

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM PICKENS COUNTY
COURT OF COMMON PLEAS

R. Murray Hughes, Special Referee
Trial Court Case No.; Case No. 2010-CP-39-0352

RECEIVED

JUN 17 2013

SC Court of Appeals

Appellate Case No. 2012-211187

US Bank National Association as Successor Trustee to the Bank of America
National Assoc., Successor by Merger to LaSalle Bank National Association, as
Trustee for Morgan Stanley Mrtgage Loan Trust 2007-3XS; and
Americash Mortgage Corporation, Respondents,

v.

Barbara E. Bebout; Robert A. Swaynham a/k/a Robert Alec Swaynham;
Mortgage Electronic Systems, Inc. (Min#1001419-0060908012-1); National Bank,

Of whom,

Barbara E. Bebout and Robert A. Swaynham are Appellants.

BRIEF OF APPELLANTS

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STATEMENT OF THE ISSUES ON APPEAL

1. Did the creditors in this case fully comply with the provisions of Section 37-10-102?
2. Were the Defendants afforded a meaningful opportunity to have the attorney of their choice represent them in all matters of the transaction at issue in this case?
3. Did the creditors in this case take timely action to ensure that the Appellants attorney preference was honored.
4. Did the creditors in this case create or contribute to a situation where the Appellants would not have a meaningful opportunity to have the representation of a attorney of their own choosing pursuant to Section 37-10-102(a)?
5. Did the actions of the Respondents result in damages recoverable by the Appellants?
6. Do the actions of the Respondents require the imposition of a fine or penalty under Section 37-10-105?

STATEMENT OF THE CASE

This case was initiated by the filing of a Summons and Complaint on February 24, 2010, by the Plaintiff as the assignee of the Appellants' mortgage. Appellants filed an Answer, Counterclaim and Third Party Complaint against Respondent AmeriCash Mortgage Corporation. The case proceeded to trial on the Appellant's Second Amended Answer, Counterclaim and Third Party Complaint. This case was referred to the Special Referee pursuant Rule 53, SCRCF. A hearing was held and as a result thereof a *Special Referee's Report and Judgement of Foreclosure and Sale* and a *Findings of Fact in Regard to the Affirmative Claims Asserted by the Defendants and Third Party Plaintiffs, Barbara E. Bebout and Robert A. Swaynham A/k/a Robert Alec Swaynham* were both entered on February 23, 2012.

Appellants received notice of entry of the above decisions of the Special Referee on March 6, 2012. Appellant's served and filed a Notice of Appeal on April 4, 2012.

Appellants were represented below by Robert Ray of Greenville. They are represented on appeal by J. Falkner Wilkes of Greenville. Respondents Americash Mortgage Corporation is represented on appeal by Louis H. Lang of Columbia. Respondent U.S. Bank is represented by Thomas E. Lydon also of Columbia.

STATEMENT OF THE FACTS

This case arose out of personal loans secured by mortgages on the Defendants' home in Pickens County, South Carolina. 85-86. Barbara Bebout testified that she is married to Alec Swangham and that they reside in Pickens, South Carolina. 84. They have three children. 84. The Defendants constructed a home on their property in Pickens County through the use of bridge or construction loans. 85. To satisfy their construction debt the Defendants sought to obtain a \$500,000 permanent loan at five and one half percent interest with fixed monthly payments for a term of thirty years. 85-86; 239.

The Defendants filled out a form on-line at Lendingtree.com and were subsequently contacted by Tamara Pacak at AmeriCash. 86; 237. The Defendants then filled out a loan application and sent it to AmeriCash. 88. The Defendants informed Pacak that they wanted to have their attorney Ken Acker close the loan. 88-89; 241. Defendants pursued the loan because they believed that AmeriCash would be able to meet the desired terms of the loan and, that Acker would close the loan. 241. Defendants received no further documentation from AmeriCash prior to the closing. 242.

Swangham received a call from Pacak on the morning of November 20, 2006, informing him that a closing was set for that day at lunchtime at a restaurant

in Greenville. 242. On the same morning Bebout received a call from an attorney named Wyatt Willoughby. 93. At the time Willoughby called Bebout, she had no idea that there was a closing already scheduled. 93. When Willoughby told Bebout that he would be doing the closing, Bebout told Willoughby that she wanted Ken Acker to close the loan. 93. The lender's own records recorded the Defendant's preference to have Acker close the loan. 448; 452. Despite the clear preference to have their own attorney Ken Acker perform the closing, AmeriCash's records fail to clearly show any express waiver from that desire. 328; 448; 452. Plaintiff's also failed to add any definitive testimony that would establish a waiver by the Defendants' as to their attorney preference. 352-353.

The Defendants intended to borrow \$500,000. 91. According to Pacak the terms were to be one mortgage at 5.5 percent, and was supposed to be in both Bebout and Swangham's names. 91; 241. Subsequent to submitting a loan application the Defendants received no other papers from AmeriCash about the loan. 89. At the closing the Defendants discovered that the loan was only in Bebout's name. 89-90. They also discovered that the interest rate was not the 5.5 percent as had been represented by Pacak. 90. At the closing, instead of a single loan, AmeriCash presented two separate loans in Bebout's name only. 91. One loan was at almost twelve percent and the other at near eight percent.

Bebout testified that when Willoughby called her she expressed her concerns about getting the terms she expected. 93. During the phone call Willoughby did not express any problems or expected changes to the terms of the loan. 93.

Bebout did not learn of the closing until the day that the closing was scheduled. 94-95. Pacak scheduled the closing at a restaurant on the Defendants' lunch hour. 95. The Defendants had about three hours notice of the closing. 95. As requested of them, the Defendants met a man with a stack of papers who greeted them by name at the restaurant. 96. Swangham did not recall the man identifying himself by name but he did say that he was there to represent AmeriCash. 242. Swangham believed that the man was the Wyatt Willoughby, who had called Bebout. 243. Defendants believed that Sandifer was not at the closing. 243. Swangham testified that only Castro was present at the closing. 244. They all sat down together at a table during the lunch time rush. 96; 439. Castro began going through loan paperwork with the Defendants amid the rush of lunch hour. 98-99. As they went through the loan papers it became apparent that Bebout was the sole borrower and that the loan rates were not the same as what had been represented that they would be. 99-100. This resulted in the Defendants becoming pretty upset. 100; 244. They immediately called Pacak at AmeriCash. 100; 246-

247. Pacak's response was that this was all she could do for them and that it was a take it or leave it deal. 100; 285.

By the date of the closing the Defendant's balloon bridge loan was within days of being due in full. 100. The process with AmeriCash had taken so long to get to a closing that the Defendants were in a position where they felt like they had no other viable options. 100-101; 257; 285; 289-291. The mortgage representative told them that it would be best to just go ahead and get these loans to pay off the balloon payment on the bridge loan and refinance later. 101. Only during the litigation did the Defendants learn that the person they were actually dealing with at the restaurant was not Willoughby, but instead a Mr. Castro. 98.

Castro flipped through papers without giving the Defendants the opportunity to read them as he asked them to initial and sign a whole stack of papers. 102-103. There was apparently some documents that Swangham never signed or initialed. 246. One of the papers that Castro apparently had Bebout sign was a blank attorney preference form. 104-105. This form was filled in after the closing with the name of Wyatt Willoughby along with the name of an insurance company. 105. Most of the copies of documents that the Defendants were given at the closing were blank. 111. The Defendants never received a good faith estimate of what the loan would be prior to the closing. 112. At the closing the Castro had

Bebout sign a document concerning her right to a good faith estimate of the loan costs, but Castro never explained it, nor was any estimate ever provided. 113; 442.

Barbara Bebout testified that she did not recall seeing but a portion of the promissary note and mortgage. 480. She also testified that the note and mortgage were not explained to her. 481. Bebout learned that she was the sole borrower on the note on the day of closing. 484. Castro never went over or explained the Defendants' three day right to rescind the loan agreement. 108.

Subsequent to the closing the Defendants followed Castro's advise and attempted to contact Pacak to refinance the loans. 100. Pacak would not return their calls. 100.

Bebout testified that had she known ahead of time that her attorney Ken Acker was not going to be present to close the loan she would not have closed the loan. 170. Bebout would not have signed the loan documents but for the pressure and Castro's representations that she could use this loan to pay off the bridge loan and then simply refinance the loan. 171; 285. Bebout testified that Castro never explained any of the paperwork or her rights to her and that if she had been aware that she could have cancelled her loans, she would have. 188.

Kevin Bruner Sandifer, attorney at law, testified that he assisted Willoughby by closing loans from time to time. 190-192. Contrary to the testimony of Bebout,

Sandifer testified that he was present with Castro at the signing. 190-192. Bebout and Swangham testified that Kevein Sandifer was not present with Castro at the closing. 83; 243. Sandifer testified that he filled out the paperwork and admitted that he filled in the name of Wyatt Willoughby on the attorney preference form in the loan documents. 204. Sandifer admitted that he may have had Bebout sign the blank attorney preference form. 204. Sandifer admitted that he may have filled in Willoughby's name after the closing. 204. Sandifer could not even recall where the Defendant's closing was held. 215. At deposition Sandifer testified that he never recalled even ever having been to the restaurant where the closing was held. 215. Sandifer admitted that his name and Castro's name were switched on some of the forms. 223. Willoughby was not present at the closing and at some point prior to the trial, Willoughby was suspended from the practice of law. 213.

Dr. Phillip Swicegood from Wofford College testified for the Defendants. 224. Dr. Swicegood calculated the difference in present lump sum value of \$122,168.83 as the difference in what the Defendants had been promised by Pakac and what they were pressured into at closing. 228-230. The Defendants also paid a total in mortgage payments to various holders of the notes \$148,000, the benefit of which was lost through the foreclosure of the home. 250.

ARGUMENT

I. THE DEFENDANTS WERE DENIED A MEANINGFUL OPPORTUNITY TO HAVE AN ATTORNEY OF THEIR OWN CHOOSING IN ALL MATTERS OF THE TRANSACTION RELATING TO THE CLOSING.

In this case the record shows that AmeriCash was responsible for, organized or participated in the closing of the Appellants' loan. Section 37-10-102(a) of the South Carolina Code (Supp. 2010) provides, in pertinent part:

Whenever the primary purpose of a loan that is secured in whole or in part by a lien on real estate is for a personal, family or household purpose . . . [t]he creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor *in all matters of the transaction* relating to the closing of the transaction. . . .

Section 37-10-102(a) *emphasis added*.

To secure payment of their Notes, the Defendants gave Plaintiffs a real estate mortgage covering their real property. As a result, the Defendants were entitled to choose an attorney of their preference for the closing of the transaction pursuant to section 37-10-102(a). A violation of the Attorney Preference statute is enforced by section 37-10-105(A) of the South Carolina Code (Supp. 2010). The enforcement provision of the Attorney Preference statute provides, in pertinent part:

If a creditor violates a provision of this chapter, the debtor has a cause

of action . . . to recover actual damages and also a right in an action . . . to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars.

S.C. Code Ann. § 37-10-105(A) (Supp. 2010).

The attorney preference issue is distinct from the enforceability of the note and mortgage. *See Wells Fargo v. Smith*, 4988 (S.C.Ct.App. 6-13-2012); *See also* § 37-10-105(A). Separate from the issue of enforceability of the note and mortgage, a violation of the statute entitles the Defendants in this case to actual damages and a possible penalty between \$1,500 to \$7,500.

In this case the evidence shows that the Plaintiffs, whether through neglect or intentionally, created a high pressure situation by failing to give the Defendants more than a few hours notice of the closing. In addition to the lack of prior notice, AmeriCash delayed the closing to the point that the Defendants' construction loan balloon payment of over four hundred thousand dollars was within days of being due. Until they walked into the closing, the Defendants were under the belief that their attorney Ken Acker would perform the closing.

The evidence shows conclusively that AmeriCash was aware that the Defendants in this case wanted their attorney Acker to close the loan. This is evident by not only the testimony of the Defendants, but by the notes of

AmeriCash as well. It was uncontroverted that attorney Willoughby, AmeriCash's attorney, never attended the closing. Sandifer, who claimed to have conducted the closing, admitted that he may have had Barbara Bebout sign a blank attorney preference waiver at the closing and then after the closing, wrote Willoughby's name in the form as Bebout's attorney of choice. As neither Acker nor Willoughby performed the closing, the record clearly shows that the Defendants were not given their choice of attorneys.

AmeriCash never provided the Defendants with a meaningful choice sufficient to meet the requirements of Section 37-10-102(a). Here the evidence shows that when AmeriCash learned that the Defendants wanted Ken Acker they made contact with Acker, apparently to determine if he would appear at the closing to sign the already prepared documents. 452. Apparently, Acker indicated that they "do not do signings only". 452. It is clear that AmeriCash had performed most of the essential elements of the closing and sought to have an attorney perform a "signing only" closing. This is clearly contrary to the clear language of law which provides that "[t]he creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor *in all matters of the transaction relating to the closing of the transaction.*" Section 37-10-102(a) *emphasis added.*

Here, AmeriCash clearly did not provide the Defendants a meaningful opportunity to have the attorney according to their own preference to represent them in all matters of the transaction. AmeriCash allowed the closing to approach the due date of the construction loan and afforded the Defendants' attorney an opportunity to perform only a "signing only" closing rather than to represent the Defendants fully in the matter. The Defendants applied for a loan in August of 2006 and on August 31, 2006 the Defendants executed a Borrower Signature Authorization provided by AmeriCash. 87; 438. The record shows that AmeriCash provided an attorney preference form to Barbara Bebout on November 20, 2006, the date of the closing. 104; 440. An attorney preference disclosure made at closing fails to comply with the statute as the timing feature of section 37-10-102 imposes a brightline rule. Any disclosure not made contemporaneously with the credit application is untimely. King v. American General Finance, Inc., 386 S.C. 82, 91, 687 S.E.2d 321, 325 (2009). To permit a construction of section 37-10-102 as sanctioning the lender's furnishing the borrower with the attorney preference disclosure after the application was completed would undermine the legislative purpose "to protect borrowers." King v. American General Finance, Inc., 386 S.C. 82, 91, 687 S.E.2d 321, 325 (2009).

Had the Defendants had a meaningful opportunity to obtain the full

representation of their own attorney, they would not have walked in to a closing on hours notice only to discover that all of the terms of their loan had changed. Instead of a single loan, there were two loans. Instead of the 5.5 percent interest rate they expected, they now had rates of nearly eight and twelve percent. They were days away from having a balloon payment due on their bridge loan and AmeriCash's attorney was advising them that they should go ahead with the closing and just refinance later. Had the Defendants had their own attorney involved they would not have been given only hours notice of the closing, they would not have been pressured into the closing, nor would they have been advised to close loans on terms that were significantly different from what they expected. As a result of AmeriCash's failure to comply with the provision of Section 37-1-102(a) the Defendants entered a loan without the advice of an attorney of their own choosing.


The violation of Section 37-1-102(a) gives rise to the Defendant's right to recovery of actual damages as well as a fine of up to seven thousand five hundred dollars. In this case the Defendant's presented expert testimony as to the damages incurred by the Defendants. 228. Dr. Swicegood calculated the difference in present lump sum value of \$122,168.83 as the monetary difference in what the Defendants had been promised by Pakac and what they were pressured into at

closing. 228-230. The Defendants also testified that they paid a total in mortgage payments to various holders of the course of the notes totaling \$148,000, the benefit of which was lost through the foreclosure of the home. 250. In this case the record supports a damages finding of the amount of the difference in value between the expected and actual loans, the loss of value represented by the payments made by the Defendants, and a statutory fine.

CONCLUSION

The decision and judgment of the lower court should be reversed and/or amended to include a finding for the Defendants based on the Plaintiffs violation of Section 37-10-102(a) and an award of damages and fine as provided by Section 37-10-105(A).

Respectfully submitted,



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June 13, 2013.

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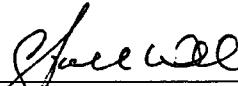
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Of whom,

Barbara E. Bebout and Robert A. Swaynham are Appellants.

CERTIFICATE OF COUNSEL

I certify that the Brief of Appellant is in compliance with Rule 211(b)
SCACR.


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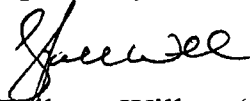
CERTIFICATE

I certify that on June 13, 2013, I served the Brief of Appellants and Certificate Rule 211(b) by placing a copy of same in the United States Mail, first class postage prepaid, addressed to counsel of record and others as indicated below:

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