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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEE COUNTY
Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 2013-CP-31-00321

Laura Toney,

Appellant

LaSalle Bank National Association as Trustee
for the Registered Holder of Structured Asset
Securities Corporation, Structured Asset
Investment Loan Trust, Mortgage Pass-Through
Certificates, Series 2004-11, Altisource Homes,
Pro Capital Investors, Wayne Capell, Lee County
Treasurer and Lee County Planning and Zoning,

Respondents

RESPONDENTS WAYNE CAPELL, LEE COUNTY TREASURER AND LEE
COUNTY PLANNING AND ZONING'S INITIAL BRIEF AND DESIGNATION
OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

August 14, 2017

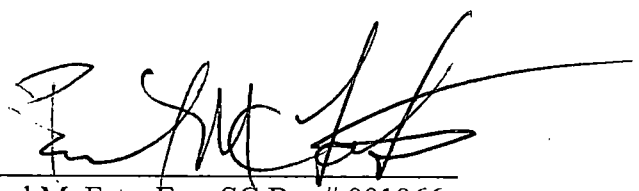

Paul M. Fata, Esq. SC Bar # 001966
Stuckey, Fata & Segars, LLC
P. O. Drawer 568
Bishopville, SC 29010
803 484-5409 FAX: (803) 484-9239
Email: paulmfata@sfsllawfirm.com
Attorney for Respondents, Wayne
Capell, Lee County Treasurer and
Lee County Planning and Zoning

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STATEMENT OF ISSUE ON APPEAL

DID THE TRIAL JUDGE ERR IN ALLOWING THE ATTORNEY FOR RESPONDENTS TO CONTINUE REPRESENTATION AFTER THE COURT WAS NOTIFIED THAT THE ATTORNEY WAS REPRIMANDED BY THE COMMISSION ON LAWYER CONDUCT FOR CONFLICT OF INTEREST?

STATEMENT OF FACTS

This matter has been ongoing between the Appellate, Laura Toney (“Appellate”) and Respondent, LaSalle Bank (“Respondent LaSalle”) since October 6, 2004.¹ Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning (“Respondent County”) were not made parties until November 13, 2013.²

Appellate’s only allegation against the Respondent County is that her property at 729 Chatman Street, Bishopville, South Carolina had been incorrectly identified on County Tax Maps. Additionally the Respondent County allowed the property to be sold for delinquent 2013 property taxes.³

In response to Appellate’s Summons and Complaint, Respondent County filed a 12(b)(6) Motion on December 19, 2013.⁴

The Respondent County filed a Motion for Summary Judgment on December 17, 2014 which was granted by the Court.⁵ The Respondent County based its Motion on the fact that Appellate had not perfected service on Respondent County by serving

¹ Complaint, 2005-CP-31-169, July 21, 2005 para. 4-7

² Complaint, 2013-CP-31-321

³ *id* allegations 10, 11 pg.14

⁴ Rule 12(b)(6) Motion dated 12/19/13

⁵ Motion for Summary Judgment dated 12/17/14

the Summons and Complaint upon the Chief Executive Officer or the Clerk of Respondent County.⁶

At the Motion hearing on November 30, 2015, Appellate argued for the first time that attorney, Paul M. Fata, attorney for Respondent County should be disqualified. Appellate alleged that Attorney Fata and his office had represented her and her family in the past creating a conflict.⁷ Appellate's motion was denied.⁸

Appellate only argues one issue regarding the Respondent County:

Did the trial judge err in allowing the attorney for Respondent County to continue representation after the Court was notified that the attorney was reprimanded by the Commission on Lawyer Conduct for conflict of interest?⁹

⁶ Transcript of hearing, 2013-CP-31-321, November 30, 2015 pgs.3-5

⁷ Order denying motion to disqualify Attorneys Fata and O'Connor, 2013-CP-31-321, January 25, 2016

⁸ Order granting Motion to Dismiss of Defendant US Bank, granting Summary Judgment of Defendant Lee County, and denying all motions of Plaintiff Laura Toney-2013-CP-31-321 pgs. 15-17

⁹ Corrected Appellate's Initial Brief, pg. 21-22

ARGUMENT

THE TRIAL JUDGE DID NOT ALLOW THE ATTORNEY FOR RESPONDENT COUNTY, TO CONTINUE REPRESENTATION AFTER BEING NOTIFIED THAT THE ATTORNEY WAS REPRIMANDED FOR CONFLICT OF INTEREST, AND, THUS, THE TRIAL COURT DID NOT ERR IN ALLOWING THE ATTORNEY TO CONTINUE TO REPRESENT THE RESPONDENT COUNTY

In Point III of the Corrected Appellant's Initial Brief, at pages 21 and 22, Appellant asserts, without referring to a factual basis in the record or elsewhere, that the attorney for the Respondent County, Paul M. Fata, had served as her attorney for several years on numerous occasions, that she had filed a complaint against Mr. Fata with the Commission on Lawyer Conduct, and that the Commission had reprimanded Mr. Fata, but he continued to represent the Respondent County in this litigation. In support of this argument, Appellant sets forth the text of Rule 1.7 of the SCRPC, Rule 407, SCACR, and nothing more. In her Statement of the Case at p. 10 of the Corrected Appellant's Initial Brief, Appellant asserts, again without reference to evidence:

Mr. Fata's Firm has represented me and my family in numerous legal manners [sic]. His firm deeded the original lot (14) to me from my husband, Milton Toney. His firm also wrote our Last Will and Testament and other real estate transactions which constitutes "Conflict of Interest."

The Commission on Lawyer Conduct has reprimanded Mr. Paul Fata for Conflict of Interest and he still continued to represent the Defendants in this case.

Appellant's recitation of the "facts" is inconsistent with the record in this matter. The transcript of the March 30, 2016 hearing confirms that Appellant had filed a motion to disqualify Mr. Fata based on a conflict of interest, that the court

denied the motion,¹ and that there was no motion to disqualify pending before the trial court on the date of the hearing.² At the hearing, Mr. Fata acknowledged that he and his partner had “done deeds, wills, various things of that nature, which have nothing to do with this property and would not have given us any undue advantage or would not have gained [sic] any information that would be used to the detriment of Ms. Toney in this matter.”³ Mr. Fata also acknowledged that Appellant had filed a complaint with the ethics committee on the same matter.⁴ On that same date, the trial court then granted the Respondent County motion for summary judgment based on their written submission.⁵ Appellant points to no evidence in the record to counter Mr. Fata’s description of legal work he and his partner previously did for Appellant.

Three months *after* the trial court granted the Respondent County’s motion for summary judgment, on June 20, 2016, the Supreme Court of South Carolina Commission on Lawyer Conduct issued a Letter of Caution to Mr. Fata based on the complaint of Appellant. The Letter of Caution specifically stated that “the imposition of a sanction was not warranted,” no charges would be filed against Mr. Fata, and “[t]he issuance of this letter of caution is not a sanction against you.”⁶ The letter reminded Mr. Fata to adhere to the requirements of the Rules of Professional

¹ The trial court issued an order denying Appellant’s motion to disqualify Mr. Fata on February 4, 2016. *See* Order Denying Motion to Disqualify Attorneys Fata and O’Connor, 2013-CP-00321, Feb. 4, 2016.

² Transcript of Hearing, 2013-CP-2013, March 30, 2016, p. 29.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 30.

⁶ Letter of Caution from Christopher G. Isgett, Chair, The Supreme Court of South Carolina Commission on Lawyer Conduct to Paul M. Fata, dated June 20, 2016.

Conduct, particularly Rules 1.9 [Duties to Former Clients] and 1.10 [Imputation of Conflicts of Interest: General Rule].⁷

The Letter of Caution was not a reprimand, as inaccurately reported by Appellant. “Public reprimand” is listed as one of several available sanctions in the Rules of Lawyer Disciplinary Enforcement. Rule 7(b), SCRLDE, Rule 413.7(b), SCACR. In contrast, “Letter of Caution” is not listed in those rules as a sanction for attorney misconduct. “Public Reprimand” is defined by the Rules of Lawyer Disciplinary Enforcement as “a reprimand by the Supreme Court in the form of a written decision which shall be imposed in person or served upon the respondent by certified mail.” Rule 2(v), SCRLDE, S.C. App. Ct. R. RULE 413.2(v). On the other hand, a “Letter of Caution” is defined as:

a written caution or warning about past or future conduct issued when it is determined that no misconduct has been committed or that only minor misconduct not warranting the imposition of a sanction has been committed. A letter of caution may be issued by disciplinary counsel, an investigative panel or the Supreme Court. The issuance of a letter of caution is not a sanction under these rules and does not constitute a finding of misconduct. The fact that a letter of caution has been issued shall not be considered in a subsequent disciplinary proceeding against the lawyer unless the caution or warning contained in the letter of caution is relevant to the misconduct alleged in the proceedings.

Rule 2(r), SCRLDE, Rule 413.2(r), SCACR (emphasis added).

Clearly the Letter of Caution was *not* a reprimand. And even if it were, it was issued on June 20, 2016, almost three months after the trial court granted the Respondent County’s motion for summary judgment and released them from this lawsuit. At the time that the trial court granted the motion for summary judgment in March of 2016, the trial court already had denied Appellant’s motion to disqualify

⁷ *Id.*

Mr. Fata, finding no conflict of interest.⁸ Therefore, as a factual matter, the trial court simply did *not* allow Mr. Fata to continue to represent the Respondent County after being notified of the Letter of Caution or, for that matter, a verifiable conflict of interest. Had the Letter of Caution been issued prior to the termination of the case against the Respondent County, the trial court would have been under no obligation to disqualify Mr. Fata, since, as stated earlier, the Letter of Caution was not a sanction or a finding of misconduct. Furthermore, because the Letter of Caution did not set forth the facts the Commission considered in reviewing Appellant's ethics complaint, had it been issued prior to March 30, 2016, the letter could not have provided a factual basis for the trial court to revisit its conclusion that there was no conflict of interest disqualifying Mr. Fata from representing the Respondent County.

Appellant's assertion that Mr. Fata continued to represent the Respondent County in spite of being subject to professional discipline for a conflict of interest based on his prior representation of Appellant is simply not true. Even if Appellant's recitation of facts were accurate, she has made no effort to describe how she was prejudiced by Mr. Fata's continued representation. Rule 1.9(a) of the South Carolina Rules of Professional Conduct prohibits attorneys from "represent[ing] another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client," here, Appellant. Rule 1.9(a), SCRPC, Rule 407, SCACR. "The purpose behind . . . [this rule] is to prevent an attorney from using confidential information that he has obtained from a client against that client on behalf of another one." *In re Goss*, 492 B.R. 469, 472 (Bankr.

⁸ March 30, 2016 Hearing Transcript, p. 29.

D.S.C. 2013) (internal citation omitted). Appellant does not argue that she suffered harm because Mr. Fata used confidential information obtained in the attorney-client relationship against her. She simply objects to his representation of other clients with whom she has a dispute. “However, an attorney is not prevented from representing a subsequent client against a former client, where the duties required of him do not conflict with those required in the first employment.” *Madison v. Graffix Fabrix, Inc.*, 304 S.C. 321, 325, 404 S.E.2d 37, 40 (Ct. App. 1991). In the absence of a showing of any harm from the use of confidential information, Appellant was not entitled to Mr. Fata’s disqualification.

CONCLUSION

Appellant can point to no basis for Mr. Fata’s disqualification, and she is not entitled to reversal of the trial court’s decision based on a fictitious conflict of interest.

Respondent County
Bishopville, SC
August 14, 2017



Paul M. Fata, Esq. S.C. Bar #001966
Stuckey, Fata & Segars, LLC
Post Office Drawer 568
Bishopville, SC 29010
803 484-5409 FAX (803) 484-9239
Email: paulmfata@sflawfirm.com
Attorney for Respondent County

THE STATE OF SOUTH CAROLINA
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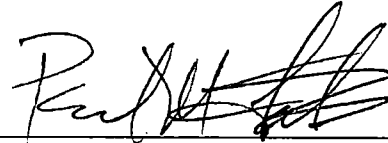
Respondents

PROOF OF SERVICE OF RESPONDENTS' WAYNE CAPELL, LEE COUNTY
TREASURER AND LEE COUNTY PLANNING AND ZONING'S INITIAL BRIEF
AND DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON
APPEAL

I hereby certify that I have served the Respondents' Wayne Capell, Lee
County Treasurer and Lee County Planning and Zoning's Initial Brief and
Designation of Matter to be Included in the Record on Appeal addressed to the
Appellate-Post Office Box 722, Bishopville, South Carolina 29010 and on Sean
O'Connor, attorney for Respondent LaSalle Bank National Association by depositing
a copy of same in the United States Mail, postage prepaid, on August 14, 2017,

(Signature to Follow on Next Page)

August 14, 2017

A handwritten signature in black ink, appearing to read 'Paul M. Fata', written over a horizontal line.

Paul M. Fata, Esq. SC Bar #001966
Stuckey, Fata & Segars, LLC
P. O. Drawer 568
Bishopville, SC 29010
803 484-5409
Attorney for Respondents,
Wayne Capell, Lee County
Treasurer and Lee County
Planning and Zoning

STUCKEY, FATA & SEGARS, LLC

PAUL M. FATA
paulmfata@sfslawfirm.com

ATTORNEYS AT LAW
115 EAST CHURCH STREET
POST OFFICE DRAWER 568
BISHOPVILLE, SOUTH CAROLINA 29010

JAMES R. SEGARS, JR.
jsegars@sfslawfirm.com

George M. Stuckey
(1924-1995)

(803) 484-5409
Fax: (803) 484-9239

August 14, 2017

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

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SC Court of Appeals

RE: Laura Toney vs. LaSalle Bank National Association, et al
Appellate Case No.: 2016-001989
Case No: 2013-CP-31-00321

Dear Ms. Kitchings:

Please find enclosed herewith the original and one (1) copy of *Respondents Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning's Initial Brief and Designation of Matter to be Included in the Record of Appeal* along with the *Proof of Service* regarding the above captioned matter. Please file same and return a filed copy to our office using the enclosed prepaid envelope. Copies of same have been served on the Appellant and Sean O'Connor, Esq. both of whom are also copied on this letter.

If you have any questions, please do not hesitate to contact me.

Thank you for your assistance with this matter.

With kind regards, I remain,

Yours very truly,

STUCKEY, FATA & SEGARS, LLC



PAUL M. FATA

PMF:boh
Enclosures
Cc: Ms. Laura Toney, pro se Appellant (w/encl.)
Sean A. O'Connor, Esq. (w/encl.)

Stuckey, Fata & Segars, LLC
Post Office Drawer 568
Bishopville, South Carolina 29010

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The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
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