

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

C. Heath Ruffner, Special Referee

Appellate Case No. 2016-001838

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MAR 14 2017

SC Court of Appeals

AMERICAN COMMUNITY BANK,
a division of Yadkin Valley Bank & Trust, Respondent,

vs.

MICHAEL R. BROWN; C. W. HORNE;
SHORTT AUCTION & REALTY CO., INC.;
BANK OF AMERICA, N.A.; and
JAGUAR PORTFOLIO, LLC, Defendants,

of whom MICHAEL R. BROWN is Appellant.

INITIAL BRIEF OF APPELLANT

John Martin Foster
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(803) 324-8100
Attorney for Appellant

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OTHER AUTHORITIES

55 AM.JUR.2D *Mortgages* § 699 (2002)

Rule 71(a), S.C.R.C.P.

OTHER AUTHORITIES

55 AM.JUR.2D *Mortgages* § 699 (2002)

STATEMENT OF THE ISSUES ON APPEAL

- I. MUST AN ORDER GRANTING FORECLOSURE OF A MORTGAGE CONTAIN A DETERMINATION OF THE SUM DUE UNDER THAT MORTGAGE?
- II. DID THE ORDERS OF THE CIRCUIT COURT ALLOW THE ENTRY OF A FINAL JUDGMENT OF FORECLOSURE, GIVEN THE REQUIREMENTS OF RULE 54(B), S.C.R.C.P.?

STATEMENT OF THE CASE

Appellant BROWN borrowed \$150,000.00 from the predecessor of Respondent AMERICAN COMMUNITY BANK, secured by a Note and Mortgage on 106.85 acres in Chesterfield County, dated December 29, 2000.

A "Disbursement Request and Authorization" purportedly signed by BROWN lists the "primary purpose" of the loan as "Business". The Lender's Title Insurance binder on the loan contained language identifying it as for residential property. No attorney preference was given or received. No three day waiting period was observed before disbursement of the loan proceeds.

Respondent AMERICAN COMMUNITY BANK, as holder of the Note and Mortgage instituted foreclosure proceedings on the loan against Appellant BROWN.

Appellant responded with an Answer, Counterclaims and Crossclaim against the Respondent Bank. This pleading set out defenses and counterclaims including one for Truth-in-Lending violations.

Respondent Bank moved for, and by its Order filed August 6, 2012 the Circuit Court granted, summary judgment as to other defenses, but allowed the counterclaim based on Truth in Lending. This was confirmed by its Order disposing of the Appellant's Motion under Rule 59, S.C.R.C.P. This Order was confirmed on appeal.

Hearing on the foreclosure relief requested was held by the Special Referee on July 22, 2016, and resulted in an Order for Foreclosure. That Order found a default in payment of \$152,791.89, and awarded attorneys of \$22,918.78 based on a strict 15% calculation. That Order for Foreclosure was received by counsel for Appellant on August 1, 2016. This Appeal was served by mailing on August 31, 2016.

ARGUMENT

I. MUST AN ORDER GRANTING FORECLOSURE OF A MORTGAGE CONTAIN A DETERMINATION OF THE SUM DUE UNDER THAT MORTGAGE.

In relevant part, S.C. Code § 29-3-630 (West) states the basic rule as to mortgage foreclosures:

No sale under or by virtue of any mortgage or other instrument in writing intended as security for a debt, conferring a power upon the mortgagee or creditor to sell the mortgaged or pledged property while such power remains of force or has not been revoked by the death of the person executing such mortgage or instrument, shall be valid to pass the title of the land mortgaged unless the debt for which the security is given shall be first established by the judgment of some court of competent jurisdiction . . .

The same rule is stated by the commentators of AMERICAN JURISPRUDENCE 2D:

The chief purposes of a decree or judgment of foreclosure [Ftn.44, citing *Columbus Land, Loan & Bldg. Ass'n v. Wolken*, 146 Neb. 684, 21 N.W.2d 418, 165 A.L.R. 1285 (1946); *Marshall & Ilsley Bank v. Greene*, 227 Wis. 155, 278 N.W. 425, 115 A.L.R. 1030 (1938)] are to establish the amount due or the sum to which he or she is entitled out of the amount realized from the sale of the security; [Ftn.45, citing the cases above and *Chicago D. & V. R. Co. v. Fosdick*, 106 U.S. 47, 1 S.Ct. 10, 27 L.Ed. 47 (1882); *Howland v. Donehoo*, 141 Ga. 687, 82 S.E. 32 (1914); *Wallace v. Holly*, 13 Ga 389 (1853)] to order the sale of the mortgaged premises; [Ftn.46, citing, *inter alia*, *Howland* and *Wallace, supra*] and ordinarily, although a decree foreclosing a mortgage may reserve the rights of persons and parties involved, [Ftn.47, citing *Humphreys v. McKissock*, 140 U.S. 304, 11 S.Ct. 779, 35 L Ed 473 (1891); *Sage v. Central R. Co.*, 99 U.S. 334, 25 L.Ed. 394 (1878)]. to conclude all the parties to the record and to bind them in its effect. [Ftn.48, Omitted.]

[55 AM.JUR.2D *Mortgages* § 699 (2002).]

The same rule is required by the procedure set out in Rule 71(a), S.C.R.C.P., which provides in relevant part:

In foreclosure actions the judge or master shall compute the amounts due the plaintiff and any other claimants, which amounts when determined shall be the total debt due to each. The total debt shall as a minimum set forth clearly the principal due upon default, the rate of interest and interest from date of default to hearing date, any other relevant interest charged, any amounts due or to be credited on escrow items, the taxable costs of collection prior to hearing, and the amount of allowable attorneys fees due and anticipated through conclusion of the action. Also included shall be the rate of interest to accrue until the date of the judgment and the post judgment interest rate. The judge or master may also establish the priority and compute the amounts due of any other liens when a determination of lien priorities appears necessary or desirable prior to a foreclosure sale.

II. DID THE ORDERS OF THE CIRCUIT COURT ALLOW THE ENTRY OF A FINAL JUDGMENT OF FORECLOSURE, GIVEN THE REQUIREMENTS OF RULE 54(B), S.C.R.C.P.?

As stated above, the rulings of the Circuit Court confirmed the Appellant's counterclaim based upon a violation of the Truth in Lending Act. Its Order filed August 6, 2012 stated, in relevant part:

VII. Procedural Status

This case now consists of a mortgage foreclosure and a Truth in Lending Act claim on which a jury demand has been made. The Court has not decided as a part of this decision whether the TILA claim is compulsory to which a jury trial right exists, or permissive in which event the right to trial by jury was waived when such claim was lodged in this foreclosure proceeding. *Wells Fargo Bank, N.A. v. Smith et al.*, 2012 WL 2125834 (S.C. Ct. App. June 13, 2012). Because the complaint is equitable and the counterclaim may be compulsory (until decided otherwise upon subsequent motion), the proper procedure is for separate trials of the legal and equitable claims, pursuant to Rule 42(b), SCRC.P. Since there are not factual issues common to both the equitable and legal claims, the TILA claim does not have to be tried first. *C&S Real Estate Services, Inc. v. Massengale et al.*,

290 S.C. 299, 302, 350 S.E.2d 191, 193 (1986). Nothing herein limits Plaintiff from referring the foreclosure claim to a special referee under Rule 53(b) and 71(a), SCRC.P.

[RECORD ON APPEAL, Order filed August 6, 2012, p. ____.]

This ruling was not changed in the Order of the Circuit Court filed November 7, 2012, which order was in response to the Appellant's Rule 59 Motion. RECORD ON APPEAL, p. ____.

Rule 54(b), S.C.R.C.P. states:

Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim of relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

In the case at hand, there is no "express determination" as to the need for delay or an "express direction" for the entry of judgment. There is, at most, a statement as to the mode of hearings which shall or may be held. In the language of *Link v. School District of Pickens County*, 302 S.C. 1, 393 S.E.2d 176 (1990), the required "determination" or "direction" under Rule 54(b) is designated as "certification."

To state this matter in practical form, unless or until the lower Court makes a determination as to the Appellant's damages, if any, under his counterclaim for a Truth in Lending violation, there is no method by which his final indebtedness to the Respondent can be determined. Without a determination of that amount, a final judgment for foreclosure relief cannot be issued. The Mortgagor in a foreclosure action has the right to redeem his default, or to know what amount may be the basis for a later judgment of deficiency.

CONCLUSION

The operative Orders of the Circuit Court contain no certification, that is, no “express determination” as to the need for delay of, or an “express direction” for, the entry of judgment for foreclosure. Such certification is explicitly required by the language of Rule 54(b), S.C.R.C.P. Those Orders reflect, at most, a ruling as to the mode of hearings which shall or may be held in future.

In the absence of compliance with Rule 54(b), the Special Referee cannot proceed to effect the remedy of foreclosure unless or until the true amount owed by the Appellant to the Respondent Bank is determined by trial of all issues in this action.

Respectfully submitted,



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March 8, 2017.

Rock Hill, South Carolina

CERTIFICATE OF COUNSEL

The undersigned certifies that this final Brief of Appellant complies with Rule 211(b), S.C.A.C.R.

March 8, 2017

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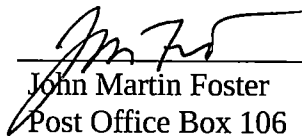
PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant and Designation of Matter to Be Included in the Record on Appeal, dated March 8, 2017, on the following counsel of record:

James W. Sheedy
Susan E. Driscoll
Driscoll Sheedy, P.A.
11520 North Community House Road, Suite 200
Charlotte, North Carolina 28277

by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known addressees) of those attorney(s) and/or persons set out below, all pursuant to Rule 233(b), S.C.A.C.R.

March 8, 2017



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March 8, 2017

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

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SC Court of Appeals

Re: American Community Bank, Respondent
v. Michael R. Brown, Appellant
Appellate Case No. 2016-001838

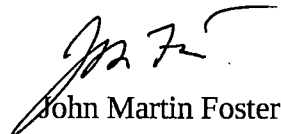
Dear Ms. Kitchings:

In accordance with Rules 208 and 209, S.C.A.C.R., enclosed herewith please find the original and one (1) copy of the Appellants' Initial Brief and Designation of Matter to be Included in the Record on Appeal, together with the Certificate of Service for the same in the above referenced case.

By copy of this letter, I am serving the attorneys for the Respondent with copies of the Initial Brief and Designation, as evidenced by the Certificate of Service.

Please return the extra conformed copy to my office in the enclosed self-addressed, stamped envelope. As always, thank you, and your staff, for your assistance in these matters.

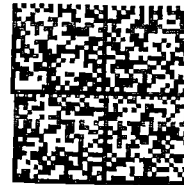
Sincerely yours,



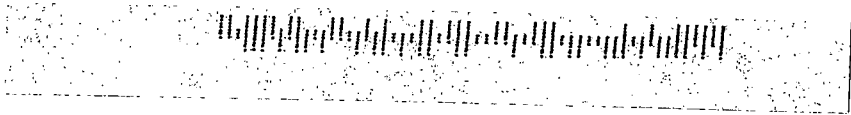

John Martin Foster

jmf/
enclosures

cc: James W. Sheedy
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TO:

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