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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Circuit Court

D. Craig Brown, Circuit Court Judge

Case No.: 2016-001521

South State Bank, f/k/a SCBT, a South Carolina state chartered banking Corporation, d/b/a First Federal, a Division of SCBT..... Respondent,

v.

Three Amigos Land Co., LLC. A South Carolina limited liability company; River City Storage, LLC, a Florida limited liability company; Ramco River City, Inc., a Michigan corporation; Liberty River City Residential, LLC, a Florida limited liability company; Ramco Jacksonville, LLC, a Michigan limited liability company; George M. Lee, III, an individual; and Paul V. Degenhart an individual, Appellants.

Of whom Paul V Degenhart is the Appellant ..... Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN HOLDING THAT THE FLORIDA COURT HAD PERSONAL JURISDICTION OVER THE APPELLANT

II. DID THE TRIAL COURT ERR IN NOT EVEN ADDRESSING APPELLANT'S ARGUMENT THAT THE FLORIDA COURT(S) LACKED SUBJECT MATTER JURSIDICTION

III. DID THE TRIAL COURT ERR IN NOT HOLDING THAT SOUTH CAROLINA LAW SHOULD GOVERN THE ENFORCEMENT OF THE JUDGMENT

STATEMENT OF CASE

On or about November 17, 2011 Respondent filed a Summons and Complaint in Duval County, Florida (R. p. 37) praying for Action on a Note, Action on guarantees, and an Action to foreclose on a mortgage held on property located in Duval County, Florida owned by Three Amigos Land Co., LLC, a South Carolina limited liability company. On or about April 23, 2012 Appellant filed a motion to dismiss because the pleadings of the Respondent failed to properly state a cause of action. (R. p. 89). On or about June 27, 2012 the Court granted Appellant's motion to dismiss and granted leave to the Respondent to file an Amended Complaint. (R. p. 2). On or about July 9, 2012 Respondent filed its amended complaint. (R. p. 51). On or about July 17, 2012 Appellant filed an answer to the amended complaint. (R. p. 68). On or about January 21, 2014 the Circuit Court of the Fourth Judicial Circuit in and for Duval County, Florida court entered its Final Judgment for Deficiency. (R. p. 32). Appellant filed a motion to amend the Final Judgment alleging that the court did not properly compute the final judgment because it was intended that any liability be several and not joint. (R. pp. 92-96). The Court issued its order denying Appellant's motion for rehearing or to amend final judgment. (R. p. 4). Shortly thereafter Appellant timely filed his notice of appeal with the District Court of Appeal of Florida First District. (R. p. 156) On or about February 12, 2015 the District Court of Appeal affirmed the judgment of the Circuit Court. (R. p. 7).

An action was then brought to domesticate the Judgment in Richland County, South Carolina. (R. p. 159). Appellant filed a motion for Relief from Foreign Judgment. (R. p. 111) A hearing was held on June 6, 2016 and an order issued on June 20, 2016. (R. p. 18). Appellant subsequently and timely filed his Notice of Appeal.

STANDARD OF REVIEW

"[T]he burden of undermining the decree of a sister state rests heavily on the assailant...[Who can overcome the presumption of jurisdiction and the validity afforded by the judgment by the Full Faith and Credit Clause only] by extrinsic evidence, or the record itself." Cook v. Cook, 342 U.S. at 128, 72 S. Ct. 157.

LAW / ANALYSIS

I. DID THE TRIAL COURT ERR IN HOLDING THAT THE FLORIDA COURT HAD PERSONAL JURISDICTION OVER THE APPELLANT

a. **Appellant was not subject to section 48.193 of the Florida Statutes dealing with Jurisdiction (long arm statute)**

b. Respondent argues that:

c. Appellant was subject to The Florida court's jurisdiction because he made an appearance in the case. Appellant does not deny that he made an appearance in the case with respect to the foreclosure but avers that should not rise to the level of conferring personal jurisdiction over him with respect to any alleged deficiency. (R. p. 81 lines 18-23) Respondent then asserts that even if Appellant had not submitted himself the jurisdiction of the Florida court the Florida court had jurisdiction because the foreclosure was local and Appellant signed an agreement containing a forum selection clause. Respondent attempts to back up this assertion by citing South Carolina and Indiana case law. (R. p. 21, lines 4-11). This case law however is inapplicable because the validity and effect of a foreign judgment must be determined by the laws of the state that rendered the judgment. Hamilton v.Patterson, 236 S.C 487, 492, 115 S.E. 2d 68,70 (1960); Purdie v. Smalls, 293

S.C. 216, 220,359 S.E. 2d 306,308 (Ct. App. 1987). Thus, with respect to jurisdiction only the laws of the State of Florida apply. **In McRae v. J.D./M.D., Inc., 511 So.2d 540 (Fla. 1987), the Florida Supreme Court held that a forum selection clause in the contract designating Florida as the forum cannot operate as the sole basis for a Florida court to exercise personal jurisdiction...** There must be an independent basis under section 48.193, and there must otherwise be minimum contacts, for the Florida Court to exercise jurisdiction. It is only after the Florida Court has in personam jurisdiction... that... The enforceability of a forum selection clause comes into play." Appellant, in fact, had no minimum contacts with the state of Florida.((R. p. 133, lines15-19). In a South Carolina case, similar to this case, our court found that a Florida decree was not entitled to full faith and credit because the party against whom the judgment was rendered had insufficient minimum contacts with Florida to render it subject to personal jurisdiction. Loyd and Ring's Wholesale Nursery, Inc., v. Long & Woodley Landscaping and Garden Center, Inc., 431 S.E. 2d 632, 315 S.C. 88, (Ct. App. 1993).

d. Lender then argues that Appellant should be subject to jurisdiction in the State of Florida because he was the managing member of Three Amigos Land Co., LLC ("Borrower"). Not only is this argument defective because it misstates the facts (Appellant was not the managing member- (R. p. 136, Section 3.1) it is defective legally because there is no statute or case law which makes a member of a limited liability company subject to the jurisdiction of any court, solely because of membership in the LLC. In summary, there is no basis for a Florida court ever having had any jurisdiction over this Appellant's guarantee and thus any judgment of the Florida Court must be considered null and void, unenforceable and not entitled to Full faith and credit.

II. DID THE TRIAL COURT ERR IN NOT EVEN ADDRESSING APPELLANT'S ARGUMENT THAT THE FLORIDA COURT(S) LACKED SUBJECT MATTER JURSIDICTION.

Appellant further argues that Florida court lacked Subject Matter Jurisdiction which argument may be raised at any time including for the first time on appeal. See State v. Funderburk, 259 S.C. 256, 261, 191 S.E.2d. 520, 522 (1972) (stating "the acts of a court with respect to a matter as to which it has no jurisdiction are void"). See also State v. Rogers, 2014 – 000980 Ct. App. (2016) " issues related to subject matter jurisdiction may be raised at any time" (citation omitted). (R. pp. 81-82, lines 18-3, p 83 lines 2-7).

The Florida Court lacked subject matter jurisdiction under authority of Florida Rules of Civil Procedure, Rule 1.140 (B) (1) and 1.540 (b) McGee v. Biggs, 974 So. 2d 524, 526, (Fla. 4th DCA 2008), Citing Strommen v. Strommen, 927 So. 2d 176 (Fla. 2d DCA 2006) and shows that:

1. The Florida Court lacked subject matter jurisdiction to proceed. Subject matter jurisdiction was never been established on the record. The jurisdictional question can be raised at any time and can never be time barred. De Claire v. Yohanan, 453 So. 2d 375 (Fla. 1984). (R. p. 83, lines2-5).
2. Subject matter jurisdiction is confirmed on a court by the state constitution and applicable statutes. Subject matter jurisdiction may not be conferred upon the court by the consent of the parties, and the lack of subject matter jurisdiction may be raised for the first time on appeal. See Walker v. Garrison, 610 So. 2d 716, 718 (Fla. 4th DCA 1992); Florida Export Tobacco Co. v. Department of Revenue, 510 So. 2d 936, 943 (Fla. 1st DCA), review denied, 519So. 2d 986 (Fla. 1987); See also Parker v. Parker, 553 So.2d 309, 311 (Fla.1st DCA 1989). See also State v. Brown, 351 S.C. 522, 570 S.E. 2d 559 (Ct. App. 2002). Subject matter jurisdiction "concerns the power of the trial court to deal with a

class of cases to which a particular case belongs." Cunningham v. Standard Guar. Ins. Co., 630 So.2d 179, 181 (Fla.1994) (citing Lovett v. Lovett, 93 Fla. 611, 112 So. 768 (1927).

3. In this case it is not contested that the Florida Circuit Court had the right to foreclose on the property. What is contested is the fact that the Florida court had any in personam or subject matter jurisdiction for the purposes of determining a deficiency, if any, an amount due under the Promissory Note, (R. pp. 143-144) if any, and the enforcement of the Personal guarantee (R. pp. 152-153) against a South Carolina resident with no contacts with the State of Florida.

4. Further, subject matter jurisdiction cannot be waived by consent or agreement thus any purported agreement waiving subject matter jurisdiction is ineffective. Williams v. Starnes, 522 So. 2d 469,471 (Fla. 2d DCA). The parties cannot agree to jurisdiction over subject matter jurisdiction when none exists. Cunningham. 630 So.2d at 181).

   See also – The question of [subject matter] jurisdiction cannot be waived by any act or admission of the parties, for the very obvious reason that the parties have no power to invest any tribunal with jurisdiction of a subject over which the law is not conferred jurisdiction upon such tribunal. Hence the common expression, 'Consent cannot confer jurisdiction.' State v. Douglas, 245 S.C. 83, 138S.E.2d 845 (1964).

The pertinent facts are as follows:

a. The loan was made in South Carolina; (R. p. 133, #2, #8, #12).

b. The promissory note which governed the transaction was executed in South Carolina and called for the application of South Carolina Law; (R. p. 144, #15).

c. All negotiations took place in South Carolina; (R. p. 133,#8).

d. The lender was a South Carolina based legal entity and was never qualified to do business in the State of Florida; (R. p. 133, #4, #7).

e. The Borrower was a South Carolina legal entity; (R. p. 133, #2).

f. The final guarantors were South Carolina residents; (R. p. 104, line 4)

g. The guarantee of Appellant in Section 14 provided that it shall be governed and construed in accordance with the internal laws of the State of South Carolina. (R. p. 153, #14). To the extent that any other guarantees were signed but did not conform to the requirements set forth in the Commitment Letter then such drafting party which was in all cases the lender.

h. All payments were made in South Carolina; (R. p. 133, #10).

i. All accounts of both lender and borrower were maintained in South Carolina; (R. p. 133, #9).

j. All documents were prepared in South Carolina by counsel representing the Lender; (R. p. 104, line 11).

k. All documents were executed in South Carolina; (R. p. 133, #12).

l. All documents were maintained in South Carolina; (R. p. 133, #9).

m. All witnesses were domiciled in South Carolina; (R. p. 133, #3).

n. The loan commitment which governed this transaction and was dated December 1, 2006 and which stated in part **"this commitment and all terms and provisions hereto shall survive the closing of the loan and shall not be merged into any of the loan documents"** anticipated enforcing all agreements pursuant to the laws of the State of South Carolina. (R. p. 141, Para 1). Even the mortgage, in Section 4.5, which governed the enforcement of the liens and security interests under Florida law is clear that all other

provisions of that mortgage shall be governed by the laws of the State of South Carolina. (R. p. 146, Sec.4.5).

o. The Supreme Court has made it perfectly clear that in this type of situation the state which seeks to subject the nonresident to its judicial jurisdiction must have a definite interest in the litigation... There must be a rational nexus between the fundamental events giving rise to the cause of action and the forum state which gives that state sufficient interest in the litigation before it may constitutionally compel litigants defend in a foreign forum. Curtis Publishing Co. v. Birdsong, 360 F.2d 344(5th Cir. 1966). The State of Florida has absolutely no interest in this litigation about the enforcement of the guarantee against a South Carolina resident. Without subject matter jurisdiction a judgment is void N.W.T. v. L.H.D. (In re D.N.H.W.) 955 So. 2d 1236, 1238 (Fla. 2d DCA 2007).

p. By finding that a Florida Court had no subject matter jurisdiction the lender's position is not compromised because all it had to do was to bring an action in the State of South Carolina. For the reasons set forth above this matter should dismissed for lack of subject matter jurisdiction and the judgment held to be void.

Despite the fact that Subject Matter jurisdiction was extensively argued in Appellant's reply to Respondent's amended motion in opposition to Appellant's motion for relief from foreign judgment and at the hearing on this Motion, the final Order in this case is completely silent on the determination of any subject matter jurisdiction. This deficiency alone should be considered grounds for granting Appellant's appeal. (R. pp. 18-23).

III. DID THE TRIAL COURT ERR IN NOT HOLDING THAT SOUTH CAROLINA LAW SHOULD GOVERN THE ENFORCEMENT OF THE JUDGMENT

The Florida court failed to interpret the Personal Guaranty under South Carolina law [wrongly stated by the Respondent to be under Florida Law]

Contrary to the Respondent's assertion Appellant asserts that the provisions of the Personal guarantee were entirely misinterpreted by the Florida Court. The terms of the individual guarantee which were not modifiable were set forth in the December 1, 2006 Commitment letter and stated that this Appellant's liability was limited to 25%.(R. p 137). Appellant later consented to increasing the percentage to 37.5%. The construction of the guarantee by the Florida Court and under Florida law in effect made the liability joint and several and not limited as contemplated in the Commitment Letter. Most significantly, the commitment letter states that "**this commitment and all terms and provisions hereto shall survive the closing of this loan and shall not be merged into any of the loan documents**". (R. p. 141). Further, the Promissory Note under which the liability, if any, accrues clearly states in Section 15 that this Note shall be governed and construed under and in accordance with the laws of the State of South Carolina. (R. p. 144, Sec. 15).That the Mortgage should be construed under Florida law as to the security interest in the property is not contested. However, the mortgage does not create a liability in favor of the Lender. It merely creates a security interest in the collateral supporting the loan. All other provisions of the mortgage shall be governed and construed in accordance with the internal laws of the State of South Carolina. (R.p. 146, Sec 4.5). The effect of this on the Appellant is substantial even assuming the judgment is valid, which is contested. The judgment should not be in the amount of $513,741.43 which is 100% of the judgment amount. Rather a judgment, if any, should be calculated based on Appellant's pro rata share of 37.5% as calculated and contemplated under the First Savers Bank Loan Commitment dated December 1, 2006

which loan commitment survived any and all documents prepared pursuant to this transaction. Applying the 37.5% factor to the total judgment would result in the judgment of at worst $192,653.04. (R. p. 137, Guarantor).

CONCLUSION

For all the reasons stated herein the relief requested by Appellant should be granted.

Respectfully submitted,

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Of whom Paul V Degenhart is the Appellant ..... Appellant

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Initial Brief complies with Rule 211(b), SCACR.

January 3, 2017

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