STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Kathleen A. Grant; Dylan T. Grant; Devin D. Grant; and Andrea J. Grant, Plaintiffs, vs. Nationstar Mortgage, LLC, Defendant.	)	IN THE COURT OF COMMON PLEAS Case No. 2017-CP-10-4445 **ORDER**

This matter came before the Court for trial on July 30, 2019. Having considered the evidence presented and the applicable legal authorities, the Court finds as follows:

FINDINGS OF FACT AND PROCEDURAL HISTORY

As set forth in the Complaint, Plaintiffs are seeking a declaration from the Court as to whether Defendant Nationstar Mortgage, LLC's ("Nationstar") mortgage that encumbers the real property that is the subject of this action remains valid following the death of David E. Grant, Plaintiffs' father.[1] As such, Plaintiffs have asked the Court to interpret the Last Will and Testament of Roberta R. Grant (the "Will"), who died testate on December 28, 1988. (Compl. at ¶¶ 1-2). Moreover, as set forth in the Complaint, the Will created a testamentary trust that will need to be construed to determine the powers afforded to the trustee, David E. Grant. (*Id.* at ¶ 9).

1. Pursuant to the terms of the Will, David E. Grant was granted a life estate in the Property. Specifically, Article V of the Will provides, in relevant part, as follows:

> 1. (a) All of the rest, residue and remainder of my property of whatsoever kind or character, or wherever located, being the remaining fraction of my residuary estate, I give, devise and bequeath to my husband, David E. Grant, for the term of his life, if he shall survive me.

[1] The real property that is the subject of this action is located at 1 Wall Street, Charleston, South Carolina 29401 (the "Property").

(b) The properties of such life estate herein passing to my husband, David E. Grant, as and in such form as such property may exist from time to time, shall be kept by him in a single fund separate and apart from such other property as may be owned or held by him. He shall not in any event be entitled, directly or indirectly, to consume or otherwise retain any of the principal of this life estate absolutely as his own, or have or possess any substantially equivalent powers or rights, and the provisions of this ARTICLE and of this Will in general shall be construed accordingly.

. . .

(d) My husband, David E. Grant, shall be obligated to invest and reinvest the properties from time to time constituting the assets of such life estate, in order to protect the remaindermen taking after him and in furtherance of said obligation **he shall have and possess full power and authority during his lifetime to mortgage or pledge all or any portion of such property, and to sell, convey or otherwise dispose of all or any portion of such property, either realty or personalty, or both, in fee simple, absolutely, by warranty deed or otherwise . . . at such prices and upon such terms and conditions as he in his absolute discretion may deem most advantageous, taking into account the protection of remaindermen taking after him.** All resulting proceeds shall continue to be properties of such life estate.

(emphasis added).

2. The Will also created a testamentary trust and David E. Grant was named the Trustee. With regards to the power of David E. Grant, as Trustee, Article VII of the Will provides as follows:

1. Any Trustee hereunder shall have the following powers, and any others that may be granted by law, with respect to each Trust hereunder, to be exercised as the Trustee in its discretion determines to be the best interest of the beneficiaries:

. . .

c) To sell any Trust Property, for cash or on credit, at public or private sales; to exchange any Trust Property for other property; to grant options to purchase or acquire any Trust Property; and to determine the prices and terms of sales, exchanges and options;

. . .

e) To borrow money for any purpose, either from the Trustee or from others, and to mortgage or pledge any Trust Property . . . .

2. a) No Trustee shall be required to give any bond as Trustee; to qualify before, be appointed by or in the absence of breach of trust account to any court; or to obtain the order of approval of any court in the exercise of any power or discretion.

b) No person paying money or delivering any property to any Trustee need see to its application.

(emphasis added).

3. Plaintiffs are listed as the remaindermen under the Will, and although Plaintiffs' disagree, the clear language of the Will indicates that the testamentary trust under the Will was created to hold their remainder interest, including the remainder interest in the Property.

4. Roberta R. Grant purchased the Property on June 25, 1987 for the purchase price of $240,000. In connection with the purchase, she executed and delivered two mortgages in the total amount of $160,000.00, which mortgages encumbered the Property.

5. Roberta R. Grant's Probate Estate filings indicated that the mortgages remained encumbrances on the Property in the total amount of $166,377.85, and her Estate's interest in the Property was appraised at $190,000.00 as of May 30, 1991.

6. Since that time, David E. Grant consolidated and refinanced the existing mortgages multiple times. The final refinance, which is at issue in this litigation, was executed and delivered on March 14, 2007, by David E. Grant, individually, and as "David E. Grant, as Trustee under the Last Will and Testament of Roberta R. Grant," to Countrywide Home Loans, Inc. in the amount of $625,000, which mortgage was recorded in the Charleston County Register of Mesne Conveyance (the "RMC") on March 19, 2007 in Book C-619 at Page 182 (the "Subject Mortgage").

7. The Subject Mortgage was a refinance of a January 2006 Countrywide Home Loans, Inc. mortgage. The Subject Mortgage was ultimately assigned to Nationstar, which assignment was recorded in the RMC on September 3, 2013.

8. At all relevant times and up until the date of David E. Grant's death on July 3, 2016, the property taxes and homeowners' insurance for the Property were paid out of escrow

pursuant to the various mortgages. The homeowners' insurance remained current and was utilized on at least one occasion to pay for repairs to the Property following Hurricane Matthew.

9. None of the Plaintiffs could testify how David E. Grant used the proceeds of the loan at issue; regardless, how or in what fashion David E. Grant utilized the proceeds is inconsequential as to the findings of this Court and, moreover, no evidence was presented at trial to that point.

10. As of July 16, 2019, the principal balance remaining owed on the Subject Mortgage is $615,675.38 and there is interest due in the amount of $54,309.51. No payments have been made on the Subject Mortgage since September 1, 2017; however, Nationstar has refrained from foreclosing its lien on the Property.

11. An appraisal commissioned by the parties to this litigation valued the Subject Property at $1,100,000.00, as of December 20, 2018. Thus, there remains equity in the Property for Plaintiffs in the amount of $484,324.62, exclusive of interest and any advances made.

12. Plaintiff Kathleen A. Grant currently resides at the Property and has done so since January 2015.

Plaintiffs filed this declaratory judgment action on August 29, 2017 and are seeking a declaration from the Court as to "whether or not certain mortgages are valid vis-à-vis four remaindermen/remainderwoman [sic] . . . ." (Compl. at ¶ 1). Plaintiffs further explain that this action is filed "specifically under S.C. Code Sections 15-53-20 and 15-53-30" and that they are asking the Court "to interpret various wills and to declare the meaning of those documents in light of the law with relationship to the mortgages now on their property but placed without their knowledge or consent." (*Id.*)

CONCLUSIONS OF LAW

There are two critical questions that control the outcome of this litigation:

(1) Did David E. Grant have the authority to mortgage the Property under the Will?

(2) If the answer to the first question is in the affirmative, then did Nationstar and its predecessor-in-interest have a duty to ensure that David E. Grant utilized the loaned funds in a manner that took into account the protection of the remaindermen?

The answer to the first question is unequivocally "Yes" under the clear and unambiguous terms of the Will, and the answer to the second question is unequivocally "No" under long-standing South Carolina law.

1. Legal Standard

"To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy." *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995) (citing *Brown v. Wingard*, 285 S.C. 478, 330 S.E.2d 301 (1985)). "A justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party." *Graham*, at 71, 459 S.E.2d at 845 (citing *Power v. McNair*, 255 S.C. 150, 177 S.E.2d 551 (1970)). This requirement is satisfied by "[a]ny person interested under a deed ... written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a . . . contract or franchise may have determined any question of construction or validity arising under the instrument, ... contract or franchise and obtain a declaration of rights, status or other legal relations thereunder." S.C. Code Ann. § 15-53-30. The court finds that the lawsuit before it demonstrates a judicial controversy, and is ripe for review.

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Query v. Burgess*, 371 S.C. 407, 410, 639 S.E.2d 455, 456 (Ct. App. 2006). "To make this determination [the Court] look[s] to the main purpose of the action as determined by the complaint." *Id.* The courts of South Carolina have consistently held that

"[t]he construction of a will is an action at law." *Holcombe-Burdette v. Bank of America*, 371 S.C. 648, 654, 640 S.E.2d 480, 483 (Ct. App. 2006); *Epworth Children's Home v. Beasley,* 365 S.C. 157, 165, 616 S.E.2d 710, 714 (2005); *Kemp v. Rawlings,* 358 S.C. 28, 34, 594 S.E.2d 845, 848 (2004); *Estate of Stevens v. Lutch,* 365 S.C. 427, 430, 617 S.E.2d 736, 737 (Ct. App. 2005); *NationsBank of S.C. v. Greenwood,* 321 S.C. 386, 392, 468 S.E.2d 658, 662 (Ct. App. 1996); *Epting v. Mayer,* 283 S.C. 517, 323 S.E.2d 797 (Ct. App. 1984). Therefore, the Court finds that this lawsuit is an action at law.

2. David E. Grant Had the Authority to Mortgage the Property Under the Will

Under South Carolina law, a life tenant may mortgage his entire life estate. However, as a general rule, a mortgage executed by a life tenant alone does not bind the interest of the remaindermen because the life tenant can only encumber his life estate interest. *First Nat'l Bank v. Hutson,* 142 S. C. 239, 140 S. E. 596 (1927); *Federal Land Bank v. Wood,* 334 F. Supp. 1124 (D. S. C. 1970); *Belue v. Fetner,* 251 S. C. 600, 164 S. E. 2d 753 (1968); *Bethea v. Bass,* 240 S. C. 398, 126 S. E. 2d 354 (1962); *McDonald v. Woodward,* 58 S. C. 554, 36 S. E. 918 (1900); *see also* 27 S.C. Jur. Mortgages § 19.

Contrary to the foregoing restrictions on a life tenant's ability to mortgage property subject to his life estate, South Carolina courts have long recognized that a last will and testament may devise a life estate interest with the power of disposition. *Blackmon v. Weaver*, 366 S.C. 245, 249, 621 S.E.2d 42, 44 (Ct. App. 2005) (citing *Johnson v. Waldrop*, 256 S.C. 372, 374-76, 182 S.E.2d 730, 731 (1971) and *Thomason v. Hellams*, 233 S.C. 11, 15, 103 S.E.2d 324, 325 (1958)); *Shevlin v. Colony Lutheran Church*, 227 S.C. 598, 88 S.E.2d 674 (1955); *Schultz v. Barr*, 186 S.C. 498, 196 S.E. 177 (1938); *Dye v. Beaver Creek Church*, 48 S.C. 444, 26 S.E. 717 (1897). In *Thomason*, the Supreme Court expressly held that "[a] deed, devise or bequest for life with power of disposition and remainder to another (of such property as is not disposed of by the

first taker) is valid." This power of disposition has also been construed to support the ability of the life tenant to mortgage life estate property. *See Hamrick v. Marion*, 176 S.C. 361, 180 S.E. 213, 214 (1935).

Under South Carolina law, "[i]t is the cardinal rule of will construction that the testator's intent should be ascertained and followed unless it violates some well-established rule of law." *McGirt v. Nelson*, 360 S.C. 307, 311, 599 S.E.2d 620, 622 (Ct. App. 2004). In ascertaining the testator's intent, effect must be given to every part of the will. *Id.* A court may not "by judicial construction make a will for the decedent that he has not made for himself." *Guaranty Bank & Trust Co. v. Byrd*, 287 S.C. 96, 99, 337 S.E.2d 231, 233 (Ct. App. 1985) (quotations omitted).

The Court finds that it is patently clear from the plain language of the Will that Roberta R. Grant intended to grant her husband, David E. Grant, a life estate with the power of disposition or, at a minimum, he possessed "full power and authority during his lifetime to mortgage" the Property, so long as he took into account the protection of the remaindermen taking after him. Indeed, the Will expressly states that David E. Grant had full authority, as a life tenant, "to mortgage or pledge all or any portion of such property . . . at such prices and upon such terms and conditions as he in his absolute discretion may deem most advantageous," so long as he was taking into account the protection of the remaindermen under the Will. This conclusion is further buttressed by the fact that the Will also expressly gave David E. Grant the full authority to sell or dispose of the Property "in fee simple, absolutely, by warranty deed or otherwise . . . ."

Because the Court finds that David E. Grant had the power and authority to Mortgage the Property, the necessary legal analysis of the Court ends there. However, given the arguments raised by Plaintiffs, it is also important to note the fact that the mortgage at issue is a refinance of the original mortgage granted to Nationstar's predecessors-in-interest, which was originally

granted by Roberta R. Grant. As referenced above, on May 30, 1991, there were two mortgages that encumbered approximately 87% of the value of the Property, leaving equity in the Property in the amount of approximately $23,623. Based on the appraisal submitted as evidence to the Court, valuing the Property at $1,100,000.00, the principal balance of the Subject Mortgage encumbers only 56% of the value of the Property according to the most recent appraisal. Thus, there remains equity in the Property for the Plaintiffs in the amount of $484,324.62, exclusive of interest and advances made. Accordingly, while not necessary for determining whether David E. Grant has the power to mortgage the Property, the Court finds that David E. Grant did not invade the principal of the Property that was in existence at the time of Roberta R. Grant's death, and it appears that he did, in fact, take into account the protection of Plaintiffs.

Furthermore, the property taxes and insurance were paid by Nationstar out of escrow under the terms of the mortgage. Payment of the property taxes under the Subject Mortgage protected the Property from being involuntarily sold at a tax sale, which would have divested the Plaintiffs of their rights to the proceeds in the Property. Moreover, the payment of the homeowners' insurance also protected the Property. Specifically, following Hurricane Matthew, Plaintiff Kathleen Grant testified that the homeowners' insurance policy was utilized to make necessary repairs to the roof. The premiums for the insurance policy were also paid out of the Subject Mortgage's escrow account.

Additionally, as Trustee of the testamentary trust created by the Will, the Court finds that David E. Grant had full authority to "borrow money for any purpose, either from the Trustee or from others, and to mortgage or pledge any Trust Property," to include the Property. As a matter of fact, Nationstar's mortgage lists as one of its borrowers "David E. Grant, as Trustee Under the Last Will and Testament of Roberta R. Grant." This provision is significant because, as set forth in the plain language of the Will, the testamentary trust was created to hold Plaintiffs' remainder

interest and David E. Grant, as trustee, executed the Subject Mortgage on their behalf. This is the only reasonable interpretation of the Will as it relates to the testamentary trust. A trustee may mortgage trust property if the trust agreement specifically authorizes such action without court approval. *See* 27 S.C. Jur. Mortgages § 12 (citing *Chapman v. Williams*, 112 S.C. 402, 100 S.E.2d 360 (1919) and *Fraser v. Fishburn*, 44 S.C. 314 (1873)). Accordingly, the Court finds that David E. Grant had the express authority as the Trustee to mortgage the Property as he saw fit.

Finally, and perhaps most importantly, David E. Grant kept the Property in the family's name for a period of approximately 28 years. The Property has been preserved for Plaintiffs and they will, presumably, reap the benefits of the increased equity in the Property. By virtue of his actions, David E. Grant ensured that there would be something left for his children, as Roberta R. Grant intended in the Will, and he, therefore, took them into account when refinancing the mortgages in order to hold onto the Property until his death.[2]

3. Nationstar (and its Predecessors-in-Interest) Never Owed Any Duty to the Remaindermen

Assuming, *arguendo*, that David E. Grant did not utilize the proceeds of the various loan refinances taking into account the protection of Plaintiffs, this Court's conclusion does not change. South Carolina law does not impose a duty on Nationstar's predecessors-in-interest

[2] Plaintiffs argued at trial that because neither David E. Grant nor Nationstar's predecessor-in-interest provided notice to Plaintiffs of the Subject Mortgage, Plaintiffs' Due Process rights were violated. This argument is unavailing. The Fourteenth Amendment of the Constitution provides in part that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law." Since the Supreme Court's decision in the *Civil Rights Cases*, 109 U.S. 3 (1883), "'the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States.'" *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)). The Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." *Id.* Plaintiffs did not present any evidence that the Subject Mortgage was a result of state action and, therefore, Nationstar's predecessor-in-interest's conduct cannot implicate the protection of Due Process as set forth in the Fourteenth Amendment.

(and, accordingly, Nationstar) to Plaintiffs to ensure that David E. Grant utilized the proceeds of the loan properly.

The long standing jurisprudence in South Carolina is clear: The normal arrangement between and bank and its customer "creates a creditor-debtor relationship rather than a fiduciary one." *Burwell v. South Carolina Nat. Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986) (citing *Nat. Loan and Exchange Bank v. New York Life Ins. Co.*, 149 S.C. 378, 147 S.E. 322 (1929); *see also Citizens and Southern Nat. Bank of South Carolina v. Lanford*, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994) ("The law does not impose a duty on the bank to explain to an individual what he could learn from simply reading the document."); *Regions Bank v. Schmauch*, 354 S.C. 648, 669, 582 S.E.2d 432, 443 (Ct. App. 2003) (holding the borrower "was not in a vulnerable position, and the bank owed no special duty of care"). Other jurisdictions are in accord with the general principle that there is no duty for a lender to use reasonable care in making a loan in the context of a loan application and lender-borrower relationship. *Nelson v. Production Credit Assoc. of the Midlands*, 930 F.2d 599, 605 (8th Cir. 1991) (finding the "Court would not impose a duty on a lender to use reasonable care in making a loan."); *Parker v. Columbia Bank*, 604 A.2d 521, 535 (Md. App. 1992) (finding "a lender owes no duty of care to its borrower"); *Baskin v. Mortgage and Trust, Inc.*, 837 S.W.2d 743, 747-48 (Tex. App. 1992) ("Regarding [lender's] liability for its own negligence, if any, the relationship between a borrower and its lender generally does not create a fiduciary duty or impose a duty of good faith and fair dealing"); *Commercial Natl. Bank v. Audobon Meadow Partnership*, 566 So.2d 1136, 1140 (La. App. 1990) ("we find no source of a duty in tort which would impose liability upon the bank").

In limited circumstances, a fiduciary relationship *may* be created between a bank and a customer "if the bank undertakes to advise the customer as a part of the services the bank offers." *Burwell*, 288 S.C. at 40-41, 340 S.E.2d at 790. However, Plaintiffs in this case are not customers

of Nationstar nor were they customers of Nationstar's predecessors-in-interest. This Court cannot locate, nor have Plaintiffs cited, any case that imposes a duty upon a bank to notify remaindermen of mortgages that are taken out by a life tenant and/or a trustee acting on behalf of the remaindermen pursuant to clear and unambiguous terms in a will, and, accordingly, this Court will not impose such a duty.[3] Further, Plaintiffs failed to present any evidence that Nationstar or its predecessor-in-interest did anything to create a duty between itself and David E. Grant. Therefore, the Court finds that no duty existed between Nationstar (or Nationstar's predecessors-in-interest) and Plaintiffs.

Moreover, the actual Will itself absolves Nationstar or any other lender of any responsibility to oversee David E. Grant's use of the proceeds. Specifically, the terms that created the testamentary trust provide: "No person paying money or delivering any property to any Trustee need see to its application." Furthermore, Plaintiffs did not point to any language in the Subject Mortgage that would impose such a duty on Nationstar's predecessor-in-interest.[4] Accordingly, the Court finds that Nationstar was not required under the terms of the testamentary trust to ensure David E. Grant utilized the proceeds of the loan in accordance with his duties under the Will.

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[3] To the extent Plaintiffs are attempting to rely on the case of *Des Champs v. Mim*, 148 S.C. 52, 145 S.E. 623 (1928) to support their argument that Nationstar's predecessor-in-interest owed a duty to Plaintiffs, such reliance is misplaced. *Des Champs* dealt with a life tenant who sold land to pay off his mortgage debts and completely divested his unborn son of his remainder interest in the subject property. The case did not, as we have here, involve a life estate interest with the power of disposition nor did it involve a claim against the bank that held the mortgage. Rather, the claim was against the life tenant for failing to preserve the property. Plainiffs' have chosen not to sue David E. Grant or his estate and, accordingly, *Des Champs* and its progeny are not binding precedent on this Court's decision.

[4] Plaintiffs argued at trial that Nationstar's predecessor-in-interest assumed some form of a "conservatorship" role by loaning the proceeds to David E. Grant because it knew of the Will. While no concrete evidence was presented that Nationstar's predecessor-in-interest knew the terms of the Will, even if it did, nothing in the language of the Will, the Subject Mortgage, or any order from the Probate Court from the estate file of Roberta R. Grant created such a "conservatorship" and the law does not impose such a role.

CONCLUSION

Based on the foregoing, the Court finds that Nationstar's mortgage is a valid encumbrance on the Property both under the express terms of the Will and the testamentary trust created under the Will. Plaintiffs cannot escape the clear terms of the Will, and David E. Grant did not invade the principal of the Property. Moreover, by mortgaging the Property as he did, he ensured that the property taxes remained paid, the homeowners' insurance covered the Property in the event of damage, and, most importantly, the Property remains in the family name and will be devised to Plaintiffs as Roberta R. Grant intended. Thus, David E. Grant did not violate the terms of the Will or the testamentary trust created thereunder, and was well within his rights to mortgage the Property. Furthermore, even if David E. Grant did misuse the loan proceeds as Plaintiffs argue, Nationstar and its predecessor-in-interest had no legal duty to monitor David E. Grant's use of the loan proceeds, and there is no duty that inures to the benefit of Plaintiffs. Thus, the clear terms of the Will authorized disbursement of the funds under the Subject Mortgage and the Subject Mortgage is and remains a valid, first priority lien on the Property, and the relief sought by Plaintiffs is DENIED.

IT IS HEREBY ORDERED.

The Honorable Bentley Price

August 14th, 2019
Charleston, South Carolina