

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

James O. Spence, Master-in-Equity

---

Case No.: 2010-CP-32-00514

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Chase Home Finance, LLC..... Appellant,

v.

Cassandra S. Risher, individually and as Personal Representative and Legal Heir of the Estate of Sidney Allan Risher, Justin R., a minor, Sydney R., a minor, Ashley R., a minor, Sidney J. Risher, Pierre Risher and Drayon Holmes, as Legal Heirs to the Estate of Sidney Allan Risher and Highland Hills Homeowners Association.....Defendants,

Of whom Cassandra S. Risher is.....Respondent.

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FINAL BRIEF OF RESPONDENT

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## STATEMENT OF ISSUES ON APPEAL

- I. DID THE MASTER ERR IN HOLDING THAT THE APPELLANT FAILED TO PROVE THE NECESSARY ELEMENTS TO ESTABLISH AN EQUITABLE LIEN?
- II. DID THE MASTER ERR IN HOLDING THAT THE APPELLANT FAILED TO ESTABLISH THE NECESSARY ELEMENTS TO RECOVER UNDER THE THEORY OF UNJUST ENRICHMENT?
- III. DID THE COURT ERR IN HOLDING THAT APPELLANT IS NOT ENTITLED TO ANY FORM OF EQUITABLE RELIEF?

## ARGUMENTS

### I. **THE MASTER DID NOT ERR IN HOLDING THAT THE APPELLANT FAILED TO PROVE THE NECESSARY ELEMENTS TO ESTABLISH AN EQUITABLE LIEN.**

As stated by the lower court in its Order, there are three (3) elements that must be satisfied for an equitable lien to arise which are (1) a debt, duty or obligation owing from one person to another; (2) a res to which the obligation attaches; and, (3) an intent, express or implied, that the property serve as security for the payment or obligation. In addition to proving the three (3) elements for an equitable lien, because such liens are based on the principles of equity, the party seeking to obtain the lien must satisfy the court that in equity and good conscience, he or she is entitled to a lien, and that he or she has no adequate remedy at law. 51 Am. Jur. 2d Liens Section 34 (2000).

Turning our attention first to the three essential elements for establishing an equitable lien, the plaintiff must first establish that there is a debt, duty or obligation owed by the defendant, Cassandra Risher, to the plaintiff. It is undisputed that Cassandra Risher signed neither the note nor the mortgage and was not asked to do so although she was present at the closing. The plaintiff acknowledges that there is no debt, duty or obligation owed by Cassandra Risher to the plaintiff but the plaintiff asserts that the debt, duty or obligation owed by Sidney Risher is sufficient to satisfy the requirement of a debt, duty or obligation "owed by one person to another". The plaintiff has cited no case law or legal principle to support its assertion that the debt, duty or obligation of Sidney Risher is sufficient to satisfy the debt, duty or obligation requirement necessary to obtain an equitable lien against Cassandra Risher. We believe the plaintiff has failed to cite any court precedent or legal principle to support its

assertion that the debt, duty or obligation of Sidney Risher can be imputed to Cassandra Risher because there is no court precedent or legal principle to support this proposition. As the court stated in Carolina Attractions, Inc. v. Courtney, 281 S. C. 140, 337 S. E. 2d 244 (Ct. App. 1985), "equitable liens must rest upon an express or implied contract; moral obligations do not sustain equitable liens." We believe the foregoing language means that the debt, duty or obligation must be set forth in an express contract between Cassandra Risher and the plaintiff or plaintiff's predecessor in interest or it must be set forth in an implied contract through the conduct of Cassandra Risher. Clearly, there is no express contract between Cassandra Risher and the plaintiff or its predecessor in interest and the plaintiff has not alleged or sought to prove the existence of an implied contract between Cassandra Risher and the plaintiff. We have not found any case law or legal principle which states or holds that the debt, duty or obligation of one cotenant can be used to obtain an equitable lien against another cotenant who has not signed an express contract and who has not engaged in any conduct to give rise to an implied contract.

The second element for establishing an equitable lien is that there must be a res to which the obligation attaches, which can be described with reasonable certainty. There is certainly a debt, duty or obligation owed by Sidney Risher to the plaintiff and the res upon which that debt, duty or obligation attaches is Sidney Risher's one-half (1/2) interest in the Lochweed property. The res that the plaintiff is seeking in this action is to obtain a lien over is the undivided one-half (1/2) interest of Cassandra Risher. We believe that the court was correct when it held in its original Order that "since there is no obligation owed by Cassandra Risher to the plaintiff, there can be no property to which the obligation attaches."

Finally, the plaintiff cannot establish the third element for an equitable lien which requires a showing that there is an intent, express or implied, that the property serve as

collateral for the payment or obligation. Clearly, there is no express intent given by Cassandra Risher to the plaintiff stating that the undivided one-half (1/2) interest of Cassandra Risher was to serve as security for the payment or obligation of Sidney Risher. Cassandra Risher was present at the closing and never once was she asked to sign the note or mortgage which would have constituted an express intent that her undivided interest in the Lochweed property was to serve as security for the debt owed by Sidney Risher. Additionally, the plaintiff does not allege nor has the plaintiff sought to prove that there is an implied intent given by Cassandra Risher to the plaintiff that her undivided one-half (1/2) interest was to serve as security for the debt of Sidney Risher.

Although we are convinced that the plaintiff failed to prove any of the necessary elements for an equitable lien, we also do not believe that the plaintiff presented sufficient evidence to the court to prove that, in equity and good conscience, it is entitled to a lien. As stated in Jones on Mortgages, Seventh Edition, Section 93(1915), "a mortgagee invoking the aid of estoppel must show that he has been vigilant in the protection of his own rights and interest. No protection will be given him against his own negligence and folly." In the instant case, there is no testimony or evidence that the plaintiff did not get what it bargained for and if the plaintiff now seeks to imply that it did not get what it bargained for, there is no showing by way of testimony that the plaintiff or its predecessor in interest has been vigilant in the protection of its own rights and interest. Also, there is no testimony that the plaintiff's predecessor in interest was without negligence or folly.

The plaintiff has not alleged or proven that it has no adequate remedy at law. As the court stated in Carolina Attractions, "it is hornbook law that equity will not impose an equitable lien where there is an adequate remedy at law." Carolinias Attractions, Supra, Page

145. We believe that the plaintiff certainly has an adequate remedy at law in this case. The plaintiff has a valid mortgage lien against the undivided one-half (1/2) interest of Sidney Risher which may be foreclosed. If the plaintiff is unable to satisfy its note from the foreclosure of the undivided one-half (1/2) interest of Sidney Risher, the plaintiff certainly has a right to proceed with a deficiency claim against the Estate of Sidney Risher. It is not a question as to whether the plaintiff will recover the entire amount of the debt owed by Sidney Risher. The question is, is there a remedy at law available to the plaintiff? We believe the answer to this question is a resounding yes which means that the plaintiff has an adequate remedy at law and is not entitled to any equitable relief.

**II. THE MASTER DID NOT ERR IN HOLDING THAT THE APPELLANT FAILED TO ESTABLISH THE NECESSARY ELEMENTS TO RECOVER UNDER THE THEORY OF UNJUST ENRICHMENT.**

Under our established law, the essential elements of unjust enrichment are (1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and, (3) retention by the defendant of the benefit under conditions that make it inequitable for the defendant to retain the benefit without paying its value. Ellis v. Smith Grading & Paving, Inc., 294 S.C. 470, 366 S.E. 2d 13 (1988). In the case at bar, there was no benefit conferred upon the defendant, Cassandra Risher, by the plaintiff. The benefit was conferred by the plaintiff upon Sidney Risher. The loan was made by the plaintiff to Sidney Risher. No loan was made by the plaintiff to Cassandra Risher. In exchange for the loan that was made by the plaintiff to Sidney Risher, Sidney Risher conveyed to the plaintiff a security interest in his undivided one-half (1/2) interest in the Lochweed property. Cassandra Risher was present at the closing but was not asked to sign the note or mortgage and there is no evidence or testimony from the plaintiff that it expected or bargained for a lien or security interest in the undivided one-half (1/2) interest owned by Cassandra Risher. In other words, there is no evidence or testimony from the plaintiff that it did not get what it bargained for. If the plaintiff did not get all that it bargained for or intended to get, it would have been a simple matter for the plaintiff to present testimony and evidence at trial that it bargained for and intended to obtain a security interest in the undivided one-half (1/2) interest of Cassandra Risher.

With respect to the second element for establishing unjust enrichment which requires that there be realization of the benefit by the defendant, since no benefit was conferred upon the defendant by the plaintiff, there could be no realization of the benefit by the plaintiff. The plaintiff conferred nothing upon Cassandra Risher. The plaintiff dealt with Sidney Risher

and whatever was conferred by the plaintiff was conferred upon Sidney Risher. Since no benefit was conferred upon Cassandra Risher by the plaintiff, there is no benefit received by Cassandra Risher from the plaintiff that is inequitable for her to retain without paying the plaintiff for its value.

There is an equitable maxim that states that one shall not be allowed unjustly to enrich oneself at another's expense. The word "unjustly", as used in this maxim, means "unlawfully". 30A C.J.S. Equity Section 98 (2007). It is a fundamental principle of equity that no one shall be allowed to be enriched unjustly at the expense of another by reason of an innocent mistake of law or fact entertained by both parties. 30A C.J.S. Equity, Supra. There is no allegation by the plaintiff in this case that the defendant, Cassandra Risher, has done anything unlawful and the plaintiff has not plead that there was an innocent mistake of law or fact by the parties.

Unjust enrichment, like equitable liens, is an equitable remedy which is available only if there is no adequate remedy at law. As argued previously in this brief, there is an adequate remedy at law available to the plaintiff in this case which further justifies the denial of equitable relief to the plaintiff under the theory of unjust enrichment.

### III. THE COURT DID NOT ERR IN HOLDING THAT APPELLANT IS NOT ENTITLED TO ANY FORM OF EQUITABLE RELIEF.

In determining whether the plaintiff was entitled to any form of relief in this case, the lower court not only considered and analyzed the application of the theories of equitable lien and unjust enrichment, the court also considered the relevant law applicable to the enforcement of mortgages. The court correctly found that the mortgage was not enforceable against the undivided interest of Cassandra Risher because the mortgage had not been signed by Mrs. Risher.

It is basic black letter law that a mortgage is only enforceable against a person who has signed the mortgage or a person who has become obligated on the mortgage through the signature of an authorized agent. “A mortgage is not valid or effectual unless signed by the mortgagor or someone on his or her behalf with his or her consent.” 59 C.J.S. Mortgages §156 (2009). A mortgage covering property owned by joint owners “is not binding on any who fail to sign and acknowledge it; although it may, if the circumstances permit, be held valid against those who do execute it.” 59 C.J.S. Mortgages §157 (2009). “A major requisite for the proper execution of a mortgage is that the mortgagor must sign the mortgage deed.” 54A Am. Jur. 2d Mortgages §20 (2009).

Although there does not appear to be any South Carolina cases directly on point, the North Carolina case of Bowers v. Bowers, 329 S.E. 2d 725(N.C APP. 1985) is similar to the case at bar and is instructive on the question of whether a mortgage is valid and enforceable against a party who failed to sign the mortgage. In Bowers, American Federal Savings and Loan Association loaned Alphonso and Marva Bowers and Arco, Inc., a corporation which the Bowers wholly owned, \$140,000.00 for the construction of a single-family “spec. house”. Mr.

and Mrs. Bowers executed a note and deed of trust in exchange for the loan. Title to the lot was taken in the name of Arco.

In September 1982, American Federal agreed to increase the loan amount from \$140,000.00 to \$196,800.00 and to extend the construction period. The parties agreed to document these changes in a new note and deed of trust, which were substituted for the original note and deed of trust.

At the closing of the second transaction, the closing attorney had Mr. and Mrs. Bowers to sign the substitute note and deed of trust individually, but failed to have them to sign as officers of Arco. Within a day or two after the closing, the closing attorney realized his mistake and through his secretary requested that Mr. and Mrs. Bowers return to his office to correct the error. They did not do so.

In May 1983, American Federal commenced foreclosure proceedings on the second note and deed of trust but was unable to do so because the second deed of trust was not valid due to the fact that the signers, Mr. and Mrs. Bowers, were not owners of the subject property.

Although the ruling of the North Carolina Court dealt with the issue of whether the first mortgage that was executed on February 24, 1982 was resurrected since the second mortgage was invalid, the court, in dicta, stated that “the second deed of trust...was not valid because it did not contain the signatures of the respondents Mr. and Mrs. Bowers in their capacities as officers of Arco, Inc.” The court further stated that “failure of the respondents to affix the proper signatures to the second deed of trust caused it to be invalid”.

In a 1984 decision of the South Carolina Court of Appeals, in the case of Paramount

Fund, Inc. v. Cusaac, 319 S.E. 2d 354 (S.C. APP. 1984), the Court denied the foreclosure of a mortgage because the plaintiff could not prove that the alleged signature of Mattie Cusaac on the mortgage was indeed her signature. The court stated that the failure to prove the signature of the mortgagor was fatal to the mortgagor's claim. The court further stated that "in view of Paramount's failure to prove a valid execution of the mortgage, it was not entitled to a decree of foreclosure".

The plaintiff has raised the argument that its mortgage is a purchase money mortgage and, therefore, its right to foreclose upon the interest owned by Cassandra Risher is superior to any rights that Ms. Risher may have as the fee simple owner of an undivided one-half interest in the said property. We believe the purchase money mortgage argument that is being advanced by the plaintiff is flawed and is not supported by any established case law or legal principle.

In the case at bar, the plaintiff does, indeed, have a purchase money mortgage covering the undivided one-half interest owned by Sidney Risher. The plaintiff has no mortgage whatsoever, purchase money mortgage or otherwise, covering the undivided one-half interest owned by the defendant, Cassandra Risher. We do not dispute that the plaintiff's purchase money mortgage from Sidney Risher would be superior to any judgments or encumbrances that may attach to the property through the action or conduct of Sidney Risher. These judgments or encumbrances, however, can only attach to the undivided one-half interest owned by Sidney Risher. As stated in Section 85b of Jones on Mortgages, "a tenant in common has no power to mortgage the interest of his cotenant and a mortgage given by him will operate only on his own interest in the

premises. So, a mortgage by a husband and wife of property owned by them as tenants in common, in which the wife is not mentioned except as releasing and conveying her rights of dower and homestead in the premises conveyed is not operative to convey her undivided interest in the land, although signed and acknowledged by both." Penny v. British & American Mortg., 132 Ala. 357, 31 So. 96 (1901); Burrows v. Pickens, 129 Ala. 648, 29 So. 694 (1901); Fite v. Kennemer, 90 Ala. 470, 7 So. 920 (1890); Thompson v. Sheppard, 85 Ala. 611, 5 So. 334 (1889).

It is clear under Section 85b of Jones on Mortgages that this noted Treatise takes the position that even though a spouse may sign a mortgage to release her dower interest in property being mortgaged by her husband, that mortgage is not effective to mortgage (to "convey" as stated in Jones) her undivided interest in the subject property.

Jones on Mortgages Section 141 further states that "one tenant in common may mortgage his interest in common property to secure his individual indebtedness, but such transaction will not affect the rights of his cotenants. In a case where four of eight tenants in common conveyed their interest in common property to the remaining four tenants and three of the latter executed a mortgage covering the entire property to secure a portion of the purchase price, it was held that the mortgage lien did not cover the lien interest of the grantee who did not join in the mortgage." Shreve v. Harvey. 74 N.J. EQ. 336, 70 Alt. 671 (1908).

The black letter law set forth above makes no distinction as to whether the mortgage is a purchase money mortgage or a non-purchase money mortgage. It is clear under the above black letter law that in order for a mortgage to be effectual, it must

be signed by each owner and the mortgage is not effectual or valid against any owner who does not sign.

The Dessaussure case cited by the plaintiff has no relevance to the case at bar. In Dessaussure v. Bollman, 7 S.C. 329, 1876 WL 5969 (1876), the court held that in a case where a seller of property, at the time of parting with his title, takes a mortgage as a part of the same transaction to secure his sale, he retains a lien on the estate conveyed not to be displaced by any other encumbrance including a judgment lien or the dower rights of the purchaser's wife. The court in Dessaussure stated that the passage of title in and out of the husband was so instantaneous that his seizin in the property was not sufficient to entitle his wife to dower as against the mortgagee. Dessaussure is distinguishable from the case at bar. In the instant case, Mrs. Risher's claim is not predicated upon a claim of dower. Her claim is based upon her fee simple ownership of an undivided one-half interest in the Lochweed property. Although we no longer have dower in South Carolina, we acknowledge that if we still had dower, under the ruling in Dessaussure, the mortgage held by the plaintiff would be superior to any claim of dower that Mrs. Risher may have claimed in the undivided one-half interest that her husband, Sidney Risher, mortgaged to the plaintiff. At the same time, however, with or without dower, Mrs. Risher's fee simple title in an undivided one-half interest in the Lochweed property would not be affected by the purchase money mortgage that was given by Mr. Risher covering his undivided one-half interest. The black letter law articulated by Jones on Mortgages, Section 85b, makes it clear that a wife's ownership interest in property is totally separate and distinct from any dower interest

that she may have in property owned by her husband. Even if a wife releases her dower interest, her undivided ownership interest is not mortgaged unless the mortgage is signed by her as a mortgagor.

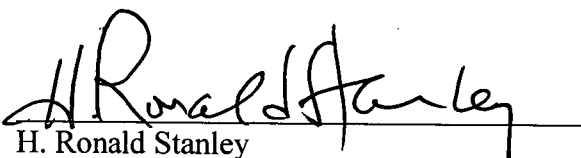
Finally, the lower court correctly found that the plaintiff's predecessor in interest, Midland Mortgage Corporation, and the closing attorney, through their own diligence, could have avoided the loss that was suffered. Our courts have consistently held that where there are two (2) parties who must suffer, the law looks with disfavor upon the party who, through due diligence, could have avoided the loss. Myrtle Beach Lumber Co. v. Willoughby, 276 S.C. 3, 274 S.E. 2d 423(1981); City Lumber co. v. Nat'l Sur Corp., 229 S.C. 115, 92 S.E. 2d 128(1956).

In the case at bar, Midland Mortgage Corporation prepared the closing documents and failed to include Cassandra Risher on the mortgage or a signature line for her on the mortgage. The closing attorney and Midland Mortgage Corporation had several opportunities to discover that the mortgage had not been executed by Mrs. Risher including when the deed and mortgage were recorded, when the title update was performed, when the final title policy was prepared and forwarded to the necessary parties and when the recorded deed and mortgage were forwarded to the necessary parties.

**CONCLUSION**

For the reasons stated herein, we believe the ruling of the lower court should be affirmed.

Respectfully Submitted

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Dated: July 25, 2012

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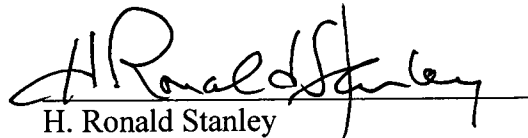
Of whom Cassandra S. Risher is.....Respondent.

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**CERTIFICATE OF SERVICE**

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I certify that I have on the 25<sup>th</sup> day of July, 2012, I served the **FINAL BRIEF OF RESPONDENT** by hand delivering (1) copy of the same to Appellant's attorney of record, Jennifer N. Stone, Esquire, 1812 Lincoln Street, Columbia, South Carolina 29201.



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