THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable James O. Spence, Master In Equity

Case No. 2016-CP-32-04163

R. O. Levy..... Appellant.

V.

Valerie Drafts, Veronica Drafts, and Tarance F. Drafts,III. . . . . Respondents.

INITIAL BRIEF OF APPELLANT

S/Joseph Henry
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PAGE

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR WHEN IT ALLOWED RESPONDENTS TO PROCEED WITH A FORECLOSURE ACTION IN THE ABSENCE OF APPELLANT AND HIS COUNSEL WHEN RESPONDENTS' COUNSEL WAS AWARE OF APPELLANT COUNSEL'S INVOLVEMENT IN THE CASE FROM CORRESPONDENCE BETWEN HIS OFFICE AND APPELLANT COUNSEL'S OFFICE AND RESPONDENTS' COUNSEL FAILED TO NOTIFY APPELLANT 'S COUNSEL OF THE HEARING.

2. DID THE TRIAL COURT ERR WHEN IT ALLOWED RESPONTS TO GIVE INCOMPLETE ANSWERS TO APPELLANT'S REQUESTS FOR ADMISSIONS BY FAILING TO STATE WITH SPECIFICITY THE BASIS FOR ANY DENIALS MADE ANDS PROVIDING THE DOCUMENTS REQUIRED BY THE ACCOMPANYING INTERROGATORY, AN INTERGAL COMPONENT OF THE REQUEST FOR ADMISSIONS, AND FAILING TO DECLARE THE INCOMPLETE ANSWERS ADMISSIONS.

STATEMENT OF THE CASE

This matter is a foreclosure action alleging that Appellant entered into a contract with Tarrance Drafts for financing the construction/erection of a building in Batesburg, South Carolina for operation of Appellant's funeral services business. The building financing included the execution of an Individual Financing Agreement (Construction Loan) specifying the terms and conditions of the loan which was further secured by the execution of a Note and Mortgage by the parties. The building was constructed on property owned by Tarrance Drafts in Blythewood, South Carolina, which was sold to Appellant as a component of the transaction for an additional sum of Seven thousand ($7,000.00) dollars. According to the loan documents executed in this transaction, the loan amount was One hundred twenty thousand dollars (120,000.00) to be repaid over a period of Twenty (20) years at an interest rate of nine percent (9%). There was also a Fifteen thousand dollar ($15,000.00) loan to be repaid over a five year period with no interest being charged. Appellant and Tarrance Drafts executed the documents to complete the financing and construction between September of 1999 and December 1999.

Tarrance Drafts died testate on August 2, 2004 in Queens New York. In his will, Mr. Drafts left his entire estate to his loving wife Willie Mae Drafts. Mrs Drafts assumed responsibility of the estate's assets, including administration of the contract with Appellant, until she assigned the Note and Mortgage to her children Valarie Drafts, Veronica Drafts, and Tarrance Drafts, III on October 21, 2016. Subsequent to assignment of the Note and Mortgage, Tarrance Drafts,III notified Appellant of arreages on his loan payments and began pursuing efforts to collect the same. In this regard, Mr. Drafts engaged the services of Attorney Henrietta Gill to prepare an account history ledger cataloguing the payments for which Appellant was receiving credit and notifying him of missed payments that were accruing interest from 2004. Respondents accelerated the due date for the balance on the loan and made demand for Two hundred eighty two thousand three hundred sixty eight dollars and ninety nine cents ($282,368.99) representing the outstanding loan balance plus

accrued interest. The demand was not met and a foreclosure action was instituted on December 9, 2016. Appellant's brother, Attorney Thomas Levy, filed a General Denial Answer on his behalf as his attorney at the time. The case proceeded to discovery with Attorney Levy filing and serving Requests for Admissions with Accompanying Interrogatory on Respondents. Thereafter, Attorney Levy introduced Appellant to Attorney Joseph Henry to inquire as to whether Attorney Henry would be willing to assist his brother with the matter as Attorney Levy was going to retire. Appellant agreed to retain Attorney Henry and Attorney Henry Sent a Notice of Appearance to the court electronically. The notice was subsequently sent by U.S. Mail to the Clerk of Court and Respondent's counsel. Appellant's counsel (Henry) upon reviewing the Answers to the Requests for Admission, contacted Respondents' counsel to notify him of the incomplete answers to the requests. Respondents attempted to supplement their responses but did not do so completely. In the interim, the Court, without notice to attorney Henry, scheduled a Foreclosure hearing on the matter and proceeded in the absence of Appellant and his counsel awarding a foreclosure and sale of the subject property. Upon learning of this oversight, Appellant filed a Motion to Set Aside the Order of Foreclosure and Sale on March 22, 2019.

The Court convened a hearing on September 30, 2019 to hear arguments on Appellant's Motion to Set Aside its Order of Foreclosure and Sale. After hearing arguments from both sides, the Court refused to set aside its Order and this Appeal ensued.

STANDARD OF REVIEW:

The determination of whether to set aside a foreclosure sale is a matter within the discretion of the trial Court. *Wells Fargo Bank, NA v. Turner,* 378 S.C. 147, 150, 662 S.E. 2d 424, 425 (Ct. App. 2008). "An abuse of discretion occurs when the conclusions of the circuit court are either controlled by errors of law or are based on unsupported factual conclusions." *Carson v. CSX Transp., Inc.*,400 S.C. 221, 732 S.E. 2d 148, 152 (2012).

FACTS:

Appellant entered into an individual financing arrangement secured by the note and mortgage for the financing and construction of a building in Batesburg South Carolina to be used to house appellant's funeral services business. The original lender on the individual financing agreement was Tarrance Drafts senior, father of the respondents in this action. Subsequent to entering into the financing arrangement with Appellant, Mr. Drafts passed away on about August 2, 2004 leaving his estate to his wife, Willie Mac Drafts. Mrs. Drafts manage the affairs of the estate including responsibility for collecting the mortgage payments on the financed property from Appellant. On or about October 21, 2016, Mrs. Drafts assign the note and mortgage to her children. Thereafter, Tarrance Drafts, III contacted Appellant indicating that payments on the loan were in arrears. Mrs. Drafts engage the services of Attorney Henrietta Gill to pursue collection of the outstanding balance including interest and penalties. According to the statement of account prepared by the Gill, the mortgage and arrearages dating back to 2004 and the man was being made for the sum of $ 282,368.99. The amount of the demand cannot be met and suit was instituted to foreclose on the subject property.

ARGUMENT:

1. THE TRIAL COURT ERR WHEN IT ALLOWED RESPONDENTS TO PROCEED WITH A FORECLOSURE ACTION IN THE ABSENCE OF APPELLANT AND HIS COUNSEL WHEN RESPONDENTS' COUNSEL WAS AWARE OF APPELLANT COUNSEL'S INVOLVEMENT IN THE CASE FROM CORRESPONDENCE BETWEN HIS OFFICE AND APPELLANT COUNSEL'S OFFICE AND RESPONDENTS' COUNSEL FAILED TO NOTIFY APPELLANT 'S COUNSEL OF THE HEARING.

This case arises out of an alleged breach of a contract involving a Note, Mortgage, and Individual Financing arrangement entered into by Appellant and Tarrance Drafts. Pursuant to the terms and conditions of this tri-level transaction, Mr. Drafts loaned Appellant One hundred twenty thousand dollars ($120, 000.00) to construct a building on property owned by Mr. Drafts in Batesburg, South Carolina. This loan was structured as a twenty year loan with a nine percent (9%) interest rate. In addition, there was a second loan of Fifteen thousand dollars (15,000.00) which did not have an assigned interest rate but was supposed to be repaid in increments over a five year period. The land on which the building was to be constructed was sold to Appellant for an additional Seven Thousand dollars ($7,000.00). The foregoing transactions were solidified between September and December 1999. (T p. 10, lines 20-25), (T p.11, lines 21-25), (T. p.16, lines 5-12), (T. pp..10-11 lines 21-25).

Subsequent to completing the transaction and building of the subject project, Mr. Tarrance Drafts passed away on August 2, 2004 in Queens New York leaving his entire estate to his wife. (T. p.9, lines 1-9). On October 21, 2016, Mrs. Drafts assigned the Note and Mortgage to her three children, Respondents in this case. (T. p.11, lines7-13). At some point after assuming responsibility for administration of the collection of the payments on the Note and Mortgage, Tarrance Drafts , III began contacting Appellant concerning arreages on the Mortgage payments.(T. p. 17 lines 11-25; p.18 lines 1-13). In the correspondence to Appellant from Respondents' attorney Appellant was alerted that Respondents intended to accelerate the loan balance if he could not pay the $282, 368.99 by the stated deadline. (T. p.25 lines 3-15). The demand was not met and a foreclosure action was commenced on December 9, 2016 (C/A No.: 2016-CP-3204163). On January 20, 2017, Respondents filed a Motion For Order of Reference seeking to refer the case to the Master in Equity for Lexington County. Appellant filed a Return to the Motion to Appoint a Receiver and Final Judgment on January 19, 2017(Docket No.: 2016-CP-32-4163). Appellant objected to the matter being referred to a Receiver and or Master in Equity due to underlying legal issues relating to the unverified accounting, lack of specificity of the actual dollar amount owed, questions regarding the validity of the Assignment, and other questionable facts regarding the Note that is referenced in the Mortgage.

Respondents' Complaint did not contain the verification of account either within the body of the pleadings themselves or an attachment to the pleadings as required by Rule 9(i) SCRCP. The Complaint, instead, states on page 4 in the first Prayer for Relief:

"**That the amount due upon said note and mortgage held by the Plaintiff be determined under the direction of this Court**, together with attorney's fees and the costs of this action and Plaintiff have judgment therefor...." (Emphasis Added). This improper Prayer was challenged by Respondent's counsel in his opposition to the Order of Reference and followed up in his Request for Admissions With Accompanying Interrogatory. Respondents failed to address the requirements of the accompanying Interrogatory in their Answers to Appellant's Requests which is the equivalent of failing to answer. Appellant retained the services of Attorney Joseph Henry to assist him with completion of his case as it was explained that his brother, Attorney Thomas Levy, was retiring and was only assisting Appellant until suitable alternate counsel could be obtained. (T. p.25 lines 14-22). Immediately upon undertaking to assist Appellant with this matter, Attorney Henry obtained and began reviewing the case file. In addition, he filed a Notice of Appearance electronically (October 22,2018 and another on March 29, 2019) and sent a copy by U.S. mail to Respondent's Counsel and the Lexington County Clerk of Court's Office. (T. p. 29 lines 17-23). However, for some unknown reason, the electronic filing did not register in the system and the hard copies were never returned. Copies of the previously transmitted Notice of Appearance were faxed to the Court upon request of the judge before the September30, 2019 hearing.

Respondents' counsel took the position at the September 30, 2019 hearing that he was not aware of Attorney Henry's involvement in the case on Appellant's behalf. However, he received a letter from attorney Henry's office dated October 23, 2018 that informed him of Attorney Henry's involvement and following up on his Answer to the Requests for Admissions previously served on him by Attorney Levy. (T.p. 23 lines 8-19). Despite having received the letter of October 23, 2018 and having responded to the same, Respondents' counsel did not notify Attorney Henry's office of the trial date set for January 24, 2019 and neither Attorney Henry nor Appellant appeared for trial. It should be noted that Respondents' counsel agreed, as evidenced by his e-mail tread with the Clerk of Court's Office dated October 17, 2019, to notify the opposing attorneys of the court proceedings and did send out notices to all of the other attorneys, except Attorney Henry. Respondents' counsel takes the position that notice to Attorney Levy is the same as notice to Attorney Henry. However, Attorney Levy's office and Attorney Henry's office are two separate and distinct business entities which do not share a common address or mail box. Rule 5(a) SCRCP requires documents subject to service be served upon **each** party of record. (Emphasis Added). Respondents will likely argue that Attorney Henry was not of record and, therefore, not entitled to notice. However, even if the position of the trial judge is adopted asserting that Attorney Levy and Attorney Henry are co-counsel on the case, this does not obviate the necessity to provide notice to each of them. (T. p. 24 lines9-10). The rule does not differentiate between situations involving co-counsel arrangements and single counsel arrangements. In addition, Attorney Henry took the requisite steps to have his firm entered on record by electronically filing and following up through the US mail. Therefore, failure to provide notice of the hearing was

a violation of Rule 5(a) SCRCP as the notice was not served on each party of record to alert them of the trial date. Because Respondents' counsel failed to serve notice of the trial date on Appellant's counsel after prior communication with counsel regarding discovery matters in the case the Court abused its discretion by allowing the Foreclosure hearing to go forward in Appellant's absence depriving Appellant of Procedural and Substantive Due Process.

II. DID THE TRIAL COURT ERR WHEN IT ALLOWED RESPONTS TO GIVE INCOMPLETE ANSWERS TO APPELLANT'S REQUESTS FOR ADMISSIONS BY FAILING TO STATE WITH SPECIFICITY THE BASIS FOR ANY DENIALS MADE ANDS PROVIDING THE DOCUMENTS REQUIRED BY THE ACCOMPANYING INTERROGATORY, AN INTERGAL COMPONENT OF THE REQUEST FOR ADMISSIONS, AND FAILING TO DECLARE THE INCOMPLETE ANSWERS ADMISSIONS

On June 18, 2018 Attorney Thomas Levy served Appellant's Requests For Admissions With Accompanying Interrogatory on Respondents. The Requests sought responses to questions concerning passage of the applicable Statute of Limitations and application of the Doctrine of Laches to Respondents' claims as the record was devoid of any evidence of collection actions instituted to enforce the provisions of the Note and Mortgage despite the allegation that years had elapsed on the due date of the alleged arreages on the account. Likewise, Respondents were requested to admit that a sum certain could not be ascertained due to loan irregularities. This Request was Appellant's inquiry into the statement in Respondents' Prayer For Relief contained in Respondents' complaint previously mentioned herein. Respondents were also requested to explain any denials made regarding a Request For Admission and to include with the explanation every fact, document, thing or other item of evidence on which the denial was based. Respondent made several denials to the Requests For Admissions but did not provide any explanations or documents to support the denials as requested by the Interrogatory. (T.p.21 lines 24-25; p. 22 lines 1-7).

The answers to the Requests concerning the applicable Statute of Limitations and Laches simply stated that the documents were signed under seal. However, a review of the documents reveal that they neither contain a seal nor the requisite delineation following the signature line indicating the intent to create a sealed document. The Note and Mortgage in the instant case contain the language: "Signed Sealed and Delivered in the Presence of." However, this language is not set in conspicuous type as is often required to set it apart from the body of the document. Although a document does not contain an actual seal, our courts have recognized that other indicia found within the document can evidence the intent to create a sealed document. The Court in, *Treadway v. Smith,* 325 S.C. 367, 479 S.E. 2d 849 (Ct. App. 1996), found that the parties intended to create a sealed document when they drafted a non-sealed separation agreement containing the standard boilerplate: "IN WITNESS WHEREOF, the parties have hereunto set their respective Hands and Seals." However, the deciding factor was inclusion, in conspicuous type, of the language: SIGNED SEALED AND DELIVERED

IN THE PRESENCE OF, immediately following the attestation clause above the signatures of the parties and witnesses. The Court concluded that this language was sufficient to indicate the intent to create a sealed document.

The Court in, *South Carolina Department of Social Services v. Winyah Nursing Homes, Inc.*,282 S.C.556,320 S.E. 2d 464 (Ct.App. 1984) found that a contract containing the standard language-"the parties hereunto have set their hands and seals" and also containing the notation "L..S." (*Locus sigilli)* adjacent to the signatures of the contracting parties was sufficient to establish the document as a sealed document. The Court cited *Blacks Law Dictionary,* 948 (6th ed. 1990) and 68 Am. Jur. 2d *Seals §*6 (2004) to explain the significance of the abbreviatoin "L.S." adjacent to the contracting parties signatures as a replacement for the presence of a seal. The Court, therefore, concluded that L.S. adjacent to the parties signatures indicated the parties intended the contract in *Winyah Nursing Homes* to be a sealed instrument.

Respondents in the instant case assert that the Note and Mortgage are sealed instruments. As discussed above, neither of these documents contain a seal nor do they contain the notation L.S. or the word SEAL adjacent to the signatures of the parties. The South Carolina Supreme Court's decision in, *Cook v. Cooper,* 59 S.C.560, 38 S.E. 218 (1901) provides further guidance in resolving disputes of this nature. In *Cooper,* the Court was faced with deciding the validity of a deed in which the date of the instrument was in question and the Appellant questioned the validity of the document because it lacked a seal upon its face. The Court, citing the presence of three factors, (1) the deed provided an attestation, "In witness whereof I hereunder sed [sic] my hand and seal…;" (2) immediately adjacent to the grantor's signature was the word "seal;" and (3) the deed concluded with "Signed, Sealed and Delivered in the presents [sic] of [names of witnesses]." *Id.* and relying in part upon the predecessor to Section 19-1-160 found that a sealed instrument was intended. The instruments relied upon by Respondents in the instant case neither contain the presence of a seal, the language Signed ,Sealed and Delivered In The Presence Of, nor, alternatively the designation L.S. or SEAL to place the signator on notice that the document is intended to be a sealed instrument. These oversights distinguish the Note and Mortgage in this case from the documents analyzed by the courts in the cases previously discussed.

Although the Note and Mortgage lack the requisite indicia of creating sealed instruments, Respondents seek to have the Court recognize them as sealed instruments to avoid application of the three year statute of limitations applicable to contracts contained in S.C. Code Ann.§15-3-530(1). This fact is evident in Respondents' Responses to Appellant's Requests number 7, 10 and 11 where Respondents simply answered: **"The instruments were signed under seal."** The documents in question do not possess the requisite indicia that they are sealed instruments or intended to create sealed instruments as anticipated by the provisions of S.C. Code Ann.§ 15-3-520(b) (twenty year statute of limitation fo sealed instruments). Respondents' reliance upon the sealed instrument provisions of SC Code §15-3-520(b) is misplaced as the Note and Mortgage in this case do not meet the criteria of a sealed instrument. Likewise, Respondents' Answers to Appellant's Requests for Admissions are inadequate. The Court abused its

discretion by failing to conduct the inquiry into whether the responses to the request were adequate in light of Respondents' assertion that the instruments in question were sealed or intended to be sealed instruments before ordering a foreclosure of the subject property. The judgment of foreclosure and sale should be reversed.

CONCLUSION

THEREFORE, for the reasons stated above, this Court should reverse the Order of the Circuit Court.

Dated: August 29, 2020

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V.

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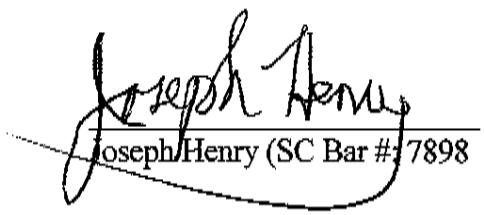
PROOF OF SERVICE

The undersigned hereby certifies that he is the attorney for the Defendants/Appellants and that a copy of **APPELLANT'S INITIAL BRIEF/ DESIGNATION OF MATTERS TO BE INCLUDED IN THE RECORD ON APPEAL** was served in the foregoing action by depositing a copy in the U.S. Mail on August 31, 2020 proper postage attached addressed as follows:

Warren Herndon, Esquire
218 E. Main Street
Lexington, S.C. 29072
Telephone: (803) 799-9772



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Columbia, South Carolina
August 31, 2020

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August 31, 2020

VIA FACSIMILE (803)734-1839 AND U.S. MAIL
LaToya Burns, Appeals Specialist
SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Valarie Drafts v. R.O. Levy (2019-002042)

Dear Ms. Burns:

Please find attached a copy of Appellant's Initial Brief, Designation of Matters to be Included in the Record on Appeal and Proof of Service.

If you have any questions or need additional information, please do not hesitate to contact me. With kind regards, I am

Sincerely,

Joseph Henry