

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master-in-Equity

Appellate Case No. 2017-000884

RECEIVED

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SC Court of Appeals

Deutsche Bank National Trust Company, as Trustee
on Behalf of the Certificateholders of Morgan Stanley
ABS Capital I Inc. Trust 2004-NC8 for Mortgage Pass
Through Certificates, Series 2004-NC8,.....Respondent,

v.

James T. Burr a/k/a James Burr and Grand Strand
Water & Sewer Authority, Defendants,

Of Whom James T. Burr a/k/a James Burr is.....Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES

- I. **Did the lower court err in granting summary judgment and disregarding Rule 43(1), SCRC, where a motion seeking summary judgment had previously been denied and there had been no material change to the factual record before the court?**

- II. **Did the lower court err in granting summary judgment where there was a genuine issue of material fact about whether the Respondent undertook and then breached an obligation to enter into a new contract to replace the one subject of the Respondent's case?**

STATEMENT OF THE CASE

The Respondent brought this case against the Appellant, seeking foreclosure of a mortgage. (R. pp. ___; summons and complaint.) After initially answering *pro se*, the Appellant retained counsel and made a motion to amend that answer to assert counterclaims that arose from an alleged failure of the Respondent (or a predecessor in interest) to honor an agreement to refinance the subject loan. (R. pp. ___; motion to amend answer; amended answer and counterclaim.) That motion was granted by consent. (R. pp. ___; order noting motion to amend resolved; reply to amended answer and counterclaim.) Though Burr initially demanded a jury trial on some of his counterclaims, the case was later referred by consent to the master-in-equity. (R. pp. ___; consent order of reference; amended answer and counterclaim p. 1.)

The Respondent made a motion for summary judgment on Burr's counterclaims. (R. pp. ___; motion for partial summary judgment.) In opposition to that motion, the Appellant served an affidavit that noted the existence of the agreement to refinance and the Respondent's failure to honor that agreement. (R. pp. ___; affidavit of Burr.) That motion was heard and denied. (R. pp. ___; order denying motion for partial summary judgment.) The Respondent then served some discovery requests, to which the Appellant did not timely respond. (R. pp. ___; attachments to motion to dismiss for failure to prosecute and for partial summary judgment.)

Rather than serving a motion to compel the discovery, the Respondent then served a motion to dismiss for failure to prosecute and for partial summary judgment, seeking dismissal of or summary judgment on the Appellant's counterclaims. (R. pp. ___; motion to dismiss for failure to prosecute and for summary judgment.) Before the

hearing on that motion, the Appellant served discovery responses. (R. pp. ___; transcript p. 6 ln. 5-8.) Other than the Respondent's discovery requests, it did not support its second motion for summary judgment with new factual material. (R. pp. ___; motion to dismiss for failure to prosecute and for summary judgment.) The court granted the motion for summary judgment. (R. pp. ___; order granting plaintiff's motion for partial summary judgment.)

The Appellant moved for reconsideration of the order. (R. pp. ___; motion to reconsider.) The court denied the motion to reconsider. (R. pp. ___; order denying motion to reconsider.)

This appeal followed.

STATEMENT OF FACTS

The only factual material in the record, the Appellant's affidavit, shows the parties entered into an agreement to refinance the subject debt – that is, to get rid of the subject note and mortgage by paying that note debt off and replacing it with a new note and mortgage. (R. pp. ___; amended answer and counterclaim; affidavit of Burr.) Viewing the record in the light most favorable to the Appellant, as is was required, a reasonable inference is that the parties had agreed on all material terms of that refinance agreement, given that it had progressed to the stage at which it was about to be closed. (R. pp. ___; amended answer and counterclaim; affidavit of Burr.) Viewing the record in the light most favorable to the Appellant, it indicates that the Appellant performed all of his obligations under the refinance agreement until the Respondent insisted on performing unlawfully by refusing to have the refinance closed by an attorney. (R. pp. ___; amended answer and counterclaim; affidavit of Burr.) The Appellant's affidavit

provided at least a scintilla of evidence to support his claims and defenses, making summary judgment improper. The master-in-equity seemed to conclude, however, that the evidence provided by the Appellant's affidavit should be discounted or should not be believed, and the master-in-equity refused to draw inferences from the record in favor of the Appellant.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRPC. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). That standard is that “summary judgment may be rendered only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Additionally, it must be shown that further inquiry into the facts of the case is not desirable to clarify the application of the law.” Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986).

“All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.” Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004). If “the parties vehemently dispute the inferences and conclusions to be drawn from the undisputed facts, . . . that simply establishes that summary judgment is not appropriate[.]” Montgomery v. CSX Transp., Inc., 656 S.E.2d 20, 29 (S.C. 2008).

“When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues.” Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008).

In 2009, the South Carolina Supreme Court clarified earlier confusion about whether a scintilla of evidence is sufficient to defeat summary judgment. Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 802-3 (2009). In Hancock, the Court held that “in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” Id. More than a scintilla is required only in cases requiring heightened burdens of proof or applying federal law. Id. Accordingly, when the ordinary burden of proof is applicable, only a scintilla of evidence is required to withstand summary judgment. Id.

Rule 43(l), SCRPC, provides, “If any motion be made to any judge and be denied, in whole or in part, or be granted conditionally, no subsequent motion upon the same set of facts shall be made to any other judge in that action.” The fact that a different trial judge previously denied a motion for summary judgment does not preclude the moving party from renewing its motion once new evidence is gathered.

Smith v. Breedlove, 377 S.C. 415, 661 S.E.2d 67, 70 (2008). “The rule requires a different ‘set of facts’” for a court to hear a summary judgment motion where a motion seeking the same summary judgment has been previously denied. Id.

ARGUMENT

This appeal is really about two things: 1) Does Rule 43(l), SCRC, mean what our Supreme Court has said it means? 2) Is all that is needed to survive a summary judgment motion a scintilla of evidence, as our Supreme Court has said it is? The answer to both questions is *yes*, but if this court determines that the answer to *either* of these questions is *yes*, the ruling of the lower court must be reversed.

I. The record before the lower court had not changed in any material way since the ruling on the first summary judgment motion, and it was error for the court to grant a summary judgment motion it had previously denied on the same record.

Rule 43(l), SCRC, barred the Respondent from making and the lower court from granting the Respondent's second motion for summary judgment. Smith, 661 S.E.2d at 70. The state of the factual record had not changed in any material way in this case since the court denied the Respondent's previous summary judgment motion. The fact that there was no material change to the factual record since the first ruling was noted repeatedly at the hearing by counsel for the Respondent, counsel for the Appellant, and the master-in-equity. (R. pp. ___; transcript p. 6 ln. 5-8, p. 10 ln. 3 through p. 11 ln. 10, p. 18 ln. 4-12, p. 19 ln. 14-16.)

The closest the Respondent came to such a change in the record was due to failure to timely respond to requests to admit, but those requests to admit do not provide any new evidentiary matter; they just simply point out that things that were already absent from the record when the Respondent first moved for summary judgment did not exist – and the Appellant had never been saying that those things did exist. (R. pp. ___; amended answer and counterclaim; requests to admit; affidavit of Burr.) The pertinent requests to admit provided as follows:

Admit Defendant did not sign a promissory note concerning the refinance loan that he alleges he applied for in the Answer and Counterclaim and that forms the basis of his counterclaims and affirmative defenses.

Admit that Defendant did not sign a mortgage concerning the refinance loan that he alleged he applied for in the Answer and Counterclaim and that forms the basis of his counterclaims and affirmative defenses.

Admit Defendant has never made a payment on the refinance loan that he alleges he applied for in the Answer and Counterclaim and that forms the basis of his counterclaims and affirmative defenses.

(R. pp. ___; requests to admit.)

The Appellant never contended, at any time, that any of that was not true. (R. pp. ___; amended answer and counterclaim; affidavit of Burr.) The absence of any such promissory note, mortgage, and payments was *always* part of the record in this case, just as much when summary judgment was denied as when it was granted. (R. pp. ___; order granting partial summary judgment; order denying partial summary judgment; affidavit of Burr.) The Appellant's case, rather, was that the Respondent (through its servicer, Countrywide) had prevented those things from happening, unlawfully. (R. pp. ___; transcript p. 11 ln. 1-5.) Per the Appellant's affidavit, the parties had agreed on all material terms of that refinance agreement, given that it had progressed to the stage at which it was about to be closed, and the Appellant performed all of his obligations under the agreement to refinance until the Respondent insisted on performing unlawfully by refusing to have the refinance closed by an attorney. (R. pp. ___; amended answer and counterclaim; affidavit of Burr.) (As the court knows, in South Carolina, a mortgage loan closing, including a refinance, must be supervised by a licensed South Carolina attorney. See Doe v. McMaster, 355 S.C. 306, 585 S.E.2d

773, 777-78 (2003); State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987).)

There was not a material change in the record before the lower court. There was no new set of facts before the lower court. Rule 43(l), SCRCP, prevented the lower court from granting summary judgment on a set of facts it had previously ruled called for the denial of summary judgment. Smith, 661 S.E.2d at 70. The lower court's ruling violated Rule 43(l), SCRCP, and constituted reversible error.

II. There was at least a scintilla of evidence to the effect that the parties entered into a contract that the Respondent did not perform and which the Respondent prevented the Appellant from performing.

The Appellant's affidavit shows the parties entered into an agreement to refinance the subject debt – that is, to get rid of the subject note and mortgage by paying that note debt off and replacing it with a new note and mortgage. (R. pp. ___; amended answer and counterclaim; affidavit of Burr.)

This agreement to refinance was a novation. “A novation is an agreement between all parties concerned for the substitution of a new obligation between the parties with the intent to extinguish the old obligation.” Wellman, Inc. v. Square D Co., 366 S.C. 61, 620 S.E.2d 86, 92 (Ct. App. 2005) (quoting Wayne Dalton Corp. v. Acme Doors, Inc., 302 S.C. 93, 96, 394 S.E.2d 5, 7 (Ct. App. 1990)). What is required for a novation is that “the circumstances attending the transaction alleged to be a novation must show the intention to substitute a new obligation in place of the existing one.” Id. (quoting Superior Auto. Ins. Co. v. Maners, 261 S.C. 257, 262, 199 S.E.2d 719, 722 (1973)).

“A novation may be broadly defined as a substitution of a new obligation for an old one, thereby extinguishing the old debt.” Moore v. Weinberg, 373 S.C. 209, 644 S.E.2d 740, 745 (Ct. App. 2007); accord Ophuls & Hill, Inc. v. Carolina Ice & Fuel Co., 160 S.C. 441, 158 S.E. 824, 828 (1931) (same). South Carolina case law has expressly recognized that “the substitution of a new obligation between the same parties, with intent to extinguish the old obligation” is a novation. Id. (again, same language in Ophuls). A novation has “the effect of paying, dissolving, or otherwise discharging” the old obligation. Id. (again, virtually identical language in Ophuls). As noted in the Ophuls case, South Carolina law recognizes that parties in a mortgagor-mortgagee relation can enter into a novation. Ophuls & Hill, 158 S.E. at 828.

The Appellant performed all of his obligations under the agreement to refinance the loan until the Respondent insisted on performing unlawfully by refusing to have the refinance closed by an attorney. (R. pp. ____; amended answer and counterclaim; affidavit of Burr.) Closing a mortgage loan, including a refinance, without the supervision of a licensed South Carolina attorney is unlawful. See Doe v. McMaster, 585 S.E.2d at 777-78; Buyers Service, 292 S.C. 426. The Respondent’s refusal to abide by the law and permit lawful performance of the parties’ agreement is what kept the Appellant from performing under this *new* agreement. See Parks v. Lyons, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951) (party who first breaches contract cannot complain of other party’s later breach thereof); 17A Am. Jur. 2d Contracts §§ 704, 719, 737-38, 740; Ralph King Anderson, Jr., South Carolina Requests to Charge – Civil, 2002, §§ 19-18, 19-19, 19-21. Since the agreement to refinance met all the elements of a novation, it *extinguished* the old agreement.

Those are the only facts in the record. The Respondent offered nothing to challenge them. The fact that the agreement was not reduced to a signed note or that no written agreement to refinance has surfaced is immaterial to whether the Respondent is entitled to summary judgment. This sort of agreement is not subject to the Statute of Frauds. See Carter v. McCall, 193 S.C. 456, 8 S.E.2d 844, 847 (1940). The Statute of Frauds, S.C. Code Ann. § 32-3-10, has five subsections. Subsections (1) (contract to charge an executor or administrator upon a promise to answer damages from his own estate), (2) (contract to answer for the debt of another), (3) (contract in consideration of marriage), and (5) (agreement that cannot be performed within one year) plainly do not apply. S.C. Code Ann. § 32-3-10. Our state Supreme Court has spoken to the applicability of subsection (4) – contract “to charge any person upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them” – and held it “can only be applied to contracts which have in view the *transfer* of an interest ‘in or concerning’ lands[.]” Carter, 8 S.E.2d at 847 (emphasis in original). “The term ‘interest’ in land as used in the statute of frauds, means some portion of the title or right of possession, *and does not include agreements which may affect land but which do not contemplate the transfer of any title, ownership or possession.*” Id. at 846 (quoting 20 R.C.L., p. 535, emphasis added by S.C. Sup. Ct.). “The very words of the statute ‘any contract or sale of lands . . . or any interest in or concerning them’ contemplate the *sale or transfer* of some title or interest therein, so as to confer upon the transferee some right of possession or ownership.” Id. (emphasis and ellipsis in original).

Further, the lower court’s references to the statute of limitations do not provide an appropriate basis for summary judgment in this case. (R. pp. ____; order granting

partial summary judgment.) The Respondent has been charging the Appellant improperly based on the old, pre-novation agreement, and that has been happening up to the present day, certainly well within three years of the time the Appellant asserted his counterclaim. (R. pp. ___; amended answer and counterclaim; affidavit of Burr.) Such a claim is not barred by the statute of limitations. S.C. Code Ann. § 15-3-530.

Finally, the lower court's determination that laches provided a basis for granting summary judgment in favor of the Respondent was also wrong. The elements of a laches defense are delay in the assertion of a right, that delay was unreasonable under the circumstances, and prejudice to the party asserting the defense. Chambers of S.C., Inc. v. County Council for Lee County, 315 S.C. 418, 421, 434 S.E.2d 279, 281 (1993); Kelley v. Kelley, 368 S.C. 602, 620 S.E.2d 388 (Ct. App. 2006); Charleston Library Soc. v. Citizens & So. Natl. Bank, 201 S.C. 447, 23 S.E.2d 362 (1942). Whether laches bars a claim is a factual determination, because whether the elements of laches are present is necessarily a factual determination. Here, no facts were offered in support of these elements, such as prejudice, by the Respondent.

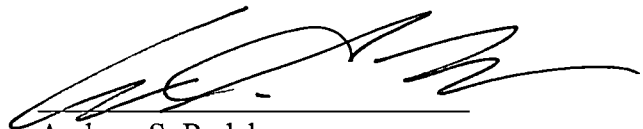
The lower court erred reversibly in granting summary judgment. The record just did not support it. Evidently, the lower court did not think much of the *quality* of the Appellant's affidavit testimony, but a court does not make credibility evaluations on a motion for summary judgment; rather, even a scintilla – meaning a tiny shred – of evidence is enough to survive a summary judgment motion. Hancock, 381 S.C. at 330. The lower court chose to disregard the Appellant's affidavit and declined to draw reasonable inferences from the record in the Appellant's favor. (R. pp. ___; order

granting summary judgment.) The Supreme Court of South Carolina says that is not the way to decide a summary judgment motion. Id.

CONCLUSION

The lower court erred in granting the summary judgment sought by the Respondent. The Appellant is entitled to reversal and remand.

Respectfully submitted,



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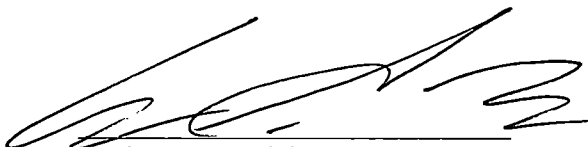
Of Whom James T. Burr a/k/a James Burr is.....Appellant.

PROOF OF SERVICE

I certify that I served the foregoing initial brief of appellant by depositing a copy
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