

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SUMTER COUNTY
COURT OF COMMON PLEAS

W. Jeffrey Young, Presiding Judge Third Judicial Circuit

Case No.: 2011-CP-43-282

First Citizens Bank and Trust Company, Inc.
f/k/a/ Community Resource Bank, N.A., Sumter
Region,

Respondent,

v.

Lance E. Jones,

Appellant.

FINAL BRIEF OF THE APPELLANT

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QUESTION PRESENTED:

Whether the Circuit Court erred in granting Respondent's Motion for Summary Judgment as to the Appellant's counterclaim of negligence asserted against the Respondent?

STATEMENT OF THE CASE

This is an appeal from the Circuit Court's grant of Summary Judgment to Respondent First Citizens Bank & Trust Company, Inc. (hereinafter "Bank") by Order dated December 28, 2011. Specifically, Appellant Lance E. Jones (hereinafter "Jones") only appeals the portion of the Order that granted Summary Judgment as to his counterclaim of negligence.

This action was commenced by the Bank on February 8, 2011 with the filing of a Summons and Complaint for breach of contract. Specifically, Bank alleged that Jones owed Bank the sum of \$49,137.21 as of December 20, 2010, together with interest, arising out of a promissory note entered into between the parties on or about November 18, 2006 and a loan modification agreement dated March 26, 2010. (R. pp. 18-24). Jones filed an Answer and Counterclaim dated April 13, 2011 and alleged, *inter alia*, negligence against the Bank and sought an award of actual damages and punitive damages. Jones also requested a jury trial. (R. pp. 25-29).

A hearing upon the Bank's motion for Summary Judgment was heard before the Circuit Court on December 12, 2011. By Order dated December 28, 2011, the Circuit Court did grant the Bank's motion for Summary Judgment as to the Bank's claim against Jones and awarded the Bank the sum of \$44,743.09 plus a per diem of interest for each day after June 27, 2011. The Order also granted Summary Judgment to Bank as to all of Jones' counterclaims. (R. pp. 5-14).

Jones received written notice of the entry of the Order granting Summary Judgment on January 9, 2012. On February 6, 2012, Jones did serve his Notice of Appeal on counsel of record for the Bank. (See Notice of Appeal). The sole issue in this appeal is whether the Circuit Court should have granted Summary Judgment as to Jones' counterclaim of negligence against the Bank.

STATEMENT OF THE FACTS

Jones entered into a loan and mortgage agreement with Community Resource Bank, N.A. on November 16, 2006 for the sum of \$65,000.00. As collateral for this loan, the Jones did pledge a certain 20.62 acre tract of land located in Sumter County. Community Resource Bank, N.A. was later purchased by First Citizens Bank and Trust Company, Inc. (R. pp. 18-19).

On July 15, 2008, Jones was involved in a serious motorcycle accident and was unable to work for several months. As a result of his loss of income, Jones was unable to pay some of his financial obligations including the 2008 real property taxes that were due and owing on the 20.62 acre tract. The property was eventually sold at a tax sale in December 2008, subject to Jones' right to redeem to the property within a year if all taxes, penalties and interest were paid. Despite his financial difficulties, Jones continued to make his monthly loan payments to the Bank. (R. pp. 77-79).

Over a period of years, Jones developed a relationship with Mr. Mark Mossell (hereinafter "Mossell"), who was employed by the Bank as Vice-President in their Sumter branch office. Mossell was the loan originator for Jones' loan that is subject of this litigation. Mossell and Jones talked frequently by telephone and in the Bank's Sumter office when Jones' made payments on the loan. (R. p. 96). Mossell and Jones met "regularly" during the time period when Jones was recovering from his injuries sustained in the motorcycle accident. (R. p. 99). They would typically converse about Jones' business and the conversation would normally last between 5 and 10 minutes. (R. p. 102). Jones appreciated the "small town bank" attention that he received from Mossell and would call upon him whenever he experienced any problems or needed assistance. (R. p. 77).

By notice dated October 23, 2009, the Sumter County Treasurer's office issued a Final Redemption notice to both Bank and Jones advising that the real property taxes in the amount of \$5,461.61 had to be paid by 5:00 p.m. on December 2, 2009 or a tax sale deed would be issued to the highest bidder. It is undisputed that both Bank and Jones received the October 23, 2009 notice and both had actual knowledge that the property taxes had to be paid before December 2, 2009. (R. pp. 82-83).

At some period in late October 2009 after the notice was sent, Jones and Mossell had a telephone conversation to discuss the delinquent property taxes. Jones asked for the Bank's assistance in loaning him the funds necessary for payment of the taxes and to pay the taxes and Mossell responded, "it would be taken care of." (R. p. 78). The Bank made the decision to pay the property taxes and a check in the amount of \$5,461.61 was requested by their accounting department to be mailed to the Sumter County Treasurer's office. (p.135). Bank never made a request to Jones that he assist or handle the act of delivering the check to the Sumter County Treasurer's office. (R. p. 83). It is undisputed that the check was never credited as being received by the Sumter County Treasurer's office and Jones' property was eventually sold by way of tax deed dated December 3, 2010. (R. p. 28; p. 34; p. 40).

ARGUMENT

Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRPC. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in a light most favorable to the nonmoving party. Silvester v. Spring Valley Country Club, 344 S.C. 280, 285, 543 S.E.2d 563, 566 (S.C. App. 2001).

The crux of this matter before the Court is that the Bank, by the affirmative acts of their employee, Mossell, and by virtue of the special relationship and course of dealing between Mossell and Jones, owed a duty to Jones to pay the property taxes due on his property and to exercise due care in the performance of this act. Whether the law recognizes a particular duty is an issue to be decided by the court. As a general rule, a person has no duty to act affirmatively to protect the interest of others. If an act is voluntarily undertaken, however, the actor assumes to duty to use due care. Carson v. Adgar, 326 S.C. 212, 217, 486 S.E.2d 3, 5 (1997).

The question of a voluntary undertaking by a person that creates a legal duty of care is generally fact specific and if the evidence provides an inference of an undertaking, it is a mixed question of law and fact for the jury to decide. Miller v. City of Camden, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997). See also Hurst v. Sandy, 329 S.C. 471, 494 S.E.2d 847 (S.C. App. 1997)(finding a jury issue as to the existence of a duty owed to buyers of a home and a civil engineer who inspected and certified the building plans but who had no contractual privity with the buyers); Cullum v. Mechanical Const., Inc., 344 S.C.426, 544 S.E.2d 838 (2001) (holding that a factual issue existed as to a duty of an architect to assure payment to a subcontractor of a home where contract documents may have created a special relationship); and Winburn v.

Insurance Co. of North America, 287 S.C. 435, 339 S.E.2d 142 (S.C.App. 1985) (jury question existed as to whether a duty was undertaken by an insurance company and its adjuster for repairs that were never made to plaintiff's boat after assurances were made by the adjuster to the plaintiff that the repairs would be made by a certain mechanic). An affirmative legal duty to act exists if created by statute, contract, relationship, status, property interest, or some other special circumstance. Carson at 217.

In this matter, a duty was created when the Bank's employee, Mossell, gave an affirmative response to Jones' request that the Bank loan him the funds necessary to pay the taxes and to have the taxes paid. Clearly, the payment of the taxes by the Bank was discretionary and the Bank could have justifiably made the decision not to pay the property taxes without breaching the contract. However, when Mossell responded "it will be taken care of" in response to Jones' request, the Bank undertook a duty to pay the property taxes which they failed to do. Mossell could have told Jones during their October 2009 conversation that Bank would provide the funds necessary to pay the taxes but that Jones was responsible for the physical act of delivering the check to the Treasurer's office. In that hypothetical situation, there would be no grounds for this appeal. Instead, there is certainly an inference from Mossell's statement "it will be taken care of" that he meant that the Bank would loan Jones the funds and take the responsibility of delivering the funds to the Sumter County Treasurer's Office. The Bank concedes this when it admitted that they never asked Jones to deliver the check or funds to the Treasurer's Office. (R. pp. 82-83). Because the evidence demonstrates an inference that the Bank voluntarily undertook the act of paying the taxes, a legal duty was created and it was improper for the Circuit Court to grant Summary Judgment as to Jones' counterclaim of negligence in this matter.

In addition to Mossell's affirmative act, it is the special relationship and course of dealing between Jones and Mossell that separates this case from typical bank-customer relationship. Generally, there is no fiduciary relationship in a bank-depositor relationship and Jones does not allege in this appeal that a fiduciary relationship existed in this matter. However, there was a course of dealing between Jones and Mossell over at least a three year period and Jones developed a level of trust in Mossell. The Bank and Mossell had assisted him in the past when his financial situation became unstable due to his motorcycle accident. Jones and Mossell typically communicated on a monthly basis for five or ten minutes and Jones would always call upon Mossell when any issues arose with regard to the Bank. It is important to note that when he received the tax notice, Jones immediately called Mossell to request his assistance, just as he had done in the past when any issue arose on his accounts at the Bank. Under these circumstances, due to their special relationship and course of dealing, it was reasonable for Jones to conclude that Bank and Mozell would do as they said and pay his property taxes.

In Caldwell v. Jim Walter Homes, Inc., 293 S.C. 229, 359 S.E.2d 518 (Ct. App. 1987), the Court of Appeals addressed a factual scenario similar to the case before the Court. Caldwell purchased a home from Jim Walter Homes subject to an installment sales contract. Caldwell was contractually obligated to pay the property taxes, but the record revealed that the tax notices were mailed to the Jim Walter Home's corporate office and they had been paying the taxes for a number of years. When the Caldwell's account became delinquent, Jim Walter Homes made the decision not to pay the delinquent taxes and failed to send Caldwell any of the notices they received from the treasurer's office. The property was eventually sold at a tax sale.

Caldwell eventually filed suit against Jim Walter Homes, Inc. alleging negligence. At trial, a jury returned a verdict for Caldwell. The Court of Appeals affirmed the verdict and held

that by “course of dealing” Jim Walter Homes undertook a duty to inform the Caldwells their property was in danger of being sold when Kershaw County officials notified it of this fact. Id at 519-520. While recognizing that the borrower in Caldwell did not receive the tax notices like Jones did, the “course of dealing” standard is still applicable here. Through Jones’ course of the dealing with Mozell and also by his affirmative act of stating the Bank would pay the property taxes, a legal duty to pay the property taxes was created.

Murray v. Bank of America, 354 S.C. 337, 580 S.E.2d 194 (S.C. App. 2003) is also particularly relevant to the case before the Court. An imposter opened an account in Murray’s name at Bank of America and eventually multiple checks were written against insufficient funds. Murray notified the bank that she had not opened the account and requested that the bank close the account and inform the merchants where the checks had been written that she was the victim of fraud. The bank, however, waited almost 30 days to close the account and never contacted any merchants. Murray was eventually arrested for writing fraudulent checks and later exonerated of all charges. She eventually brought an action against the bank alleging negligence among other causes of actions. The Court of Appeals held that there was a sufficient relationship between the parties to impose a duty of care upon the bank to Murray when she went to the bank seeking closure of the account. Murray at p. 198. Just like Murray, in this matter before the Court a request was made to a bank employee to take some action and an affirmative response was given to the request that created a legal duty.

When viewed in a light most favorable to Jones, it is clear based upon the record that a duty was created by the affirmative acts of the Bank to offer to pay the property taxes due on Jones’ property. Jones’ and Bank’s employee, Mossell, had developed a course of dealing over the years that made it reasonable for Jones to rely on Mossell’s affirmative response that the

property taxes would be “taken care of”. By offering to pay the property taxes, Bank undertook a legal duty arising outside of the contract between the parties. Bank admits that it never made any request to Jones’ to pay the property taxes and Bank had at least 30 days from the date the decision was made to pay the taxes (November 2, 2009 or earlier) and the deadline date for receipt of payment (December 2, 2009)(R. p. 83). The thirty days should have been a sufficient amount time for the Bank to properly ensure that a check was delivered to the Sumter County Treasurer’s Office. The Bank made the decision to pay the taxes without assistance from Jones and the end result is the taxes were never paid and Jones’ property was sold. Bank’s voluntary undertaking, coupled with the relationship status and course of dealing between Jones and Bank’s employee, Mossell, all combine to establish a legal duty of the Bank to pay the property taxes owed on Jones’ property and, therefore, it was improper for the Circuit Court to grant Summary Judgment in this matter.

CONCLUSION

For the foregoing reasons, Appellant Lance E. Jones respectfully requests that the Court reverse the Order of the Circuit Court dated December 28, 2011, granting Summary Judgment to the Respondent First Citizens Bank and Trust Company, Inc. with regard to Appellant's counterclaim for negligence and remand this matter to the Circuit Court.

Respectfully Submitted,



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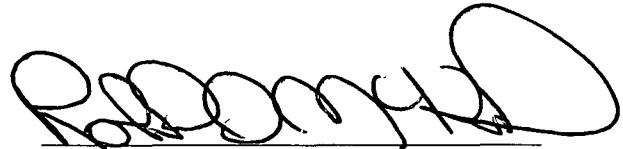
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APPELLANT'S CERTIFICATE OF COMPLIANCE WITH RULE 211(b), SCARP

I, the undersigned attorney for the Appellant, certify that the Final Brief of Appellant complies with Rule 211(b), SCACR.



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PROOF OF SERVICE

I certify that I have served one copy of the Final Brief of the Appellant, one copy of the Record on Appeal, and Appellant's Certificate of Compliance with Rule 211(b); SCACR on Hamilton Osborne, Jr., Esquire, by depositing a copy of it in the United States Mail, postage prepaid, on September 19, 2012; addressed to Hamilton Osborne, Jr., Esquire, Haynsworth, Sinkler, Boyd, P.A., Post Office Box 11889, Columbia, SC 29211-1889.



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