86152

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
MAR 12 2018
SC Court of Appeals

MidFirst Bank, Respondent,

v.

Mahasin K. Bowen as Personal Representative for the Estate of Mary Lee Samuel; Mahasin K. Bowen; Cecil Samuel a/k/a Cecil A. Samuel; Charles Samuel, Jr.; Earl Hassan Samuel; Kenneth Kareem Samuel; Kilgore Marketing Solutions dba RSVP Columbia; Tauheedah Mateen; Raymond Samuel a/k/a Shamsud-din Raymond Samuel; South Carolina Department of Motor Vehicles, Defendants,

Of Whom Mahasin K. Bowen, as Personal Representative for the Estate of Mary Lee Samuel, and individually is the Appellant.

Appellate Case No. 2016-001119

APPEAL FROM RICHLAND COUNTY
Joseph M. Strickland, Master in Equity

NOTICE OF MOTION AND MOTION TO RECONSIDER AND ALTER OR AMEND ORDER OR, IN THE ALTERNATIVE, PETITION FOR A PANEL REVIEW

YOU WILL PLEASE TAKE NOTICE that Appellant, Mahasin K. Bowen, by and through her undersigned attorney, moves this Court to reconsider and to alter or amend the Order issued and filed on February 28, 2018, or, in the alternative, for a panel review, to address the following:

The Court's terse decision, indicating a refusal to consider Appellant's arguments having to do with the entry of the judgment granting the Motion for Summary Judgment, which decision merely quoted from one case, has misapplied the law. It ignores altogether Rule 56(c), SCRCP. (While all of Appellant's issues and arguments should be considered, this Motion will focus on Issue II. (See A.Brief, p. 1)

In *Peterson v. Porter* (the one cited case), this Court held that Peterson (the plaintiff) raised

the issue (employer – employee relationship) for the first time in a motion to reconsider, alter or amend judgment (rather than during the summary judgment proceedings) and that, therefore, the issue was "not preserved for review." Peterson did not raise this issue in his complaint or at any other time prior to the motion to reconsider. This fact is an important distinction when considering the circumstances of present case.

The *Peterson* case cites *McClurg v. Deaton*, 380 S.C. 563, 579-80, 671 S.E.2d 87, 96 (Ct. App. 2008) for the forgoing proposition. That case did not involve summary judgment proceedings. In other words, Rule 56 was not involved. Deaton raised the issue (defendant's claim that the default judgment was incongruent with the damages pled in the complaint) for the first time in his motion to reconsider. He had filed no pleading in response to the complaint and was in default, but he had filed a motion to set aside default, which did not raise this issue. This case cannot be compared to the circumstances of the present case.

The *McClurg* case cites *Kiawah Prop. Owners Group v. Pub. Serv. Comm'n*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004), for this proposition. That case also did not involve summary judgment proceedings (Rule 56, again, was not involved). The plaintiff first raised the issue in its petition for rehearing. The issue was not raised in the complaint or at any time prior to a post-trial motion. This case too cannot be compared to the circumstances of the present case.

The *Kiawah Prop.* case cites *Peterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995) for this proposition, which was stated differently: "a party may not raise an issue in a motion to reconsider, alter or amend a judgment that could have been presented prior to the judgment." (emphasis added)

Although a somewhat curious statement,[1] the last quoted proposition is a much better

1 The statement surely meant that the issue may not be raised *for the first time* in a motion to reconsider.

statement of the law (especially when considering Rule 56 motions) than the propositions adopted but paraphrased by subsequent cases. Nevertheless, neither *Peterson v. Reid* nor the cases it credits for this proposition, to wit: C.A.H. v. L.H., 315 S.C. 389, 434 S.E.2d 268 (1993) and *Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990), involve summary judgment proceedings; and they, therefore, cannot be compared to the circumstances of the present case.

In summary, all of the cases leading up to *Peterson v. Porter*, which are cited as precedents for this "not preserved for review" proposition, have nothing whatsoever to do with Rule 56.

Peterson v. Porter holds that issues (questions of fact) are only to be considered if they are raised *during the summary judgment proceedings*. This holding fails to follow Rule 56(c); that is, unless *during the summary judgment proceedings* means *all matters before the court beginning with the complaint and continuing through the hearing on the motion for summary judgment.*

Rule 56(c), in relevant part, states:

> . . . The judgment sought shall be rendered forthwith **if 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 a judgment as a matter of law** . . . . (emphasis added)

The pleadings must be a part of summary judgment proceedings. Rule 56(c) requires that the court consider the pleadings before deciding "that there is no genuine issue as to any material fact." Stated another way, Rule 56(c) requires that a judgment granting a motion for summary judgment cannot be rendered **if the pleadings** (as potentially clarified by discovery and affidavits)[2] DO NOT **show that there is no genuine issue as to any material fact.**

---

2 The deposition of Ms. Bowen, interrogatories and admissions were not placed in evidence. Likewise, no affidavit addressing the intention of the parties with regard to the mobile home was placed in evidence. (R.pp. 202-210). The Record of Hearing contains comments with regard to a Manufactured Home, which comments were transcribed from the Amended Complaint, but none of these comments were supported by actual evidence. MidFirst Bank asserts that its Requests for Admissions (deemed admitted by Ms. Bowen) establish its case, but the Requests for Admission are not in evidence, and neither the Record of Hearing nor the Judgment makes any mention whatsoever thereof. (See Reply Brief, p.4)

In every case involving a motion for summary judgment, the pleadings (among potentially other matters) must be considered by the court before rendering a decision to grant the motion. The pleadings, which are a part of the record of the case, are, at all times, before the court and are, pursuant to Rule 56(c), an important part of "the summary judgment proceedings."

MidFirst Bank's Amended Complaint (R.p. 152) raised this issue, seeking reformation of the mortgage (see paragraphs 17, 18 and 19). This issue, which was first raised in 2013 – thirteen years after the loan was made (1999) – involves a material fact (actually, the primary fact).

Ms. Bowen, in her Answer to the Amended Complaint (R.p. 160), contested the issue of reformation of the mortgage and denied that it was the intention of all parties to the loan transaction that the mobile home be included as collateral (see paragraphs 16, 17, 18, 19, 20 and 21).

This contested issue, must be considered by the court before deciding to deny a trial on the merits. The court must conclude that this contested issue is either not genuine or does not involve a material fact. Ms. Bowen submits that such conclusion would be a breach of discretion. ("For summary judgment to be granted, it must be perfectly clear that no issue of fact is involved." Davenport v. Island Ford, Lincoln, Mercury, 320 S.C. 424, 426, 465 S.E.2d 737 (Ct. App. 1995).) In any event, no such conclusion was expressly made by the lower court.

Granted, Ms. Bowen (pro se) did not file any affidavits, in response to MidFirst Bank's motion, to demonstrate that there were one or more disputed factual issues; and one might argue that she should have done more than simply deny (in her Answer) MidFirst Bank's allegation (that the parties to the mortgage loan intended to do something that was not done at closing or within more than a decade thereafter) and that, because of this failure, she did not meet some burden. This argument does not follow the law, which is stated as follows:

> Under Rule 56(c), the party seeking summary judgment has the **initial responsibility** of demonstrating the absence of a genuine issue of material fact . . . **Once the moving party carries its initial burden**, the opposing party must do more than rest upon the mere allegations or denials of his pleadings, but must, by affidavit or otherwise, set forth specific facts to show that there is a genuine issue for trial." *Lord v. D&J Enters.*, 407 S.C. 544, 553 757 S.E.2d 695, 699 (2014) (citations omitted) (emphasis added).
>
> . . . When a motion for summary judgment is **made and supported** as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial . . . . Rule 56(e), SCRCP (emphasis added).

The key phrase here is, "once the moving party carries its initial burden." The burden is, at least in the first instance, on MidFirst Bank to show, not that there was, in fact, an "intention," but that there is no genuine issue of material fact. MidFirst Bank failed to meet this initial burden. The Judgment (R.p. 6) fails to make mention of its even attempting to meet this burden. Instead, it simply recites conclusions based upon facts not in evidence.

Ms. Bowen submits that "intention" is impossible to show without participation of the parties who allegedly intended to do something that was not done. Not a single party to the loan transaction appeared by affidavit or otherwise to address this issue.[3] Suffice it to say that MidFirst Bank failed to satisfy its initial burden to show that this material issue of fact (which it raised) was effectively no issue of fact at all. Therefore, Ms. Bowen had no burden to counter.

If Mr. Bowen had countered, she could only respond (as she effectively did in her Answer) that the mortgage reflects the parties' intention. The Court should consider: how does a party prove a negative? "No Court may justifiably ask a litigant to prove a negative . . . ." *State v. Lee*, 375 S.C. 394, 402, 653 S.E.2d 259, 263 (2007) dissent by Chief Justice Toal.

---

3 There was no involvement in this case by any of the participants in the loan (closed on December 23, 1999), i.e. SouthTrust Mortgage Corporation (lender) and Raymond Samuel (the only surviving mortgagor).

OTHER IMPORTANT CONSIDERATIONS

PRO SE DEFENDANT

Ms. Bowen was unrepresented through the hearing on MidFirst Bank's Motion for Summary Judgment. (A.Brief, p.3) Reasonable accommodations should be made to ensure that pro se litigants are afforded the opportunity to have their matter fairly heard. While this is not, or may not be, a rule or requirement, the courts should be mindful that justice must involve traditional notions of fair play, especially in a court of equity, as in this case. That said, there is no indication whatsoever in the record that Ms. Bowen (pro se) (who had timely responded to both the Complaint and the Amended Complaint) was assisted in any fashion by the court in order to level the playing field and "to do equity."

LEGAL DESCRIPTION UNAMBIGUOUS

The legal description of the mortgaged property, as stated in the mortgage (R.p. 52) and the initial Complaint, is unambiguous, and it fails to mention, or even imply, that a mobile home was intended to be mortgaged. (See Reply Brief, pp. 3-4) There was no finding that the mortgage is unambiguous, but there was certainly no finding (or even an argument) that the mortgage was ambiguous. Even if the mortgage were ambiguous (reasonably susceptible to more than one interpretation), in which case the court may consider matters outside the mortgage, this uncertainty itself is a question of fact. A reformation of an ambiguous mortgage cannot be accomplished by summary judgment (A.Brief, p. 17). There was no evidence suggesting a mutual mistake or pointing to an antecedent agreement with which the mortgage failed to conform. (See A.Brief, p. 19)

LEGAL DESCRIPTION UNILATERALLY REVISED BY MIDFIRST BANK

The legal description contained in the Amended Complaint is remarkably different from

the legal description in the mortgage. It derives its existence from a 2007 agreement whereby MidFirst Bank unilaterally revised the legal description (see A.Brief, p. 5-7); but importantly, this revised description – drawn up eight years after the mortgage – also fails to mention, or imply, that a mobile home was intended to be mortgaged.

None of the three plats referenced in the revised legal description depict a mobile home on the mortgaged land. (See A.Brief, p. 7)

The legal description attached to the Assignment of Mortgage to MidFirst Bank in 2008 – over eight years after the mortgage – also fails to mention a mobile home. (R.pp. 96-97)

MIDFIRST BANK RAISED BUT FAILED TO ADDRESS ISSUE OF PARTIES' INTENTION

MidFirst Bank (not Ms. Bowen) raised the issue that the mobile home (personal property), which was situated on the mortgaged land, was "intended" by the parties to the mortgage to be included as a part of the collateral for the mortgage loan. It then sought to avoid a trial on this issue (which was disputed by Ms. Bowen (pro se)) because it had no ability to prove that the parties' intention was contrary to the mortgage. It moved for a summary judgment and made no effort to address this issue by way of affidavits. The Record of Hearing and the Judgment make it clear that no evidence whatsoever on this issue was introduced by MidFirst Bank.

FAILURE OF EVIDENCE

The record is devoid of any arguments made at the hearing on the Motion for Summary Judgment, as there was, effectively, no hearing: no court reporter; no testimony; just a canned Record of Hearing; and the Record of Hearing (R.p. 202) does not describe any evidence, which was properly entered, to support its argument that the mobile home was intended to be mortgaged with the land.

There is absolutely no evidence before the court from which to resolve this issue in favor

of MidFirst Bank (to conclude that the parties to the mortgage intended that a mobile home be a part of the mortgaged property).

None of the evidence submitted by MidFirst Bank (through affidavits) supports, directly or indirectly, the matter of the intention of the parties to the loan with regard to the inclusion of the mobile home as a part of the collateral for the loan (See Reply Brief, pp. 1-3).

In conclusion, as MidFirst Bank failed to appropriately address this issue of "intention" (an issue which it raised and pursued throughout), it should be clear that it also failed to show that there was no genuine issue of material fact.

Please reconsider the genuine issues of material fact and the arguments set forth in the Appellant's Brief and the Reply Brief.

Respectfully submitted,

Leonard R. Jordan, Jr., ID #003221
JORDAN LAW FIRM
211 Veterans Road, Suite D
Columbia, South Carolina 29209
(803) 726-1950 Tel
(803) 726-1951 Fax
Email: ljordan@ljordanlaw.com
Attorney for Appellant

Columbia, South Carolina
March 12, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

MidFirst Bank, Respondent,

v.

Mahasin K. Bowen as Personal Representative for the Estate of Mary Lee Samuel; Mahasin K. Bowen; Cecil Samuel a/k/a Cecil A. Samuel; Charles Samuel, Jr.; Earl Hassan Samuel; Kenneth Kareem Samuel; Kilgore Marketing Solutions dba RSVP Columbia; Tauheedah Mateen; Raymond Samuel a/k/a Shamsud-din Raymond Samuel; South Carolina Department of Motor Vehicles, Defendants,

Of Whom Mahasin K. Bowen, as Personal Representative for the Estate of Mary Lee Samuel, and individually is the Appellant.

Appellate Case No. 2016-001119

APPEAL FROM RICHLAND COUNTY
Joseph M. Strickland, Master in Equity

CERTIFICATE OF MAILING

I, Kelly McVey of Jordan Law Firm, attorney for Appellant, Mahasin K. Bowen, hereby certify that I have, this 12th day of March, 2018, served a copy of the Notice of Motion and Motion to Reconsider and Alter or Amend Order or, in the Alternative, Petition for a Panel Review, upon Genevieve S. Johnson, Esquire, attorney for Respondent, MidFirst Bank, by mailing a copy thereof, postage prepaid, to the address indicated below:

Genevieve S. Johnson, Esquire
Brock and Scott, PLLC
3800 Fernandina Road, Suite 110
Columba, South Carolina 29210

Kelly McVey