

STATE OF SOUTH CAROLINA)
)
COUNTY OF AIKEN)
)
CitiMortgage)
)
Plaintiff,)
)
vs)
)
Mary L. Moxley)
)
Defendant)

THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

CASE NO.: 2016-CP-02-02033

ORDER

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SC Court of Appeals

Hearing Date: March 20, 2017
Plaintiff's Attorney: Finkel Law Firm
Magalie A. Creech; Adams and Rees, LLP
and W. Cliff Moore, III
Defendant's Attorney: Tom G. Woodruff, JR.
Court Reporter: Angela D. Zuver

PROCEDURE

1. The plaintiff filed a summons and complaint, lis pendens and notice of foreclosure intervention on February 2, 2014.
2. The defendant, Mary Moxley, filed an answer and counterclaim on March 6, 2014.
3. The plaintiff filed a reply on April 8, 2014.
4. Plaintiff filed a motion for summary judgment on June 30, 2014.
5. The defendant, Mary Moxley, filed a motion to compel responses to discovery on August 4, 2014.
6. In the order issued on September 26, 2014, the court found:
 - a. The plaintiff's motion for summary judgment on the foreclosure claim was denied;
 - b. The plaintiff's motion for summary judgment was granted as to the affirmative defenses of unclean hands and claim of equitable unenforceability, to the extent that

those affirmative defenses were based on the loan not being closed under the supervision of an attorney.

- c. The remaining claims were denied so the parties could complete discovery.
7. An order granting plaintiff's motion to compel was filed on December 16, 2014.
8. Plaintiff filed a motion for summary judgment on March 19, 2015.
9. In the order issued on September 1, 2015, the court found:
 - a. Mary Moxley agreed to withdraw the South Carolina Unfair Trade Practice counterclaim.
 - b. The plaintiff's motion to correct the plat reference from Book 668 to Book 568 was granted.
 - c. The plaintiff's motion for summary judgment on the foreclosure cause of action as to Mary L Moxley was denied.
 - d. The plaintiff's motion for summary judgment to dismiss the defendants counterclaim pursuant to S.C. Code Ann. 37 – 10 – 102, was granted.
10. The trial was held on March 20, 2017.

STATEMENT OF FACTS

PATSY JUDD

Ms. Judd testified that she was a business operation analyst for CitiMortgage for seven years. She had access to the loan servicing records. She was familiar with the account in this matter. Those records were kept in the normal course of business and were made at or near the time of the events reflected in the record. Prior to her testimony, she reviewed the note, mortgage, default letters, payment history, origination file and the origination appraisal.

CitiMortgage began servicing the loan in September 2007. Prior to that, the servicer was ABN AMRO. The two companies merged on August 21, 2007 (plaintiff's number seven). The original note was for \$69,700.00. William Moxley signed the note. The interest rate was 9.5% per annum. The plaintiff currently holds the note. The mortgage reflects that the collateral is property located at 398 Glenwood Dr., Warrenton, SC. There is a mobile home on the property but the witness did not see the addendum for the mobile home to the exhibit.

The appraisal that was introduced does reflect a mobile home on the property. The mortgage legal description was not part of the mortgage that was introduced at trial. Plaintiff made a request to submit a certified original copy. Over the objection of the Defendant Moxley, the court allowed the introduction of the document. The legal description does reflect the mobile home was part of the collateral to secure the loan with the real property.

An authorization form was signed by Mr. Moxley, which gave Mary Moxley authority to speak on his behalf in regards to the loan. Plaintiff also introduced a copy of the HUD1 settlement form. This was part of the origination file from the prior servicer. It reflects the closing date of September 29, 2000. It also provides an address of the property of 398 Glenwood Dr., Warrenville, SC.

Several exhibits were introduced for identification only. This included a scope of representation form, a seller/borrower affidavit and indemnity agreement and an affidavit and agreement. Plaintiff also introduced as exhibits the right of rescission letter, the authorization to correct form, the truth in lending disclosure statement, copies of two South Carolina drivers' license purported to be those of Mary L Moxley and William Clyde Moxley, Jr. The photograph on Mrs. Moxley's was not legible, but her name and address were identified on the document. Plaintiff introduced the deed regarding this transaction that is recorded with the Aiken County RMC Office.

The witness testified that the default date was July 1, 2013. She further testified that the default has not been cured or modified. A letter was mailed to the estate of William Moxley, Jr., dated September 3, 2013. The records reflect that Mary Moxley notified the plaintiff of her husband's death in March of 2013. On June 6, 2013 a payment was made in the amount of \$3,306.86. William Clyde Moxley, Jr. passed away prior to this payment. This reflects three payments plus \$15.00 for making the payment by telephone. This brought the loan current as of June 1, 2013. The default date is July 1, 2013.

The figures introduced were as follows:

- a. principal amount: \$58,644.97
- b. accrued interest: \$21,554.85 (this figure was accurate through April 14, 2017)
- c. the attorney fee and cost total \$2,311.69
- d. inspection cost of \$491.50
- e. negative escrow: \$7,847.82 (included in that figure is \$4,940.40 for hazard insurance, \$2,211.00 for flood insurance and \$688.42 for property taxes)
- f. Total: \$90,850.83
- g. the per diem is \$15. 26380
- h. the recovery of attorney's fees and costs are allowed in paragraph 6E of the note in paragraph 21 of the mortgage.

On cross-examination, the witness testified that there appears to be two witnesses on the mortgage. John Ballentine and Tracy L. Kirkpatrick signed as the witnesses. Ms. Judd was also asked about several entries on the HUD – 1 Form. On redirect, the plaintiff introduced a FEMA loan hazard document and identified both the property location and the owners. Plaintiff also introduced an Aiken County Flood Map with the receipt from Aiken County records.

JOHN KEITH BALLENTINE

In September 2000, Mr. Ballentine was employed with the law firm of Ratchford and May. He was identified as a paralegal/loan closer. He would travel around the state doing real estate refinance closings. The real estate packages were prepared at the law firm. He would take the packages and get the documents signed. In this matter, he signed as a witness and the notary public.

He reviewed plaintiff's exhibit number 19 that is the copy of the South Carolina drivers' licenses. He testified that those are be provided at the closing or that he would have copies. Either way, he would verify the identity of the parties through the drivers' license prior to those parties signing the documents. He does not remember this particular real estate closing, but his practice was that no signatures would be obtained unless he verified the identity of the parties. He testified that he would have seen Mary Moxley's identification before she signed the

documents. Further, he would not have any doubt that Mary Moxley would have signed the mortgage based on his procedure.

Mary Moxley's signature is on the seller/borrower affidavit and indemnity agreement. This is a standard document used in the closing package. He testified that he would identify the parties before those documents were signed. Mr. Ballentine testified that, to his knowledge, he had never conducted a real estate closing when someone other than the person who was to sign the documents appeared at the closing and signed any documents.

On cross-examination, Mr. Ballentine admitted that he is not a certified paralegal. A lawyer did not appear at any real estate closings. All of the transactions were parties refinancing current loans. At this point, plaintiff made an objection when the defense raised the issue of unauthorized practice of law. Defendant believes that issue had been ruled on in prior orders. That objection was noted for the record, and the cross-examination continued.

Normally, Mr. Ballentine would be able to locate a third party to sign as a witness. There were occasions when he would take documents back to the law firm and have Ms. Kirkpatrick sign the documents as a witness even though she was not a witness to the execution of the documents.

He admits that he cannot make out the facial features of Mrs. Moxley by looking at the copy of her driver's license admitted into evidence. He estimated he did 75 to 100 closings in Aiken County. He would not have met any parties at a broker's office in Aiken County. If no other witness was available at the closing, he would be the only witness and the second witness would be the signature from the individual at the law office in Columbia. He further testified that he is making an assumption that this closing was held in Aiken. The loan closing could have been held in Columbia. However, he testified that he felt it was better than a fifty percent chance that the closing took place in Aiken.

MARY MOXLEY

The plaintiff called Mary Moxley as a witness. She testified she could not recognize the facial features on plaintiff's Exhibit 19, which was purported to be a copy of her driver's license. She agreed that it was her name on the driver's license. In her deposition taken in 2016, she admitted that it was a copy of her driver's license. She testified she has no memory of signing the mortgage. She does not remember going to Columbia, South Carolina, in the year 2000 and does not remember meeting Mr. Ballentine. She admitted that while she does not remember making a payment in June 2013, she might have made the payment. When asked if her signature was on the mortgage, she responded, "I don't think so. I really don't think so because I make big loops with my Ls. I don't think it is my signature."

She also testified that she is taking several medications and has been taking those for the past few years. At trial, she testified that the medications include Ambien, Xanax, Seroquel and Prozac. She does have problems with her long and short-term memory. At one point, she stated, "I'm not totally illiterate, but I don't have a good memory." She does feel that her memory was better at the time of the hearing. She did admit to having no recall about financial matters in the year 2000.

She reviewed the Authorization to Obtain Credit Information form and the Financial Services Authorization and Agreement. At trial, she did not believe it was her signature on those documents. She testified that, "my handwriting has changed a lot over the years back and forth. Sometimes I can't even write my hands shake so bad." She testified in her deposition that it looked like her signature on those forms. When asked if she was testifying at the trial that it does not look like her signature, she responded, "I don't know, to be honest with you, my signature has changed so many times." She later testified that her husband would have handled the finances in the year 2000. She had four or five surgeries during that time. In her deposition, she testified some of the initials on the mortgage appeared to be her writing. At trial, she testified that it does not look like her writing. In fact, when her attorney reviewed all of the exhibits with her signature, she testified that she had not signed any of those documents or that it did not look like her signature. However, there appears to be different testimony at her deposition, where she testified that it could be her signature or it looked like her signature.

She also testified that she and her husband always lived in one mobile home on the property. There may have been other mobile homes on the property over the years, but other family members lived in those mobile homes.

CONCLUSIONS OF LAW

This court has subject matter jurisdiction over this proceeding and personal jurisdiction over the parties. Venue of this action is proper in Aiken County and this court and all persons entitled to be served and/or provided notice of these proceedings have been served and/or provided such notice or have otherwise appeared in this action.

MOTION TO AMEND

The defendant, Mary Moxley, move to amend the pleadings to conform to the evidence pursuant to Rule 15 (b), SCRPC. "Issues not raised by the pleadings but tried by consent of the parties shall be treated as if they had been raised in the pleadings." *Beaufort County School Dist. V United Nat. Ins. Co.*, 392 S.C. 506, 709 S. E. 2d 85 (Ct. App. 2011).

In the order filed on September 26, 2014, the court granted the plaintiff summary judgment motion and dismissed Mary Moxley's affirmative defenses of unclean hands and equitable unenforceability. The court relied on *Matrix Financial Services Corp. v Frazer*, 394 S.C. 134, 714 S.E. 2d 532 (2011), *BAC v Kinder*, 398 S.C. 619, 731 S.E. 2d 547 (2012). In the order filed on September 1, 2015, the court granted the plaintiff summary judgment motion to dismiss Mary Moxley's counterclaim pursuant to S. C. Code Ann. 37 – 10 – 102. Mary Moxley agreed to withdraw her counterclaim for South Carolina Unfair Trade Practice Act.

The plaintiff did object to the testimony and the lines of questions about the unauthorized practice of law at trial. However, to the extent that this specific defense was not addressed in the prior orders, the court will rule specifically on the unauthorized practice of law in this situation.

In *Matrix v Fraser*, *Id*, the South Carolina Supreme Court held that a lender who closed a loan without attorney supervision, having committed the unauthorized practice of law, came to

the court with unclean hands and was thus barred from seeking equitable relief. However, in a substitute opinion issued on a rehearing ("Matrix II"), the Court explained that this holding would be prospective only, stating it would "apply this ruling to all filing dates after the issuance of this opinion," which was August 8, 2011, *Id.* At 140, 714 S.E. 2d at 535. Whatever ambiguity may have existed as to what the court meant by "filing date" was resolved in *BAC v Kinder*, 398 S.C. 619, 731 S.E.2d 547 (2012). In that case, the Court stated, "We clarify now that it is the date the document a party seeks to enforce was filed. Here, Systems' mortgage was recorded on April 20, 2007, well before the issuance of Matrix. Thus, regardless of whether an attorney participated in the closing of the mortgage, BAC would not be barred from recovery by the illegality."

Mary Moxley has failed to establish the unauthorized practice of law for which she would be entitled to any relief.

EXECUTION OF MORTGAGE

Mary Moxley also raised the issue about the validity of the mortgage, if there was only one witness to the execution of the document. Mr. Ballentine could not be sure where the real estate closing took place since it was approximately 17 years prior to his testimony. He was clear that the other witness that signed the mortgage would not have traveled with him to Aiken for a real estate closing. Therefore, if the real estate closing was held in Aiken County, Mr. Ballentine would have witnessed the execution of the mortgage and the second witness, would have signed the mortgage when he returned to the law offices. While he could not be sure, Mr. Ballentine felt that it was more likely that the real estate closing occurred in Aiken County.

Mary Moxley relies on *Leasing Enterprise, Inc. v. Livingston*, 294 S.C. 204, 363 S.E. 2d 410 (1987). That case involved a judgment creditor arguing that a deed between the debtor and a family member did not have priority. The Court noted that S.C. Code Ann. 27-7-10, (1976) requires two witnesses in the probate of a document to be recorded. This matter does not involve a recording or a priority issue. The real issue is if the mortgage is valid between the parties if there was only one witness to the execution of the mortgage. In *Smith v. Hawkins*, 254 S.C. 423, 175 S.E. 2d 824 (1970), the Court found that a deed or mortgage without sufficient witnesses

was valid between the parties. (Also see *Stelts v. Martin*, 90 S.C. 14, 72 S.E. 550 (1911)) Based on the testimony and the exhibits, the mortgage is valid between the parties.

WILLIAM C. MOXLEY, JR.

Based on the testimony and exhibits, it is undisputed that the William C Moxley, Jr. signed the Note and Mortgage. The probate clause on the mortgage does indicate it was signed in Richland County. Mr. Ballentine was not sure where the real estate closing was held. However, he testified it was more likely that the documents were signed in Aiken County. There's also no dispute that the funds were delivered from the lender and the payments were made as required by the terms of the Note. Mary Moxley has argued that if the documents were signed in Aiken County, Mr. Ballentine was the only witness. As discussed above, the mortgage would still be valid between the parties if Mr. Ballentine was the only witness.

"Generally, the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on the debt." *US Bank Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 684 S.E.2d 199 (Ct. App. 2009), *Bank of America v. Draper*, 405 S.C. 214, 746 S.E. 2d 478 (2013). The court finds, even if there was only one witness, the mortgage is enforceable, between the plaintiff and William C Moxley, Jr. There is no dispute that William C Moxley, Jr. executed the Note. The plaintiff has established the existence of the debt and the default by Mr. Moxley on that debt. It is entitled to the requested relief against William C Moxley, Jr. There is also no dispute that Mr. Moxley signed the mortgage.

MARY MOXLEY

Based on her testimony, the tragic death of Mary Moxley's husband has had a profound effect on her. She testified that she is now under a doctor's care and is taking various medications. She testified that she feels she is doing better at the time of trial as opposed to the time her deposition was taken by the plaintiff. At her deposition in May of 2016, she testified that she was still having problems with her memory. The medications affect her short-term long-term memory.

She also testified that her signature has changed, "back-and-forth" over the years. Her testimony at the hearing differs in several instances from her deposition testimony. In her deposition, she testified the initials on the mortgage and signatures on the other documents appeared to be her writing. Her testimony at the hearing was that none of the initials or signatures are in her writing or that she does not remember signing those documents. In addition, at her deposition, she admitted that the driver's license exhibit was a copy of her driver's license. At trial, all parties agreed that you could not identify her by the photograph on the exhibit. However, it is her name on the license. She admitted that while she does not remember making a payment in June 2013, she might have made the payment. This would have been after her husband passed away.

Mr. Ballentine admitted that he does not remember Mary Moxley or this particular real estate transaction. His testimony does reflect a standard procedure to identify the parties before any documents were signed. This did include the identification of the parties by their driver's license.

"In an action to foreclose a mortgage on real property, the mortgagee has the burden of proving a disputed mortgage by the preponderance of the evidence." *Paramount Fund, Inc. v. Cusaac*, 282 S.C. 497, 499, 319 S.E.2d 354, 355 (Ct. App. 1984). Based on the payments made after Mr. Moxley's death, the procedure Mr. Ballentine described, Mary Moxley's testimony about her memory, the changes in her signature and the difference in her deposition and trial testimony, the court finds that the plaintiff has established by a preponderance of the evidence that Mary Moxley did sign the mortgage and other documents. While Mary Moxley has no obligation under the note, the court finds that she and Mr. Moxley signed the mortgage. Therefore, the plaintiff is entitled to obtain the relief requested in the foreclosure matter.

CONCLUSION

1. This court has subject matter jurisdiction over this proceeding and personal jurisdiction over the parties. Venue of this action is proper in Aiken County and this

court and all persons entitled to be served and/or provided notice of these proceedings have been served and/or provided such notice or have otherwise appeared in this action.

2. Mary Moxley has failed to establish the unauthorized practice of law for which she would be entitled to any relief.

3. Based on the testimony and the exhibits, the mortgage is valid between the parties.

4. The plaintiff has established the existence of the debt and the default by Mr. Moxley on that debt. It is entitled to the requested relief against William C Moxley, Jr.

5. Based on the payments made after Mr. Moxley death, the procedure Mr. Ballentine described, Mary Moxley's testimony about her memory, the changes in her signature and the difference in her deposition and trial testimony, the court finds that the plaintiff has established by a preponderance of the evidence that Mary Moxley did sign the mortgage and other documents. While Mary Moxley has no obligation under the note, the court finds that she and Mr. Moxley signed the mortgage. Therefore, the plaintiff is entitled to obtain the relief requested in the foreclosure matter.

6. The plaintiff will submit a proposed foreclosure order and will use the figures established at this hearing:

- a. principal amount: \$58,644.97
- b. accrued interest: \$21,554.85 (this figure was accurate through April 14, 2017)
- c. the attorney fee and cost total: \$2,311.69
- d. inspection cost: \$491.50
- e. negative escrow: \$7,847.82 (included in that figure is \$4,940.40 for hazard insurance, \$2,211.00 for flood insurance and \$688.42 for property taxes)
- f. Total: \$90,850.83

IT IS SO ORDERED.

2017
Aiken, South Carolina

M. Anderson Griffith
Master-in-Equity



Aiken Common Pleas

Case Caption: CitiMortgage Inc VS Mary L Moxley , defendant, et al
Case Number: 2016CP0202033
Type: Master/Order On Sale Of Real Estate

AND IT IS SO ORDERED

s/M Anderson Griffith-3076

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