

THE STATE OF SOUTH CAROLINA
In The Court of Appeal

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SC 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

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

v.

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

Appellants Final Brief

Wilton H. Cain *Cassandra M. Cain*

Wilton H. Cain and Cassandra M. Cain

6476 Highway 17 North

Awendaw, SC 29429

8439913198

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FOR THE FOREGOING REASONS APPELLANTS RESPECTIFULLY
REQUEST COURT TO DISMISS DEFICIENCY JUDGMENT

TABLE OF AUTHORITIES

SC Supreme Court National Bank V. Buncombe Professional Park

LLc case 2014-000915

Johnston V. Aiken Auto Parts 311,SC 285, 287, 428, SE 737 CT

APP 1993

Supreme Court Adm Letter May 2, 2011 (2011-05002-01)

SC CODE OF LAWS

15-3-240

15-3-530

15-39-610

22-3-(300-310)

29-3-10

29-3- (330-740)

38-12-70

STATEMENT OF ISSUES ON APPEAL

Is this foreclosure action a Tort action, is there an injured party is the default of a civil contract that being a mortgage agreement as in this case, if there is no damage to property who is injured. Is the mortgage company a injured party.

Does the Mortgage company BB&T the first party in this law suit have the rights of a third party such as the Private Mortgage Insurer to sue on behalf of the insurer. Subrogation rights and are the Mortgage company required to give timely notice to defendants and the court they represent the third party Insurer in this foreclosure case .

Does the communication between parties in this foreclosure case represent and is a part of this case, as outlined in Supreme Court Administrative Letter may 2, 2011 (2011-05-02-01).

Is a contract which is agreed upon by two parties independent of either signature party independent of the parties that signed the agreement, Is the PMI (mortgage insurance) wholly independent of the defendant

who agreed on the contract to purchase it and to pay for it monthly included in mortgage payment for the amount of 97.70 a month.

Does the mortgage insurance payment to mortgage company in a foreclosure reduce the mortgage company loss resulting from a default on the mortgage contract .

Is the foreclosure sale price set before the results of the appraised value of the home is set by the court, and is the sale process completed before appraisal value is set under title 29 section 3-(10 -740).

Is the mortgage company attempting to collect payments made by insurer required to state the amount they are trying to collect, is enrichment allowed/permitted under SC Code of law Title 29-3-10-740

STATEMENT OF CASE

On June 16, 2011 Court granted a judgment of foreclosure and ordered property sold for a value of 121,500.00

The Court held a foreclosure sale August 3, 2011 became final September 2, 2011.

Order of a deficiency Judgment filed on September 16, 2011

On September 28, 2011 court signed order granting Appellants request for an appraisal however court did not notify either party of order, on October 27, 2011 court rescinded previous order.

Defendant filed an appeal and on September 24, 2014 in answer to appeal # 2011-205089 court issued an order remanding case back to circuit court for explanation as to why the denial for appraisal under SC CODE 29-3-700 .

On May 29, 2015 court reinstated September 28, 2011 appraisal rights an appraisal was completed, on December 4, 2015 Honorable Dale E. Van Slambrook issued an order for sale value of 168,000.00 thereby reducing deficiency Judgment to 37,393.82 from 83,893.82

On December 29, 2015 Defendant filed a motion to dismiss deficiency judgment, Master of Equity decided to treat motion as motion to Alter, amend or reconsider order reducing deficiency judgment. On January 14, 2016 a hearing was held and court signed order written by plaintiff as court requested plaintiff to write the order denying defendants motion to dismiss deficiency judgment and to base order on their arguments on February 16, 2016 Appellants filed an appeal with this court.

ARGUMENTS

The mortgage borrower (appellants) are the policy holder on the Mortgage insurance and insurance is paid for by Appellants as well as a result of Appellants default to mortgage company. Title 29-3010 permits Mortgage Company to recover such money loaned not damages or enrichment. Title 29-3-330 clearly states a mortgage is a lien against real property not a person, Title 15-3-240 a person in privity of a contract can only recover economic loss, appellants contend any subrogation rights must be processed within three years under 15-3-530 in this case the plaintiff has failed even to mention any rights to represent Mortgage insurer or give any notice of representation or any claim of subrogation for more than four years. The mortgage Insurance Company RMIC has also not made a claim of subrogation or given any notice for over four years. The appellants clearly see that the Plaintiff is trying to avoid any statues by now claiming they have subrogation rights, Appellants question is in regards to representation when is and when was notice given to Appellants and court, appellants are not claiming PMI was not paid to Plaintiff but stating Plaintiff refuse to state amount, appellants again request amount paid since it is clear Plaintiff

claim to have those rights and desire to exercise them in order to collect PMI payment made.

Mortgage insurance in this foreclosure is a part of the mortgage contract made between Plaintiff and Appellants signed by Appellants and as outlined is to pay mortgage company in event of appellant default on said (loan) mortgage contract, to reduce/cover loss not to enrich mortgage company. Plaintiff BRIEF REGARDING DEFICIENCY JUDJUGMENT dated Jan 4, 2015 page 6-7 states “ it is made clear that defendants are not a party to the insurance and are not the beneficiaries of such a policy “ is a fatal error defendants are a party of the policy and agreed not to receive payment from policy but to reduce Plaintiff loss by amount paid to plaintiff by PMI (private mortgage insurance). Further Plaintiff notice of Plaintiff having a subrogation agreement and which state contrary to their letter dated March 29, 2011 which states “ the only agreement we have with the PMI company is that they will insure our loan as long as we pay the premiums , which were paid for by Appellants. Further Defendant point to PMI master policy demands a deficiency judgment in order to pay page 2. PMI pay upon loss occurring that when default occurs page 4 (l;17).

The Company is identified as the PMI insurer on page 21 , 7.3 Clearly states that the Company has exclusive recovery rights if payment to a claim is made and if the Company decides not to seek recovery rights with respect to a loan , then the Company shall issue a written waiver of its subrogation and management right to the insured BB&T. Defendant points out no waiver has been presented to Court or Defendants giving subrogation rights to BB&T, there has not been any notice of same given for more then four years , Defendant believe timely notice must be given of subrogation rights.

The Plaintiff never asserted they had subrogation right for PMI insurer until 2015 more then four years after suit began, by asserting same is affirmation insurance was paid. Fact defendant have made request to BB&T as to amount of insurance paid to no avail.

Appellants points out to the Court any payment made by insurer to BB&T must be reported to the Court for reason it is a part of foreclosure case which is under the Courts jurisdiction as well as a part of any subrogation case further this none reporting would allow Plaintiff now

to say none was paid , Appellants believe in order for case to be whole and justly handled by the Court the PMI information must be known.

Appellants contend that when PMI was requested the deficiency judgment was 83,893.82 it took over four years to get and appraisal which reduced amount of deficiency judgment to 37, 393.82, what would that mean , it would mean that when Plaintiff requested PMI payment loss was 83,893.82 thereby being more than the legal loss. Present a fraudulent request by Plaintiff to RMI . making this a case with possible fraud intentional or not the stated insurance coverage of 25% is higher than actual loss, Fact under 293-660 on Sep 16 2011 a deficiency judgment was granted 83,893.82 when in fact sale includes any appraisal value set by Court which was set at 168,000.00 and not the Plaintiff offer in 2011 for 121,500.00. Fact it was impossible for Plaintiff in 2011 to determine the legal loss prior to the appraisal value being set in December2015, Court must certify factual on correct loss before any judgment can properly be set.

Further Court must not substantiate a case without insuring no fraud exist or misleading / misrepresentation of facts as well as rule

whether subrogation rights exist. This case must be separated into Plaintiff payment received and rights of subrogation. Title 29-3-740 provide for a method to insure recovery of loss as a result of a default but the legislators intent is recovery not enrichment, such as insurance payment then a deficiency judgment to pay Plaintiff twice for same loss.

Further Plaintiff are attempting to apply the Collateral Source Rule to this foreclosure. Appellants clearly state that at no time has Plaintiff stated there was any damage to the foreclosed property. The collateral source rule is a tort action that provides a judgment for a injured party (personal injury). There is no provision in a foreclosure which is a civil contact default for a personal injury. In Plaintiff filing there is no claim or any statement as to any personal injury that occurred as a result of this foreclosure action/default. Further for Collateral source to apply the insurance must be (Policy page 7, 2;4b , 2;5 items 10 and 17) Wholly independent of the wrong doer in this case must be Wholly independent of appellants/borrower which reference clearly shows is not, also who agreed upon insurance as well as paid the premiums for insurance. Further borrowers /defendant must have violated some ones personal legal rights that caused a injury or violate some law in regards

to some ones personal right neither was done or claimed by Plaintiff. Secondly mortgage insurance in this case is a result of a contract signed by Defendants and Plaintiff who received benefit from insurance paid for by defendants to prevent Plaintiff loss as a result of defendant default.

CONCLUSION

Based on arguments stated the Court should rule Plaintiff requested and received mortgage insurance payment specifically as result of Default of defendants for the purpose of reducing loss of Plaintiff therefore plaintiff suffered no loss, therefore dismiss deficiency judgment against defendants.

Further Court should rule Collateral source rule does not apply to this foreclosure, further Plaintiff have no subrogation rights in this case, as well as timeliness has expired to seek subrogation right by Insurer

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March 27, 2017