

THE STATE OF SOUTH CAROLINA
The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No. 2010-CP-08-3514

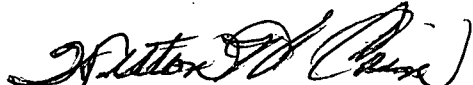
Branch Banking and Trust Company.....Respondents,

v.

Wilton H. Cain and Cassandra ^{Durrah} Cain.....Appellants,

FINAL BRIEF OF APPELLANTS

SEPTEMBER 4, 2012


Wilton H. Cain and Cassandra M. Cain
2886 Palmer Drive
Charleston, SC 29414
8435534649
Appellants

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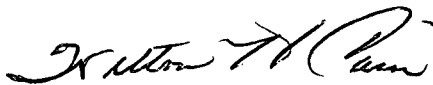

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TABLE OF AUTHORITIES

CASES

Dennes V. Moses, 18 WN. 537, 52 P. 333. (1898)

Tri-South Mortgage Investors V. Fountain, 266 SC. 141, 221 S.E. 2d 861 (1976)

Anderson Brother Bank V. Adams, 305 SC 25, 406 S.E. 2d 173 (1991)

SCN V. White, SC 420 S.E. 2d 514 (CT. App 1992)

SCN Mortgage Corp. V. White, 47 SCL. Rev. 37 Fall 1995

STATUTES

S.C. Code of Law Section 29-3-660 through 29-3-740

S.C. Code of Law Section 37-1-301 (11)

S.C. Code of Law Section 12-37-250

S.C. Code of Law Title 29-3-680

STATEMENT OF ISSUES ON APPEAL

- 1. DID THE COURT ERR BY RESCINDING THE ORDER GRANTING AN APPRAISAL AFTER A DEFICIENCY JUDGMENT.**
- 2. DID THE COURT ERR BY DENYING DEFENDANT MOTION TO RECONSIDER/ APPEAL ORDER TO RESCIND ORDER OF APPRAISAL.**
- 3. DID THE COURT ERR IN NOT ISSUING AND ORDER OF APPRAISAL.**
- 4. DID THE COURT ERR IN BY NOT GRANTING A HEARING AS REQUESTED ON MOTION TO RECONSIDER.**

STATEMENT OF THE CASE

On June 16, 2011 a foreclosure hearing was held before Honorable Robert E. Watson Master of Equity for Berkeley County. The Court Ordered the property foreclosed and sold a Deficiency Judgment was requested and Ordered on June 30, 2011 (R . Page 2)

September 2, 2011 final sale was held and only offer was by respondent for 121,500.00 with a Deficiency Judgment. On September 6, 2011 Defendant filed a Petition with clerk office and Proposed Order for Appraisal after a Deficiency Judgment with verified Petition with Berkeley County Clerk of The Court. (R. Pages 10-11)

On September 28, 2011, the Honorable Kristi Harrington signed an Order granting an Appraisal the order was not received by Defendant. The Court clerk (Becky) continuously state to defendant that Judge Harrington had not sent the order to office . (R. Page 3)

On October 29, 2011, the Defendant received two orders, one granting an Appraisal signed September 28, 2011, accompanied by an order signed October 27, 2011, rescinding the order of Appraisal stapled together. (R. pp 3-4)

On November 1, 2011 the Defendant filed a motion with the Berkeley County Clerk to Reconsider/Appeal Order to Rescind Order of Appraisal and Issue Order of Appraisal, on November 9, 2011 the Honorable Kristi Harrington signed an Order Denying Motion to Reconsider. (R. Pp 12-13), (R. Page 5)

STATEMENT OF THE CASE (CONT)

In all the above action the Defendant did not receive any notice of any hearing, nor was made aware of any Court Hearing on Issues. The Court decided without granting Defendant a Hearing. Any statement to the contrary that Defendant had knowledge of a hearing is a Fatal Error.

FACTS

The Defendants filing with the Clerk of Court in Berkeley County for an Order of Appraisal after a Deficiency Judgment was Proper and Timely order under South Carolina Code of Law 29-3-680 . (R. Page 10)

The offer in Court at the Foreclosure sale was 121,500.00 significantly below Debt of 201,660.89 with a Deficiency Judgment.

The foreclosure Statutes regarding Appraisal gives Defendant in a foreclosure where a Deficiency Judgment is demanded a right to petition the Court for an Order o Appraisal and be granted. Which could possibly result in Deficiency Judgment being adjusted or extinguished. S.C. Code of Law 29-3-680 through 29-3-740. Filed September 9, 2011 (R. Page 3)

The B section of S.C. Code 29-3-680 requires that in order for a Waiver of Appraisal Right to be effective, written notice must be sent to Defendant before the Loan Transaction. Which never happen, was not done, no notification was sent or ever mentioned prior to during or after.

The Statute also requires the Defendant Signature appear on Same Page of the Bold written notice of Waiver of Appraisal Right, IT DOES NOT. SEE EXHIBITS PAGE 5-7

ARGUMENTS

- I. THE APPLICATION FOR APPRAISAL SHOULD BE GRANTED BECAUSE TO DENY BASED ON A CONTRACTUAL WAIVER IS AGAINST PUBLIC POLICY . THE SOUTH CAROLINA SUPREME COURT RULED ON NUMEROUS OCCASION THAT CONTRACTUAL WAIVER IS INVALID AS AGAINST PUBLIC POLICY, RULINGS: DENNES V. MOSES, 18 WN. 537, 52 P.333. (1898) ANDERSON BROTHER BANK V. ADAMS, 305 S.C. 25, 406 S.E. 2d 173 (1991) SCN MORTGAGE CORP. V. WHITE, 47 SCL. REV.37 FALL 1995, SCN MORTGAGE V. WHITE, S.C. 420 SE. 2d 514 (CT. APP 1992) TRI-SOUTH MORTGAGE INVESTERS V. FOUNTAIN, 266 S.C. 141, 221 SE. 2d 861 (1971).
- II. FURTHER THE SOUTH CAROLINA LEGISLATORS INTENT AS WRITTEN BY S.C. STATE SENATOR THOMAS IN BILL S 565 MARCH 13, 2007 TO AMEND SECTION 29-3-680 (1976) [RELATING TO APPLICATION FOR APPRAISAL IN CONNECTION WITH A FORECLOSURE PROCEEDING, SO AS TO PROVIDE THAT THE STATUTORY RIGHT TO APPRAISAL PURSUANT TO APPLICATION TO THE COURT MUST NOT BE WAVED BY DEBTOR, MAKER, BORROWER, GUARANTOR, OR OTHER OBLIGOR , AND TO PROVIDE THAT A CREDITOR WHO ELECTS TO SEEK A PERSONAL JUDGMENT ON THE UNDERLYING DEBT AS APPOSED TO A FORECLOSURE OF THE MORTGAGE MAY RECOVER ONLY THE DIFFERENCE BETWEEN THE STATUTORY APPRAISAL VALUE AND THE AMOUNT DUE ON DEBT].
- III. FURTHER THE STATUTE DOES NOT ALLOW FOR THE SIGNATURE TO BE ON PRECEDING OR NEXT PAGE MUST BE ON THE EXACT PAGE WITH RAZED WRITTEN WAIVER LANGUAGE. THE INTENT OF THE LAW IS TO DRAW ATTENTION TO WAIVER STATEMENT OF APPRAISAL NOT TO ENTER IT BY TRICKERY. THE LOAN DOCUMENTS IN THE FILE CLEARLY IDENTIFIES TO THE COURT THE DEFENDANT SIGNATURE IS ON THE NEXT PAGE NOT SAME PAGE, EXHIBIT 00030619 VOL. 6868 PAGE 178 AT THE TOP OF PAGE AND ON THE BOTTOM PAGE 13 OF 15. IT FURTHER SHOWS THE SIGNATURE OF DEFENDANTS ON PAGE 00030619 VOL. 6868 PAGE 179 AT THE TOP OF PAGE AND PAGE 14 OF 15 AT THE BOTTOM. THE AFFIDAVIT VERIFYING SIGNATURE IS ON PAGE 180 PAGE 15 OF 15 SIGN BY NOTARY PUBLIC ELIZABETH O. GUMB THE 19 DAY OF SEPTEMBER 2007. THEREBY FAILING TO MEET REQUIREMENTS OF SOUTH CAROLINA CODE OF LAWW 29-3-680.

IV. FURTHER IN THE SIGNING, OF THE LOAN THERE WAS NEVER ANY MENTION OF A WAIVER OF APPRAISAL RIGHTS, AT THE CLOSING, WE WERE GIVEN THE KEY AND INFORMED THERE WOULD BE A COPY OF THE LOAN PAPERS MAILED TO US ON AN A ELECTRONIC DISK, AND THE ATTORNEY AT THE CLOSING WAS CENTEX CORPORATION ATTORNEY.

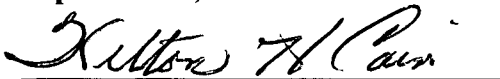
V. FURTHER THE STATE OF SOUTH CAROLINA LEGISLATOR INTENT AND PURPOSE IS THAT NO ONE SIGN A WAVIER WITHOUT BEING POSITIVELY AWARE OF THE SIGNING OF THE WAIVER. WE WERE NOT AWARE OF THE SIGNING, THE LEGISLATOR PURPOSE OF THE LAW IS ALSO THAT NO ONE SIGN A WAIVER WITHOUT FULL KNOWLEDGE AND UNDERSTANDING OF IT MEANING. THERE WERE SO MANY PAGES OF THE LOAN DOCUMENTS AND MRS. CAIN HAD JUST RECIEVED A STEM CELL TRANSPLANT FROM ACUTE MYLEOID LEUKIEMA AND BECAME VERY TIRED WHEN THEY SAID JUST SIGN HERE, NO WAVIER WAS MENTION.

CONCLUSION

FOR THE REASONS STATED, THIS COURT SHOULD REVERSE THE JUDGMENT OF THE CIRCUIT COURT BY JUDGE KRISTI HARRINGTON AND ISSUE AN ORDER OF APPRAISAL.

RESPECTFULLY SUBMITTED,

September 4, 2012



Wilton H. Cain and Cassandra M. Cain
2886 Palmer Drive
Charleston, S.C. 29414
(843) 553-4649
Appellants

400152443

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence, all of which shall be additional sums secured by this Security Instrument.

23. Release. Upon payment of all sums secured by this Security Instrument, this Security Instrument shall become null and void. Lender shall release this Security Instrument. Borrower shall pay any recordation costs. Lender may charge Borrower a fee for releasing this Security Instrument, but only if the fee is paid to a third party for services rendered and the charging of the fee is permitted under Applicable Law.

24. Homestead Waiver. Borrower waives all rights of homestead exemption in the Property to the extent allowed by Applicable Law.

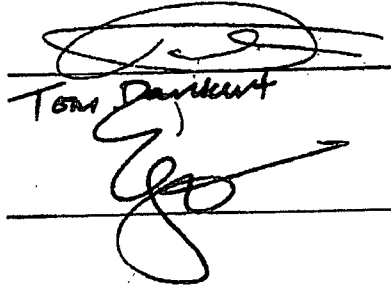
25. Waiver of Appraisal Rights. The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within 30 days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal 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. TO THE EXTENT PERMITTED BY LAW, 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 shall not apply so long as the Property is used as a dwelling place as defined in Section 12-37-250 of the South Carolina Code of Laws.

26. Future Advances. The lien of this Security Instrument shall secure the existing indebtedness under the Note and any future advances made under this Security Instrument up to 150% of the original principal amount of the Note plus interest thereon, attorneys' fees and court costs.



BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it

Signed, sealed and delivered in the presence of


Tom Durrant


WILTON H CAIN (Seal)
-Borrower


CASSANDRA M DURRAH-CAIN (Seal)
-Borrower

(Seal)
-Borrower

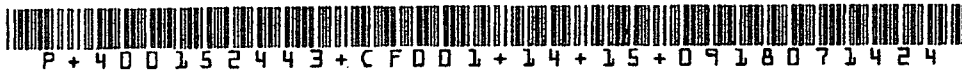
(Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower



STATE OF SOUTH CAROLINA,

I,

Ego

Ego

Charleston County ss

do hereby certify that

Wilton H. Cain and Cassandra M. Durnah-Cain

personally appeared before me this day and acknowledged the due execution of the foregoing instrument

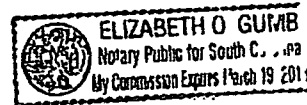
Witness my hand and official seal this

19 day of September 2007

Ego

Notary Public for South Carolina

My Commission Expires



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CERTIFICATE

**I CERTIFY THAT THE FINAL BRIEF COMPLIES WITH RULE 211 (B) WITH
REFERENCES TO THE RECORD IN TRACKING NO. 2011-205089 .**

SEPTEMBER 4, 2012



**WILTON H. AND CASSANDRA M. CAIN
2886 PALMER DR.
CHARLESTON, SC
843-553-4649**

**THE STATE OF SOUTH CAROLINA
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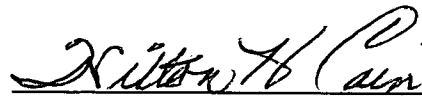
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PROOF OF SERVICE

**I CERTIFY THAT I HAVE SERVED THE APPELLANTS FINAL BRIEF
TRACKING NO. 2011-205089 ON RESPONDENTS BY DEPOSITING A COPY IN THE
U.S. MAIL, POSTAGE PREPAID, ON SEPTEMBER 4, 2012, ADDRESSED TO JASON
D. WYMAN (SC BAR # 100271) ROGER TOWNSEND & THOMAS PC AT 220
EXECUTIVE CENTER DRIVE (29210) P.O. BOX 100200 COLUMBIA SC 29202-3200.**



**WILTON H. AND CASSANDRA M. CAIN
2886 PALMER DR.
CHARLESTON, SC
843-553-4649**