, of Jordan Law Firm, attorney for Appellant, Mahasin K. Bowen, hereby certify that I have this 7th day of November, 2016, served a copy of the Initial Reply Brief upon William S. Koehler, Esquire, attorney for Respondent, MidFirst Bank, by mailing a copy thereof, postage prepaid, to the address indicated below:

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