THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master in Equity

Appellate Case No. 2015-000157
Case No. 2010-CP-42-4430

Wells Fargo Bank, N.A., successor-by-merger to Wachovia Bank, N.A., Respondent,

v.

Fallon Properties South Carolina, LLC, Timothy R. Fallon, Susan C. Fallon, Fallon Luminous Products Corporation, G. E. Business Capital Corporation, formerly Transamerica Business Capital Corporation, FSD Repurchase Solutions, LLC and South Carolina Department of Revenue, Defendants,

Of Whom Fallon Properties South Carolina, LLC, Timothy R. Fallon and Susan C. Fallon are the, Appellants.

FINAL BRIEF OF APPELLANTS

Rodney F. Pillsbury
25 Mills Ave.
Greenville SC 29605
(864) 241-9828
Counsel for Appellants

Alexander Hray, Jr.
389 E. Henry St., Suite 107
Spartanburg, South Carolina 29302
(864) 342-1111
Fax: (864) 342-1113
Attorney for Appellants

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STATEMENT OF ISSUE ON APPEAL

1. DID THE TRIAL COURT ERR IN FINDING THAT THE APPELLANTS WAIVED THEIR STATUTORY APPRAISAL RIGHTS?

STATEMENT OF THE CASE

On August 23, 2010 Wells Fargo Bank, N.A., Respondent, brought an action against Fallon Properties South Carolina, LLC, Timothy R. Fallon, and Susan C. Fallon, *et al.*, to foreclose its mortgage encumbering improved commercial real property located in Spartanburg County, South Carolina. Fallon Properties South Carolina, LLC was the borrower and mortgagor of Respondent's loan and Timothy R. Fallon and Susan C. Fallon were guarantors of the said loan. The remaining defendants in the foreclosure action were subordinate lien holders on the real property subject to the foreclosure.

In the foreclosure action the Respondent demanded deficiency judgment as to the Appellants. The Master's Judgment for Foreclosure and Sale was dated January 13, 2014 and filed on January 14, 2014. On February 3, 2014, pursuant to the Judgment for Foreclosure, the real property was sold at the Master's Sale. The sales price of the real property at the Master's Sale was less than the amount due on the indebtedness owed to the Respondent thereby giving rise to a deficiency judgment against the Appellants.

On April 4, 2014 Appellants' filed a timely Petition for Order of Appraisal ("Petition") pursuant to S.C. Code Ann. Section 29-3-680 (1976). A hearing was held before the Master in Equity on the Petition on December 11, 2014. By Order of the Master in Equity dated and filed December 15, 2014 the Petition was denied.

On January 15, 2015, Fallon Properties South Carolina, LLC, Timothy R. Fallon, and

Susan C. Fallon served the Notice of Appeal on Wells Fargo Bank, N.A.

ARGUMENT

I. BECAUSE APPELLANTS MUST BE NOTIFIED IN WRITING BY RESPONDENT BEFORE THE TRANSACTION THAT A WAIVER OF APPRAISAL RIGHTS WOULD BE REQUIRED THE COURT ERRED IN DENYING THE APPELLANTS' PETITION FOR ORDER OF APPRAISAL.

This appeal is from an Order of the Master in Equity on an equitable matter therefore under the proper standard of review on appeal the appellate court may review the evidence to determine facts in accordance with its own view of the preponderance of the evidence. *Tiger Inc. v. Fisher Argo, Inc.*, 301 S.C. 229, 391 S.E.2d 538, 543 (1989). The sole issue on appeal is whether the Respondent complied with the conditions of S.C. Code Ann. Section 29-3-680 (1976) (the "Statute") by which, *inter alia*, the process for waiving appraisal rights is detailed. The Statute was adopted by the South Carolina General Assemble in 1996 by Act No. 430, Section 5, of the Joint Acts and Resolutions. Prior to the adoption of the Statute the South Carolina supreme court, overruling precedent, held "the contractual waiver of appraisal rights invalid as against public policy." *SCN v. White*, 312 S.C. 384, 440 S.E.2d 868 (1994). After this holding and until the adoption of the Statute an attempt to have a defendant waive its appraisal rights was ineffective. Even with the adoption of the Statute waiver of the appraisal rights remains unenforceable with respect to foreclosures affecting a dwelling place and a consumer credit transaction. Even for transactions in which the waiver of appraisal rights is allowed to be given by a defendant specific steps must be taken in order for the waiver to be effective. It is undisputed that the transaction subject to this action is one in which a waiver of appraisal rights is allowable.

The Statute has a two prong requirement in order for a defendant to effectively waive its rights to an appraisal. For the first prong ("First Prong") subsection B of the Statute, in relevant part, makes the following requirement:

> . . . a defendant against whom a personal judgment may be taken on a real estate secured transaction may waive the appraisal rights as provided by this section if the debtors, makers, borrowers, and/or guarantors are notified in writing before the transaction that a waiver of appraisal rights will be required . . .

The second prong ("Second Prong") requirement of the Statute is as follows:

> . . . and upon signing a statement during the transaction similar to the following:
>
> "The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within thirty days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. THE UNDERSIGNED HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY."
>
> This waiver may be in any document relating to the transaction; however, the required language must be on a page containing the signature of the person

making the waiver and the capitalized sentence must be underlined, in capital letters, or disclosed in another prominent manner.

In this appeal the Appellants do not dispute Respondent's compliance with the Second Prong requirement of the Statute. The only question on appeal is whether the Respondent complied with the First Prong requirement. No specific cases dealing with the interpretation of this Statute as it relates to the requirements of the First Prong have been rendered; therefore, this appeal is a matter of first impression. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Ward v. West Oil Co., Inc.*, 387 S.C. 268, 273, 692 S.E.2d 516, 519 (2010). "If a statutes language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the Court has no right to look for or impose another meaning." *Id.* 273, 692 S.E.2d at 519. Further, "(A)ll rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonable discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." *Id.* 273 692 S.E.2d at 519.

Respondent concedes that the burden is on the Respondent to demonstrate its compliance with the Statute. (R. p. 45, lines 10-12). In the hearing on the Petition the Respondent attempted to demonstrate that it had complied with the requirements of the First Prong in four ways.

1. The Respondent introduced evidence that the Respondent had made a prior loan to the same Appellants secured by the same real property and that as a part of that prior loan transaction a waiver of appraisal rights was required and given; thereby, the Appellants would, or should, have been aware that the Respondent would also require a waiver of appraisal rights in this later loan which is the subject of this appeal. (R. p. 45, line 21 - p. 46 line 2). However, the

First Prong of the Statute is clear that for a particular transaction a written notification that a waiver of appraisal rights would be required must be made before the transaction being entered into by the parties to whom the notice is required. The only logical interpretation would be that specific notice has to be made for the specific transaction. The reading of the Statute indicts that the notice requirement is transaction specific and the Statute does not allow for a blanket general notice to be given to debtors or guarantors in order to satisfy the First Prong notification requirement.

2. The Respondent's witness testified with respect the normal practice of the Respondent in providing the First Prong notice to Respondent's borrowers in general (R. p. 41, line 17 - p. 42, line 14); however, the Respondent's witness did not, and could not, testify that the normal practice of providing the First Prong notice was followed in this transaction. (R. p. 43, lines 10-16). The normal practice would be to mail the First Prong notice to the borrower prior to the scheduled date for closing. The Respondent's normal practice does not require the First Prong notice to be signed by the borrower (R. p. 42, lines 9-14) nor is the First Prong notice retained as a part of the Respondents transaction records once the transaction has closed. (R. p. 42, lines 15-22). The Respondent did not, and according to the testimony of its witness, could not produce the First Prong notice document it asserts was provided to the Appellants. Countering the testimony of Respondent's witness Appellant Timothy R. Fallon ("Fallon") affirmatively testified that, with respect to this transaction, he received no correspondence from Respondent prior to, or other than, the transaction loan package with instructions to sign and return the same. (R. p. 44, line 18 - p. 15, line 1). The documents received in this package by

the Appellant were the transaction documents for the transaction and under the Statute would not qualify as the First Prong notice.

3. The Respondent introduced into evidence the Waiver of Appraisal Rights signed as a part of the transaction. On this document in regular size print is the statement "Furthermore, the undersigned acknowledges receipt of written notification before this transaction that a signed waiver of appraisal rights would be required during this transaction." (R. p. 62). This exhibit is the only written evidence produced with respect to the waiver of appraisal rights being given. However, as noted above, Fallon testified that he had only received one set of documents regarding this transaction. The question becomes, whether the Appellants are bound by a self-serving recital in a form document which was one of many documents in a closing package when there is direct testimony elicited at the hearing contradicting this recital. Fallon testified that he had not received any prior documents from the Respondent. (R. p. 44 line 21 - p. 15, line 1). Fallon testified that he had received a "ton" (of documents). (R. p. 44, lines 21-22). It was acknowledged by the Master in Equity that loan packages for transactions of this magnitude contain a large number of documents. (R. p. 48, lines 11-12). In the case of *Anderson Brothers Bank v. Adams*, 305 S.C. 25, 406 S.E.2d 173 (1991) which was filed prior to the adoption of the Statute the South Carolina supreme court held "that the waiver (as to guarantors) was ineffective, being '[a] statement hidden in small print at the end of a mortgage ..." (*Id.* 28, 406 S.E.2d at 174) and that case further held "that boilerplate language, inserted by Bank, at the end of a mortgage signed only by Debtors, is not binding upon Guarantors." (*Id.* at 28, 406 S.E.2d at 174). The *Anderson* case dealt with a guarantor not the borrower but is instructive and should likewise be applied in this case. In equity a self-serving, preprinted acknowledgement among a "ton" of

transactional documents should not be considered dispositive of a fact in the face of direct testimony that no First Prong notice had been given.

4. Finally, the Respondent presented into evidence a letter dated February 12, 2007 which Respondent had sent to Mr. Brian Price, the Appellants' closing attorney ("Attorney") for the transaction. (R. pp. 60-61). The letter indicates that one of the enclosures delivered to Attorney with the letter was a "Waiver of Appraisal Rights". The receipt of the letter preceded the date of the closing of the transaction and the Respondent argued, and the Master in Equity found, that receipt of the letter constituted notice to the Appellants that a waiver of appraisal rights would be required for the transaction and satisfied the First Prong notice requirement under the Statute. (R. p. 21 at p. 23) In fact, the Master in Equity based his finding solely on the Respondent's Exhibit Number 2. (R. p. 50, lines 16-18).

The Appellants concede that the Attorney received the subject loan package prior to the date of the transaction and that the package would have contained the waiver of appraisal rights as one of the Respondent's closing documents. However, the Appellants position is that the Master in Equity's finding that the letter satisfies the First Prong notice requirement is misplaced. It is not contested by the Appellants that an attorney is an agent for the party represented by the attorney; however, that is not the issue in this case. The issue is the interpretation of the verbiage used in the Statute allowing for the First Prong waiver. As earlier noted this case is one of first impression. The specific verbiage of the Statute allows for the appraisal rights to be waived if "the debtors, makers, borrowers, and/or guarantors are notified in writing before the transaction that a waiver of appraisal rights will be required." The Statute does not provide for notice to an agent of any of this parties to whom notice is required but rather

direct notice. The adoption of the Statute came after the holding in *SCN v. White* which held a contractual waiver of the right to statutory appraisal to be in violation of public policy of this state. The Statute partially modified the holding in the *SCN v. White*. As previously noted, the waiver of appraisal rights, even with the adoption of the Statute and by the specific terms of the Statute, is not allowed for transactions involving dwellings and consumer loans and the waiver of appraisal rights is also not allowed in any other transaction unless the First Prong and Second Prong tests are both met. Logically, if strict adherence to the requirements of the Statute is not established the waiver or appraisal rights remain a violation of public policy of this state as previously declared by our supreme court. The General Assembly saw fit to require this two pronged approach to ensure that debtors or guarantors in a transaction understand the significance of the rights being waived and not just waived as a perfunctory matter of course. For the Court to rule that the notice that a waiver of appraisal rights can be given to an agent of the parties waiving the right (whether the agent be an attorney at law or some other agent) seems to vitiate the need to give any prior notice at all. It is clear from the Statute that the First Prong notice needs to be actually received by the party to whom it is required to be given, otherwise the notice is of no use to that party.

CONCLUSION

For the reasons stated, this Court should reverse the order of the Master in Equity and remand the case to the Master in Equity with instructions to grant the Petition for Order of Appraisal.

Respectfully submitted,

July 6, 2018

Alexander Hray, Jr.
389 E. Henry St., Suite 107
Spartanburg, South Carolina 29302
(864) 342-1111
Fax: (864) 342-1113
Attorney for Appellants

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellants complies with Rule 211 (b) SCACR.

Alexander Hray, Jr.
389 E. Henry St., Suite 107
Spartanburg, South Carolina 29302
(864) 342-1111
Fax: (864) 342-1113
Attorney for Appellants