

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Presiding Judge

2010-CP-10-6009

Wells Fargo Bank, N.A.,.....Respondent,

v.

Ronald R. Watkins and Stefan Acres
Property Owners Association, Inc.,

Defendants,

Of Whom Ronald R. Watkins is the,.....Appellant.

2010-CP-10-6391

Wells Fargo Bank, N.A.,.....Respondent,

v.

Ronald R. Watkins and Stefan Acres
Property Owners Association, Inc.,

Defendants,

Of Whom Ronald R. Watkins is the,.....Appellant.

2010-CP-10-6945

Wells Fargo Bank, N.A.,.....Respondent,

v.

Ronald R. Watkins and Ashland
Plantation Property Owners
Association, Inc.,

Defendants,

Of Whom Ronald R. Watkins is the,.....Appellant.

FINAL BRIEF OF APPELLANT

KNOWLES LAW FIRM, PC

Brian M. Knowles, Esquire
P.O. Box 50201
Summerville, SC 29485
(843) 810-7596

Attorney for Appellant

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STATEMENT OF THE ISSUES ON APPEAL

WHETHER THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT AND MOTION FOR ORDER OF REFERENCE, AND IN FAILING TO FIND THE AFFIRMATIVE DEFENSE OF UNCLEAN HANDS AS PLED BY APPELLANT WAS APPLICABLE.

STATEMENT OF THE CASE

In 2010, Respondent brought three foreclosure lawsuits against Appellant related to three separate pieces of real estate. R. pp. 0010-0045. Appellant filed an Answer and Counterclaims in each respective matter, in which Appellant raised the affirmative defense of unclean hands based upon Respondent's unauthorized practice of law. R. pp. 0046-0073. Appellant then filed a Motion for Summary Judgment, Memorandum in Support, and Affidavit in Support in each matter, based upon the Respondent's unclean hands. R. pp. 0107-0294. Respondent filed a Motion to Dismiss or for Summary Judgment and a Motion for Order of Reference in each matter. R. pp. 0086-0106. The trial court held a hearing on September 6, 2011 on the above-referenced motions. By way of Order dated October 24, 2011, the trial court granted Respondent's Motion to Dismiss or for Summary Judgment and Motion for Order of Reference and denied Appellant's Motion for Summary Judgment. R. pp. 0001-0009. On November 15, 2011, Appellant served the Notice of Appeal on the Respondent. R. pp. 0295-0296.

FACTS

In 2007, Appellant refinanced three real estate loans with the Respondents, with each property possessing a first and second loan and mortgage.

As it relates to case bearing civil action number 2010-CP-10-6009 and on or about March 6, 2007, the subject matter loans, a first Mortgage in the amount of

\$150,500.00 along with a simultaneous second Mortgage in the amount of \$62,500.00, were closed at a Wachovia branch location in Charleston, South Carolina. R. pp. 0016, 0128-0129. Upon information and belief, Respondent contracted with LSI Title Agency, Inc. (hereinafter "LSI"), a title agency company which routinely provides real estate loan closing services, to perform the subject matter loan closings, including but not limited to, preparing the preliminary and final title insurance policies, performing the title abstract, preparing the legal documents, recording legal documents, obtaining payoffs, and disbursing funds. R. pp. 0016, 0126, 0128-029. Each of these actions undertaken by LSI, on behalf of the Respondent and at the Respondent's direction, constitutes the unauthorized practice of law, as established by a long line of South Carolina cases evolving since 1987. For decades, Lenders have been on notice of the requirements and guidelines established by the Supreme Court of South Carolina regarding real estate loan closings and how to avoid engaging in the unauthorized practice of law.

As it relates to case bearing civil action number 2010-CP-10-6391 and on or about March 6, 2007, the subject matter loans, a first Mortgage in the amount of \$155,500.00 along with a simultaneous second Mortgage in the amount of \$68,200.00, were closed at a Wachovia branch location in Charleston, South Carolina. R. pp. 0167, 0179-0180. Upon information and belief, Respondent contracted with LSI Title Agency, Inc. (hereinafter "LSI"), a title agency company which routinely provides real estate loan closing services, to perform the subject matter loan closings, including but not limited to, preparing the preliminary and final title insurance policies, performing the title abstract, preparing the legal documents, recording legal documents, obtaining payoffs, and disbursing funds. R. pp. 0167, 0177, 0179-0180. Each of these actions undertaken by

LSI, on behalf of the Respondent and at the Respondent's direction, constitutes the unauthorized practice of law, as above-mentioned.

As it relates to case bearing civil action number 2010-CP-10-6945 and on or about June 22, 2007, the subject matter loans, a first Mortgage in the amount of \$398,000.00 along with a simultaneous second Mortgage line of credit in the amount of \$49,200.00, were closed at a Wachovia branch location in Charleston, South Carolina. R. pp. 0216, 0223. Upon information and belief, Respondent contracted with National Settlement Services, a title agency company which routinely provides real estate loan closing services, to perform the subject matter loan closings, including but not limited to, preparing the preliminary and final title insurance policies, performing the title abstract, preparing the legal documents, recording legal documents, obtaining payoffs, and disbursing funds. R. pp. 0216, 0223, 0267-0288. Each of these actions undertaken by National Settlement Services, on behalf of the Respondent and at the Respondent's direction, constitutes the unauthorized practice of law, as above-mentioned.

Respondent instituted three separate foreclosure actions related to the three above-mentioned properties. Appellant contends that the Respondent is unable to prevail in law or equity, based upon Respondent's unclean hands for engaging in the unauthorized practice of law. As the record and transcript of proceedings reflect, the trial court erred in various findings, including but not limited to holding that Appellant's affirmative defense of unclean hands was not applicable and granting Respondent's motions.

ARGUMENT

THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT AND MOTION FOR ORDER OF REFERENCE, AND IN FAILING TO FIND THE

AFFIRMATIVE DEFENSE OF UNCLEAR HANDS AS PLED BY APPELLANT WAS APPLICABLE.

Standard of Review

“On appeal from the grant of a summary judgment motion, this Court applies the same standard as that required for the circuit court under Rule 56(c), SCRCP.” *Wachovia Bank, N.A. v. Coffey*, 398 S.C. 76, 698 S.E.2d 244 (Ct. App. 2010) (citing *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000)).

Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Under Rule 56(c), SCRCP, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. With respect to an issue upon which the nonmoving party has the burden of proof, this initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the nonmoving party’s case. Once the moving party carries its initial burden, the ‘opposing party must, under Rule 56(e), ‘do more than simply show that there is some metaphysical doubt as to the material facts’ but ‘must come forward with specific facts showing that there is a *genuine issue for trial.*’ The party opposing summary judgment cannot simply rest on mere allegations or denials contained in the pleadings. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. If triable issues exist, those issues must be submitted to the jury. Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. However, when plain, palpable, and undisputed facts exist on which reasonable minds cannot differ, summary judgment should be granted. J.S. Kahn, SOUTH CAROLINA RULES OF PROCEDURE ANNOTATED (2004) 256 (citing *Hedgepath v. AT&T*, 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001)).

Law and Analysis

I. RESPONENT’S MOTION TO DIMISS OR FOR SUMMARY JUDGMENT AND MOTION FOR ORDER OF REFERENCE SHOULD NOT HAVE BEEN GRANTED.

A. The Respondent should not be entitled to legal or equitable enforcement of its Promissory Note and/or Mortgage, as the Respondent engaged in the unauthorized practice of law, and thus has

unclean hands, which the trial court should have found applicable as raised by Appellant's affirmative defense of the same.

“All real estate and mortgage loan closings must be supervised by an attorney.” *Matrix Financial Services Corporation*, S.C. Supreme Court Op. No. 26859 (Aug. 8, 2011) (citing *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003); *State v. Buyers Serv. Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987)). “Performing a title search, preparing title and loan documents, and closing a loan without the supervision of an attorney constitutes the unauthorized practice of law. *Id.* (citing *Buyers Serv.*, 292 S.C. at 430-34, 357 S.E.2d at 17-19. Furthermore, the closing of a real estate loan without the supervision of an attorney constitutes the unauthorized practice of law by the lender, resulting in unclean hands and the inability to enforce the borrower's Promissory Note and Mortgage in law or equity. *Id.* (citing *Coffey, supra*).

The unauthorized practice of law is inherently prejudicial to not only the parties involved in the instant transaction but also to the public at large for the reason so cogently stated in *Buyers*:

The reason preparation of instruments by lay persons must be held to constitute the unauthorized practice of law is not for the economic protection of the legal profession. Rather, it is for the protection of the public from the potentially severe economic and emotional consequences which may flow from the erroneous advice give by persons untrained in the law. *Id.* (citing *Coffey, supra* at 248 (citing *Buyers Serv.*, 292 S.C. 426, 431, 357 S.E.2d 15, 18 (1987)).

The closing of a real estate loan requires multiple steps, which include but may not be limited to the preparation of documents, including the note and mortgage, preparation and issuance of preliminary and final title insurance policies, requesting of payoffs, disbursement of funds, recording of certain loan documents, and attorney supervision and advice to the borrower over the entire process. *See e.g. Buyers Serv.*, 292 S.C. 426, 357 S.E.2d 15 (1987); *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773; *In the*

Matter of Fortson, 361 S.C. 561, 606 S.E.2d 461 (2004); and *In The Matter of Boyce*, 364 S.C. 353, 613 S.E.2d 538 (2005). When an attorney fails to supervise the above-mentioned real estate loan closing steps or is present at a real estate loan closing to act only as a witness and/or notary public to the signing of the documents, this constitutes an improper “witness-only” closing in violation of S.C. law. *Id.* See also, *In re Calhoun*, 371 S.C. 403, 639 S.E.2d 679 (2007), *S.C. Bar Ethics Advisory Opinion 05-18*, *In the Matter of Lester*, 353 S.C. 246, 578 S.E.2d 7 (2003), *Ex Parte Wilson*, 356 S.C. 432, 589 S.E.2d 760 (2003), *In the Matter of Arsi*, 357 S.C. 8, 591 S.E.2d 627 (2004), *In the Matter of Pstrak*, 357 S.C. 1, 591 S.E.2d 623 (2003); See generally, *In re Wilkes*, 359 S.C. 540, 598 S.E.2d 272 (2004), *S.C. Bar Ethics Advisory Opinion 99-11*.

Respondent may argue that *Matrix* is the controlling case in this present matter; however, *Coffey* is the controlling case that correlates with the matters on this appeal. R. p. 0307, lines 18-24. *Matrix* is distinguishable from this present matter, as the Court in *Matrix* dealt with the limited issue of equitable subrogation, and the Court held that this equitable remedy was not available to a lender who had committed the unauthorized practice of law. *Matrix, supra*. The *Matrix* Court further noted that “[w]e do not believe the doctrine of unclean hands is the appropriate basis for resolution of this case.” *Matrix, supra* at 534. The cases at hand and *Coffey* do not involve equitable subrogation, rather an attempt to foreclose, while possessing unclean hands due to the unauthorized practice of law. At hand, Respondent concedes that all of the subject matter real estate closings were witness only closings. R. p. 0310, lines 17-19. The *Coffey* opinion held that if a lender possesses unclean hands, due to its unauthorized practice of law, then the lender is unable to recover in law or equity. *Coffey, supra*. Further, the *Coffey* Court discussed

that as it related to recovering at law that “this is consistent with South Carolina precedent asserting that no person be permitted to acquire a right of action from their own unlawful act and that one who participates in an unlawful act cannot recover damages for the consequences of that act.” *Coffey, supra*, (citing *Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 276-77, 437 S.E.2d 168, 170-71 (S.C. Ct. App. 1993)). “[O]ur supreme court refused to allow a public insurance-adjusting business to be compensated for the value of its performance attributable to the unauthorized practice of law.” *Id.* (citing *Linder v. Ins. Claims Consultants, Inc.*, 348 S.C. 477, 560 S.E.2d 612 (2002)). In *Coffey*, the Court found that the lender had committed the unauthorized practice of law by not following the regulations of our state as it relates to real estate loan closings, i.e. failing to have attorney supervision over the requisite real estate loan closing steps. *Id.* Therefore, the lender possessed unclean hands and was barred from seeking equitable relief. *Id.*

In the present case, the Respondent, by its own stipulation at the hearing, has engaged in one or more of the above-mentioned requirements of a real estate loan closing without the supervision of a licensed South Carolina attorney and through a title agency, which may include preparing loan closing documents, such as the preliminary and final title insurance policies, recording of documents, requesting of payoffs and disbursement of funds from the closing, and title search. R. p. 0310.

Furthermore and for the Court’s edification and as it relates to civil action number 2010-CP-10-6009, the loan closing documents on its face and taken as a whole evidence the above statement. R. pp. 0128-0166. Furthermore, the Respondent responded to Interrogatory number 11 of Defendant’s First Set of Interrogatories stating that “LSI was responsible for providing the title insurance commitment, the title insurance policy, the

recording of documents, and the disbursement of funds.” R. p. 0126. The HUD-1 Statement reflects that the place of settlement (closing) was at 2550 N. Redhill Avenue, Santa Ana, CA 92705 and that the settlement agent (closing agent) was LSI Title Agency, Inc., an Illinois Corporation. R. p. 0128. Furthermore, the first Mortgage reflects on the top, left hand corner of the first page, at Book X617 at Page 372, that the Mortgage recording was requested by World Savings Bank, along with Custom Title Solutions. R. p. 0133. The Mortgage, at Book X617 at Page 390, reflects that the first mortgage was not recorded by a closing attorney, and that the same was recorded and returned to Fidelity National Title at the same address as LSI. R. p. 0148. As it relates to the second Mortgage reflects on the top, left hand corner of the first page, at Book X617 at Page 391, that the Mortgage recording was requested by World Savings bank, along with Custom Title Solutions. R. p. 0150. The Mortgage, at Book X617 at Page 407, reflects that the second mortgage was not recorded by a closing attorney, and that the same was recorded and returned to Fidelity National Title at the same address as LSI. R. p. 0166.

The Respondent admits that the title insurance policies were prepared and issued by LSI. R. p. 0126. The issuance of a title insurance policy is based upon a title search of the property and would have been requested by the party issuing the title policies. The HUD-1 Statement reflects that LSI Aqua Help Division was paid for the title insurance policies. R. pp. 0128-0131. Furthermore and pursuant to the HUD-1 Statement, LSI was paid for the settlement or closing fee. R. pp. 0128-0131. Finally, the Respondent admits that LSI was responsible for disbursing the funds at closing, and the HUD-1 Statement reflect a payoff disbursement performed by LSI. R. pp. 0128-0131. Clearly, a South

Carolina lawyer did not close and/or supervise the subject matter loans, rather a national title company performed this service, in violation of our well settled state law.

As it relates to civil action number 2010-CP-10-6391, the loan closing documents on its face and taken as a whole evidence the above statement. R. pp. 0179-0215. Furthermore, the Respondent responded to Interrogatory number 11 of Defendant's First Set of Interrogatories stating that "LSI was responsible for providing the title insurance commitment, the title insurance policy, the recording of documents, and the disbursement of funds." R. p. 0177. The HUD-1 Statement reflects that the place of settlement (closing) was at 2550 N. Redhill Avenue, Santa Ana, CA 92705 and that the settlement agent (closing agent) was LSI Title Agency, Inc., an Illinois Corporation. R. p. 0179. Furthermore, the first Mortgage reflects on the top, left hand corner of the first page, at Book X617 at Page 408, that the Mortgage recording was requested by World Savings Bank, along with Custom Title Solutions. R. p. 0182. The Mortgage, at Book X617 at Page 426, reflects that the first mortgage was not recorded by a closing attorney, and that the same was recorded and returned to Fidelity National Title at the same address as LSI. R. p. 0197. As it relates to the second Mortgage reflects on the top, left hand corner of the first page, at Book X617 at Page 427, that the Mortgage recording was requested by World Savings bank, along with Custom Title Solutions. R. p. 0199. The Mortgage, at Book X617 at Page 443, reflects that the second mortgage was not recorded by a closing attorney, and that the same was recorded and returned to Fidelity National Title at the same address as LSI. R. p. 0215.

The Respondent admits that the title insurance policies were prepared and issued by LSI. R. p. 0177. The issuance of a title insurance policy is based upon a title search

of the property and would have been requested by the party issuing the title policies. The HUD-1 Statement reflects that LSI Aqua Help Division was paid for the title insurance policies. R. p. 0180. Furthermore and pursuant to the HUD-1 Statement, LSI was paid for the settlement or closing fee. R. p. 0180. Finally, the Respondent admits that LSI was responsible for disbursing the funds at closing, and the HUD-1 Statement reflect a payoff disbursement performed by LSI. R. p. 0179. Clearly, a South Carolina lawyer did not close and/or supervise the subject matter loans, rather a national title company performed this service, in violation of our well settled state law.

As it relates to civil action number 2010-CP-10-6945, the loan closing documents on its face and taken as a whole evidence the above statement. R. pp. 0223-00288. The HUD-1 Statement reflects that the place of settlement (closing) was at 373 Inverness Parkway, Ste. 100, Centennial, CO 80112 and that the settlement agent (closing agent) was National Settlement Services. R. p. 0223. Furthermore, the first Mortgage reflects on the top, left hand corner of the first page, at Book K633 at Page 214, that the Mortgage was prepared by World Savings Bank, Genet Solomon, and that the recording was requested by the same entity and person, along with Lenders First Choice. R. p. 0225. The Mortgage, at Book K 633 at Page 232, reflects that the first mortgage was not recorded by a closing attorney, and that the same was recorded and returned to Lenders First Choice. R. p. 0243. As it relates to the second Mortgage reflects on the top, left hand corner of the first page, at Book K633 at Page 233, that the Mortgage was prepared by World Savings Bank, Genet Solomon, and that the recording was requested by the same entity and person, along with Lenders First Choice, Recoding Department. R. p. 0245. The Mortgage, at Book K 633 at Page 253, reflects that the second mortgage was

not recorded by a closing attorney, and that the same was recorded and returned to Lenders First Choice. R. p. 0265.

The title insurance policies for both the first and second subject matter loans clearly reflect that the same were prepared/issued by Lenders First Choice (NSS) at the same address as National Settlement Services. R. pp. 0267-0286. The issuance of a title insurance policy is based upon a title search of the property and would have been requested by the party issuing the title policies. The HUD-1 Statement reflects that Lenders First Choice was paid for the title search, title insurance policies, wire fee, and delivery fee. R. p. 0223. Furthermore and pursuant to the HUD-1 Statement, National Settlement Services was paid for the settlement or closing fee and the signing fee. R. p. 0223. Finally, the HUD-1 Statement reflects a two payoff disbursements performed by National Settlement Services. R. p. 0223. Clearly, a South Carolina lawyer did not close and/or supervise the subject matter loans, rather a national title company performed this service, in violation of our well settled state law.

In each of these real estate loan closings, the Respondent's actions constitute the unauthorized practice of law, and therefore, the Respondent possesses unclean hands. The Respondent should not be entitled to enforce its subject matter loans, in law or equity, under the doctrine of the *Coffey* Court. Furthermore and since 1987 as established by prior precedent, lenders have been on notice of the State of South Carolina's real estate loan closing requirements, regulations, and laws, and the lenders have a choice whether to either comply with our state law or circumvent our state law. In the present cases, as alleged by Watkins by way of the affirmative defense of unclean hands, Respondent has circumvented South Carolina state law and, in doing so, the Respondent has engaged in

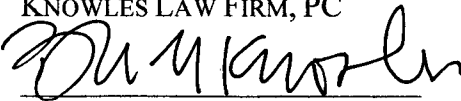
the unauthorized practice of law. As a matter of such, Respondent possesses unclean hands. Accordingly, the Respondent should not be permitted to enforce its subject matter notes and mortgages against Watkins, and the lower court erred in granting Respondent's Motion to Dismiss or for Summary Judgment and Motion for Order of Reference. R. pp. 0297-0311.

CONCLUSION

For the reasons stated, this Honorable Court should reverse the Order of the trial court, find that the Respondent's Motion to Dismiss or for Summary Judgment and Motion for Order of Reference should have been denied, as Respondent possesses unclean hands and is barred from recovery at law or equity in each of the three relevant cases, remand the matter for further proceedings if deemed necessary, and for other such further relief as appropriate.

Respectfully submitted,

November 7, 2012

KNOWLES LAW FIRM, PC

Brian M. Knowles, Esquire
P.O. Box 50201
Summerville, SC 29485
(843) 810-7596

Attorney for Appellant Ronald R. Watkins

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CERTIFICATE OF COUNSEL REGARDING COMPLIANCE WITH RULE 211(B)

Counsel for the Appellant hereby certifies that Appellant's Final Brief comply with Rule 211(b) of the South Carolina Appellate Court Rules.

November 7, 2012

KNOWLES LAW FIRM, PC



BRIAN M. KNOWLES

P.O. Box 50201

Summerville, SC 29485

(843) 810-7596

Attorney for Appellant

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PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant, Certificate of Counsel, and Proof of Service for the same on the following parties by depositing in the United States Mail, postage prepaid, on November 13, 2012, addressed to the following party of record:

Thomas E. Lydon, Esquire
P.O. Box 12519
Columbia, SC 29211

Attorney for Respondent Wells Fargo Bank, N.A.

November 13, 2012

KNOWLES LAW FIRM, PC

BRIAN M. KNOWLES
P.O. Box 50201
Summerville, SC 29485
(843) 810-7596

Attorney for Appellant