

THE STATE OF SOUTH CAROLINA
In The Court of Appeal

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

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APR 18 2017

SC Court of Appeals

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

v.

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

FINAL BRIEF OF APPELLANTS

APRIL 16, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES-----ii-iii

STATEMENT OF ISSUES ON APPEAL-----1-3

STATEMENT OF CASE/ ARGUMENTS-----4-14

CONCLUSION -----15-16

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

TABLE OF AUTHORITIES

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Perptul Bldg and Loan Association of Anderson v. Braun
270, SC 338, 340

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391 SC 76,82-83, 705 SE 2d21, 25 (2011

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250, SC 149, 156 SE 2d 759 (1967

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Johnston V. Aiken Auto Parts

311, SC 285, 287, 428 SE 2d 737, 738 CT APP 1993

STATUTES

S.C CODE 15-39-720

S.C CODE 15-3-150

S.C CODE 15-39-610-760

S.C. CODE 29-3-10

S.C. CODE 29-3-310-750

S.C. CODE 29-3-700

S.C. CODE 22-3-300-310

S.C. CODE 38-12-70

S.C. CODE 38-71-190

SUPREME C ADM LETTER MAY 2, 2011 (2011-05-02-01)

STATEMENT OF ISSUES ON APPEAL

Is this foreclosure action RESULTING FROM A DEFAULT of a civil contract a Tort action in South Carolina, is there an injured party in the default of a civil contract that being a mortgage agreement as in this case, 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 automatic rights of a third party such as the Private Mortgage Insurer to sue on behalf of the insurer under Subrogation rights and is the Mortgage company required to give timely notice to defendants and the court they represent the third party Insurer with Subrogation rights in this foreclosure case . Is giving notice after over four years have passed in this case timely notice that Plaintiff represent insurer. Must the notice be surely understandable to all parties.

Is the communication (letters) between parties as requested by the court in this foreclosure case a part of this case, does the communication represent the plaintiff and are therefore binding upon parties, 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, is the civil contract 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 of 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 already paid by insurer, are the Plaintiff's required to state the amount they received from insurer, is enrichment allowed/permitted under SC Code of law Title 29-3-10-740 . To claim subrogation rights must the value be stated.

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

STATEMENT OF THE CASE/ARGUMENTS

This appeal results from Master of Equity Order Denying Defendants motion to dismiss Deficiency Judgment filed on January 26, 2016.

This foreclosure case was filed Oct 4, 2010 by BB&T a trial without jury and no court reporter was held on June 16, 2011, with a judgment entered June 30, 2011, the sale value was set at 121,500.00, on September 2, 2011 the property was sold at a judicial sale for 121,500.00 to BB&T , on September 19, 2011 a deficiency judgment was entered for 83,893.82, within 30 days on September 29, 2011 defendants filed petition for Proposed Order for Appraisal under S.C Code 29-3-700 there was no opposing party, Judge K. L. Harrington denied Appraisal right which Defendants appealed Case no. 2011-205089 on September 24, 2014 three years later Court remanded issue back to Circuit Court on May 29, 2015 Order was issued for Appraisal. And Ordered case back to Master of Equity. Appraisal being completed on December 4, 2015 Judge Dale E. Van Slambrook accepted Appraisal of 168,000.00 and issued an Order Reducing Deficiency Judgment to 37,393.82. On December 29, 2015 Defendants filed a Motion to Dismiss

Deficiency Judgment hearing was held on January 14, 2016 and on January 26, which resulted in Order confirming Deficiency Judgment of 37,393.82 on February 16, 2016 Defendants filed a Notice of Appeal.

STATEMENT OF FACTS

This is a case, which expands a period of over six years, and the fact of the case remains the facts. This Appeal is in regards to Defendants belief the Court Eroded in the Order for the Deficiency Judgment against the defendants eroded in the correct amount, eroded by the order not being dismissed, eroded by using the Collateral source rule and subrogation right and whether (PMI) Mortgage Insurance paid to Plaintiff reduces lost for Lender Freddie Mac, eroded in a foreclosure case whether this mortgage insurance is wholly independent of defendants, the amount of mortgage insurance, what sale price did Plaintiff collect mortgage insurance 121,500.00 or proper value of 168,00.00 which was mortgage insurance paid to plaintiff on, did plaintiff rushed settlement before final value set, by deficiency Order written January 26, 2016.

The Plaintiff sole the house on 10/03/2012 while case was in Appeal did not report it to court or deduct the increase from Deficiency

Judgment, and failed to report sale to court and the value on home had not yet been set. House sold for 154,000.00. that is an increase of 33,000.00 in value over sale price of 121,500.00

The Court requested and permitted emails to be used as a means of communication between parties and the court in those contact defendants raised questions on RMI subrogation and collateral source on January 21, 2016, the email also point out to the Court Defendants concern about whether plaintiff attempt on subrogation was lawful, on January 15, 2016 , email also clearly show the Court directed the Plaintiff to write Order base on their finding, dated January 14, 2016 the order is dated January 16, 2016,

The defendants contend numerous errors exist and were made in the conclusion of the deficiency judgment order, let me begin with this as directed by Court to contact Plaintiff attorney for any information on case and in line with the South Carolina Supreme Court Administrative letter stating the Foreclosure Attorney is the point of contact on May 2, 2011 (2011-05-02-01) Ref: Mortgage Foreclosure Action to prevent defendants run around. Defendant therefore contend communication to and from Plaintiff Attorney is a part of case , therefore letter from Defendants to Plaintiff attorney dated August 28, 2010 must be

Defendants further claim private mortgage insurance is for default and is a RISK insurance under S.C Code of Law 38-12-70, further defendants contend a mortgage represent a security for a obligation but not full payment “ Perptul Bldg and Loan Association of Anderson V. Braun 270,S.C. 338, 340 therefore defendants contend Tort does not apply and PMI payment must reduce loss and that reduction must be considered in determination of Deficiency Judgment against Defendants.

Defendants raised question about mortgage insurance at a hearing on June 16, 2011 which Mr. Rick Miller BB&T witness testified that there was mortgage insurance and that it was 25% of loan as evident in Plaintiff filing “ plaintiff’s Brief Regarding Deficiency Judgment” filed Jan 4, 2016 page 2, there was no Court reporter however Judge Watson Master of Equity wrote in his notes of the case which Judge Dale E. Van Slambrook made reference to at hearing as evident in transcript of Hearing on January 14, 2016 as to defendants concern whether insurance company had any rights under equitable Subrogation, Court didn’t respond, on page 9 line15 thru line 2 page 10, again in transcript page 24 ,line 14 thru line 25 it was stated that BB&T representative notified Court there was 25% of PMI on loan, the state ok confirming notes from Judge Watson , then again stated “okay, but

today you have any documentation, letters, affidavits, paperwork that you can submit, Defendant is unable to present evidence because Plaintiff refuse all request to provide any evidence on amount of PMI paid or the date paid.

Defendants further refer to Plaintiff filing on January 4, 2016 a copy of the agreement between BB%T and the Mortgage Insurance Co. RMIC , in that agreement on page 3 (1:10) state Default mean the failure by a borrower (a) to pay when due an amount equal to or greater than one periodic monthly payment due under the terms or condition of the loan, or (b) comply with any other terms or condition of the loan base on borrower loan agreement. This agreement also addresses Subrogation rights on page 21, line 7:3 stating those right are exclusively RMIC rights and not the Plaintiff's the insurer is exclusive agent to pursue recovery right unless plaintiff is given a waiver in writing stating Subrogation right given to Plaintiff.

Defendants raised issue of Mortgage Insurance in trail Court therefore proper to raise in Appeal Court SC Dept of Transp V. Horry County 391 SC 76, 82-83, 705 SE 2d 21,25 (2011).

The Plaintiff at no time for more than over five years has implied or given this Court or the Defendant any notice that they had Subrogation rights given by insurer for insurance payments, neither has there been any notice that Plaintiff Attorney represent the insurer RMIC, the Plaintiff first mention of Subrogation right in January 4, 2016 by Attorney Erica Lybrand and again at hearing on January 14, 2016 . Defendants contend third party right is a Civil action and therefore require proper notification to the parties involved. Civil action notice must be timely to pursue which according to S.C.Code of Law Title 15. Defendants however call the Courts attention to the fact that Plaintiff claim subrogation rights, that states that indeed and insurance payment was made by the insurer, any action demanding payment under subrogation requires the amount to be clearly stated. Defendants request Court to instruct Plaintiff to state amount of insurance paid by RMIC.

Plaintiff only claim subrogation rights after case was over six years old defendants contend right to raise issue not preserved Summersell V. SC Dept of Pub Safety 337,SC 19, 522 SE 2d 144 (1999).

Defendant executed mortgage with CTX Mortgage Company September 19, 2007 was recorded September 20, 2007 book 6868 at

higher than legally allowed. This process was not completed under court direction in violation of court order (Judgment of Foreclosure and sale page 7 item number 32 June 30, 2011) and out of line with SC Code Sec. 15-39-720 (1976). The Plaintiff being in violation of Court Order under SC CODE 29-3-710-740-750 all action resulting must be extinguished and cancel, the Court had no jurisdiction over process nor does court have knowledge of any fund transferred or due and neither does Defendant. Fact Plaintiff made decision to alter the process without Court approval. Foreclosure is an open Civil process not a closed secret process as Plaintiff have made it. Further Defendant contend any payment received by Plaintiff reduced there loss and there have no loss resulting from foreclosure proceeding and have no claim for loss under Title 29 they have received full payment (recovery).

Plaintiff completed sale prior to the completion of sale process as outlined in SC Code 15-39-610 which prays NO JUDICIAL SALE OF PROPERTY SHOULD BE MADE UNTIL AFTER THE TIME FOR FILING OF AN APPEAL OF A JUDGMENT IS PAST OR AN APPEAL IS HEARD AND THE JUDGMENT AFFIRMED an appraisal was requested in a timely manner an after appeal granted yet Plaintiff completed a sale of property which was under court judiction. (SC Code 22-3-300-310) It is

believed Plaintiff requested and received more Mortgage Insurance than was due because it was requested at a sale value of 121500 and not true value of 168000 as set by the Court after appraisal

Equitable maximum are set under Title 29-3 of the SC Code which forbid enrichment only collection of debt.. Plaintiff in there filing to seek equity must grant equity therefore are not entitled to enrichment only payment for debt and not third party possible debt Shumaker V. Shumaker 234 SC 421, 427,108 SE 2d 682,686 (1959), Anderson V. Purvis 211, SC 255, 266, 44 SE 2d 611,616 (1947).

Rule 267 foreclosure procedures to be proper must satisfy Mortgage by foreclosure signed by Judge Robert Watson dated September 16, 2011

Defendants contend the application of the Collateral Source Rule to a foreclosure action which is a Civil action is in error, the South Carolina Courts have not addressed foreclosure action as a Tort specifically under Collateral Resource Rule which applies to “ wrongdoer “ and permits damages to be awarded to the injured party, in this case it would put Plaintiff in a better position than if no default had occurred Maro V. Lewis, 389 SC 216, 222, 697 SE 2d 684,688 CT APP 2010, there was no willful intent no fraud committed by Defendants and

no harm to lender, BB&T are just the severer of the loan Freddie Mac is the lender . There has been no claim of an injury and no harm just a default on a contract, Collateral Source fails for wrongdoer implies some criminal act or unlawful act has been committed by defendants not true, also it fails to be wholly independent of Defendants , fact Master policy submitted by Plaintiff is proof PMI (insurance) is not wholly independent of defendants reference items 1.16, 1.17, 2.4(2b), 4.1,5.1 page 173 borrower shall pay for mortgage insurance, point in fact if defendants fail to pay premium of 97.70 monthly it would be a breach of contract, proving not wholly independent of Defendants in each case cited must be “ wholly independent “, Rattenni V. Grainger 298 SC 276, 379 SE 2d 890 (1989), Young V. Warr 252 SC 179, 165 SE 2d 797 (1969), Powers V. Temple, 250 SC 149, 156 SE 2d 759 (1967), mount V.Sea Pines Co. 337, SC 355, 357, 523 SE 464, 465, CT App. 1999, Johnston V. Aiken Auto Parts, 311 SC 285, 287, 428, SE 2d 737, 738,CT App. 1993. Foreclosure is a Civil action Defendants contend no criminal act Tort may be brought in a civil action SC Code 15-3-150. Therefore Collateral Source fails to apply in a foreclosure.

CONCLUSION

RULE THAT THE COURT ERRED IN NOT DISMISSING DEFICIENCY JUDGMENT, THE COURT ERRED BY NOT SEPARATING PLAINTIFF LOSS FROM THIRD PARTY INSURER PAYMENT TO PLAINTIFF, COURT ERRED IN NOT RULING MORTGAGE INSURANCE IS DEPENDANT UPON DEFENDANTS WHO MAKE PAYMENT AND AGREED TO IT BEING A PART OF LOAN.

THE COURT ERRED IN APPLYING COLLATERAL SOURCE RULE, THAT THE COURT ERRED BY ALLOWING PLAINTIFF TO CLAIM SUBROGATION RIGHTS. THE COURT MUST DENY PLAINTIFF SUBROGATION RIGHTS WHICH ARE NOT ESTABLISHED. THE COURT ERRED IN NOT RULING RMI IS NOT WHOLLY INDEPENDENT OF DEFENDANTS, THE COURT ERRED IN NOT RULING A FORECLOSURE ACTION IS NOT A TORT ACTION,

COURT ERRED IN NOT RULING PLAINTIFF PRESENTED NO EVIDENCE THEY HAD SUBROGATION RIGHTS , ORDER SAME ALSO RULE NO NOTICE GIVEN BY PLAINTIFF THEY HAD SUBROGATION RIGHTS, RULE PLAINTIFF FAILED TO FOLLOW AND ALLOW COURT TO

MANAGE SALE , PLAINTIFF COMPLETED SALE BEFORE VALUE OF HOME SET BY COURT, ORDER PLAINTIFF TO TURN ALL ASSET OVER TO COURT FOR COURT TO CONTROL, RULE PLAINTIFF HAVE NO LOSS AND DISMISS DEFICIENCY JUDGMENT, Order Plaintiff TO NOTIFY DEFENDANTS AND THE Court the amount of PMI insurance paid AND THE DATE.

Wilton Cain Cassandra Cain

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APRIL 16, 2017

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CERTIFICATE OF APPELLANTS

THE UNDERSIGNED CERTIFIES THAT THIS FINAL BRIEF COMPLIES WITH RULE
211 (B),SCACR.

Wilton Cain Cassandra Cain
Wilton Cain and Cassandra Cain

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April 16, 2017