

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Hon. R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2013-001516
Trial Court Case No. 2011-CP-10-07407

Capital Bank, N.A.,

Respondent,

v.

Charles A. Moore a/k/a
Charles A.B. Moore

Appellant.

REPLY BRIEF OF APPELLANT

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COUNTER STATEMENT OF FACTS

Respondent's Statement of Facts appears on pages 2-3 of its Brief, and contains certain matters that are disputed. In particular, Appellant has disputed the following facts as stated by Respondent, all of which Respondent attempted to establish by the Foster Affidavit, concerning which Appellant has already provided detailed arguments in Appellant's initial Brief:

1. Appellant disputes that Respondent has proven that First National Bank of the South is Respondent's predecessor in interest.
2. Appellant disputes that the July 16, 2010 Purchase and Assumption Agreement assigned the Note to Respondent. This alleged agreement is not part of the record in this case.
3. Appellant disputes the alleged merger, since no sworn or certified copies of any documents proving the merger were attached to Respondent's Motion for Summary Judgment (MSJ, R. pp. 27-40).
4. Appellant disputes that Respondent is the current owner and holder of the Note. This statement is a legal conclusion concerning the application of the law of negotiable instruments to a question of ultimate fact. In addition, no sworn or certified copy of the Note was attached to the MSJ, and no allegation about Respondent being the owner and holder of the Note was made in Respondent's affidavits.
5. On page 3 of Respondent's Brief, Respondent improperly introduces new factual allegations that are not part of the record in this case. In particular, Respondent

claims that Randy Foster is the Vice President for Other Real Estate Owned for the Respondent. This factual allegation was not contained in the Foster Affidavit, which only alleged that Randy Foster was an unspecified employee of Respondent (R. p. 28, ¶ 1). This factual allegation was therefore not submitted to the trial judge in the first instance, so could not have been relied upon by him in his ruling, and should be disregarded by the appellate court.

6. None of the documents that were attached to the Foster affidavit, which are being relied upon by Respondent, were properly submitted to the trial court, since they were not sworn or certified copies of the original documents.

STANDARD OF REVIEW

Appellant adopts Respondent's Standard of Review section of Respondent's Brief, as it appears to properly state the law on this issue.

ARGUMENTS CONCEDED BY RESPONDENT

Subject to Respondent's argument that Appellant's arguments were not properly preserved, there are numerous arguments of Appellant that Respondent does not address, and therefore concedes. In particular, Respondent fails to counter the following arguments made in Appellant's Brief concerning the competency and admissibility of the Foster Affidavit and the attached documents:

1. Burden of proof. Respondent does not contest Appellant's argument that Respondent is the one that bears the burden of proof upon bringing a summary

judgment motion in establishing the absence of a genuine issue of material fact.

2. Improper affidavit form. Respondent does not contest Appellant's argument that the alleged Foster Affidavit fails to meet the format requirements of a proper affidavit. In other words, it is not really an affidavit at all due to the alleged defects. This failure is critical, since Respondent cannot win on summary judgment without a proper affidavit establishing the facts alleged by Respondent.
3. No proof of agency. Respondent does not contest Appellant's argument, based on binding South Carolina appellate law, that Respondent did not establish Randy Foster's authorization to act as Respondent's agent in preparing and submitting the Foster Affidavit in this case. Although Randy Foster made a self-serving statement that he was authorized to make the affidavit for the Respondent, there is nothing in the record showing that Respondent itself acted to establish Randy Foster's authority to make the affidavit on Respondent's behalf.

ARGUMENTS CONTESTED BY RESPONDENT

The statement of issues of Appellant and Respondent differ. Respondent did not file a cross appeal. Respondent identifies three issues, and Appellant states only two. Essentially, Appellant deals with whether or not Appellant is liable to Respondent in Appellant's second issue, while Respondent deals with this question in Respondent's first

and third issues. Appellant requests that the court deal with the issues as framed by the Appellant.

Appellant's first issue concerns whether the granting of summary judgment to the Respondent was premature, due to incomplete discovery in this case. In addressing this issue, Respondent first claims that Appellant has failed to properly preserve this argument for appellate review. Respondent's position is based on the fact that Appellant did not move that the trial judge continue the summary judgment hearing until such time as discovery could be completed. Respondent cites *Pryor v. Northwest Apartments, Ltd.*, 321 S.C. 524, 529, 469 S.E.2d 630,633 (Ct. App. 1996) in support of this contention. However, Appellant believes that the facts of this case are distinguishable from the *Pryor* case. In the present case, unlike the *Pryor* case, there exists a consent discovery scheduling order, which was relied upon by the Appellant, and which provided additional time to complete discovery (R. p. 1). That scheduling order was entered by another judge, with the consent of both parties, and the trial court was without authority to modify it without proper notice and hearing, which did not occur. Appellant should have been able to rely upon that scheduling order, especially since Respondent consented to it, and Appellant believes that the trial court abused its discretion by terminating discovery prior to the terms of that order.

Appellant's next issue concerns whether or not summary judgment was proper based on what Appellant alleges is incompetent and inadmissible evidence, primarily in the form of the Foster Affidavit, which does not satisfy Respondent's burden of proof to demonstrate the absence of a genuine issue of material fact. Respondent first addresses this issue in Respondent's issue number one concerning whether or not Respondent

proved that there was no genuine issue of material fact regarding Appellant's liability under the Note.

Respondent first claims that Appellant did not properly preserve his arguments on this issue, except for arguments regarding Randy Foster's personal knowledge. Respondent's allegations are not accurate on this issue. As can be seen from the transcript of the February 12, 2013 summary judgment hearing (R. p. 102, lines 17-25), Appellant also addressed the issue of alleged faulty assignment of the Note. On pages 10-11 of the MSJ Transcript (R. p. 104, lines 18-25 through p. 105, lines 1-3), Appellant addressed the issue of the improper form of the alleged affidavit, as well as the burden of proof argument. On page 11 of that same transcript (R. p. 105, lines 3-14), Appellant attempted to argue about the competency of the Foster Affidavit, but the court did not allow it, due to the trial judge's having read the Foster Affidavit and finding that it was competent. This is the same page where the Appellant raises the issue regarding Randy Foster's lack of personal knowledge to make the affidavit, which Respondent concedes was properly preserved. It is true that Appellant was not allowed to raise all of the reasons at the MSJ hearing about why the Foster Affidavit was incompetent and inadmissible, but the argument on that issue was properly made and ruled upon by the trial judge. As a matter of fact, on page 11 of the MSJ Transcript (R. p. 105, lines 17-25), the trial judge stated:

"The Court: You can challenge that. I have read the affidavit and I disagree with you. I think it's sufficient.

Mr. Cantrell: Okay, Your Honor. Okay. I've got a number of affidavit related points I'm skipping through those as Your Honor's indicated...

The Court: I think the affidavit's fine. You can challenge that affidavit at [sic] any basis you want to. I think it's fine. ..."

It would be unfair for the appellate court to require the Appellant to risk contempt of court to pursue an issue that the trial judge had properly ruled was preserved for appellate review upon any basis that the Appellant chose to contest it. It appears that the trial judge also disagrees with the Respondent that Appellant's arguments regarding the competency and admissibility of the Foster Affidavit and its attached exhibits were not properly preserved.

Respondent next claims that even if Appellant's arguments relating to the Foster Affidavit were properly preserved, that they are without merit. Respondent's first claim in support of this argument concerns whether or not Randy Foster had the necessary personal knowledge, as required by Rule 56(e), SCRC, to make the affidavit. It is unclear how Respondent's counsel knows that the affiant had personal knowledge, when the most the affiant stated in his alleged affidavit was that he had only "knowledge" of unspecified "records" (R. p. 28, ¶ 1), as previously pointed out by Appellant in his initial Brief (Brief App., p. 10). Mr. Foster did not allege personal knowledge, and also did not allege that the records consulted were business records of the Respondent, let alone alleging that the business records met the standard as required by Rule 803(6), SCRE. The affiant neither claims to be a document custodian for Respondent, nor does he establish the necessary qualifications to be an "other qualified witness" under that Rule. At most, he claims to be an unspecified employee of Respondent, which is not sufficient to meet the burden required to introduce the alleged business records, some of which are not even records created by Respondent, and therefore constitute nothing more than

hearsay. Appellant objects to Respondent's counsel merely assuming that these facts are true, even though not alleged by the affiant. Respondent cites a case for the proposition that corporate officers are assumed to have personal knowledge of the acts of their corporations, but Respondent ignores the fact that Randy Foster was never identified as a corporate officer in his alleged affidavit. That alleged additional fact has been supplied by Respondent's counsel, and was never properly brought before the trial judge, and should therefore be ignored by the appellate court as well.

Interestingly, on page 10 of Respondent's Brief, Respondent concedes that a "witness must have personal knowledge of the matter and must swear or affirm to tell the truth", neither of which occurred in this case, since the affiant alleged only "knowledge" obtained from unspecified "records", and there is nowhere in the affidavit where the affiant swears or affirms that the statements made are the truth, which is one of the reasons why Appellant claims that he alleged affidavit is not really an affidavit at all, and incompetent to support the granting of summary judgment against Appellant.

Respondent next claims that the Foster Affidavit and its attached exhibits are admissible for the purpose of granting summary judgment. Respondent bases this claim on the alleged existence of Randy Foster's "personal knowledge", although he never alleges such, and also upon Respondent's counsel's alleged additional factual supplementation that Randy Foster is actually a corporate officer of Respondent, which in itself is an inadmissible and unpreserved factual allegation that does not appear in the appellate record, and was never presented to the trial court.

Appellant respectfully disagrees that the Foster Affidavit exhibits are admissible as business records of Respondent, for the reasons already stated, including the fact that

some of them are not even records of the Respondent, which casts great doubt on Randy Foster's credibility; since he was willing to try to introduce them as records of the Respondent. Although the trial court does have discretion in admitting evidence, there must be some basis upon which to do that, and when the necessary foundation for the personal knowledge of the affiant and for the alleged business records has not been produced to the trial court, then admitting such evidence is an abuse of discretion, which should be reversed by the appellate court.

Respondent's counsel continues on page 12 of Respondent's Brief to make up more alleged facts concerning Randy Foster's position with Respondent, but there is no support for these allegations in the record on appeal.

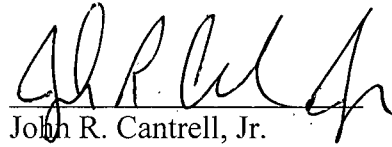
Respondent claims that the Appellant was not prejudiced by the admission of these alleged business record exhibits attached to the Foster Affidavit. However, without these exhibits, which are necessary to satisfy Rule 56(e), SCRCP's requirement that "sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith", Respondent would not have been able to acquire an order from the trial court, which currently establishes Appellant's liability to Respondent under the Note, thereby prejudicing Appellant, and also depriving Appellant of a trial on disputed genuine issues of material fact, as has more fully been alleged in Appellant's initial Brief. Appellant disagrees that the Foster Affidavit allegations in the main body of the affidavit would have established Appellant's liability to Respondent independently from the alleged business record exhibits attached to the Foster Affidavit, both due to the requirement noted above in Rule 56(e), SCRCP about having to attach those documents to the affidavit, and also due to the fact that nowhere in the Foster

Affidavit (R. pp. 28-29) does Randy Foster even allege that Respondent is the owner or holder of the Note in question, contrary to Respondent's contention otherwise in the last paragraph of Respondent's Brief (Brief Resp., p. 12). To be certain, Randy Foster does allege in paragraph 3 of the Foster Affidavit that the Note was assigned from the FDIC to NAFH National Bank pursuant to a July 16, 2010 assignment, but this is far from alleging that Capital Bank, N.A. was the owner and holder of the Note on the date when Respondent's collection action was filed on October 12, 2011. Indeed, even this assignment allegation fails, both due to the fact that a sworn or certified copy of the alleged assignment was not attached to the Foster Affidavit as required by Rule 56(e), SCRCP, but also due to the fact that the question of whether or not the Note was properly assigned to the Respondent's alleged predecessor in interest is a question of law, which means that it was an inappropriate conclusory allegation made by a non-lawyer in an affidavit of fact.

CONCLUSION

Wherefore, having fully addressed Respondent's allegations in its Brief, Appellant respectfully requests that the appellate court find in Appellant's favor, and reverse the trial court's grant of partial summary judgment as to liability against the Appellant, and remand the case to the trial court for trial on these issues, after Appellant has been provided with sufficient time to complete the discovery process.

Dated this April 28, 2014.

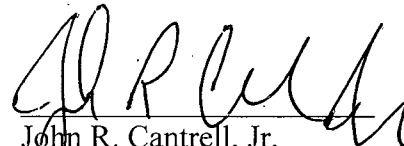


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CERTIFICATE OF COUNSEL

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

Dated this April 28, 2014.



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