



STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF ANDERSON

Case No.: 2012-CP-04-1819

First Federal Bank fka First Federal Savings & Loan Association of Charleston,

Plaintiff,

**ORDER ESTABLISHING MORTGAGED PROPERTY IS NOT PRINCIPAL RESIDENCE OF MORTGAGORS**

v.

George A. Shira, III and Betsey R. Shira,

Defendants.

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GENERAL SESSIONS

This matter comes before the Court pursuant to the foreclosure hearing held before me on October 8, 2012 ("Hearing"). At the conclusion of the Hearing, the Court requested that counsel for First Federal Bank fka First Federal Savings & Loan Association of Charleston ("Plaintiff") and George A. Shira, III and Betsey R. Shira (collectively "Defendants") submit post-Hearing briefs on the issue of whether the mortgaged property ("Property") is the principal residence of the Defendants, and, thus, subject to the South Carolina Supreme Court's Administrative Order 2011-05-02-01 ("Foreclosure Intervention Order").

After reviewing the file, the evidence presented at the Hearing, Plaintiff's Post Hearing Brief on Residency Issue, and Defendants' Memorandum in Support of Declaring Residence an Owner-Occupied Dwelling,

I HEREBY FIND AND CONCLUDE as follows:

This is an action to foreclose a mortgage given as security for a 2008 loan made by Plaintiff to Defendants. In its Complaint and at the foreclosure hearing, Plaintiff asserted that

this action is not subject to the Foreclosure Intervention Order because the subject Property is not an Owner-Occupied dwelling as defined in the Foreclosure Intervention Order.

Based upon the testimony presented and the loan documents executed and delivered by Defendants to Plaintiff which were admitted into evidence at the Hearing, I hereby find that the subject Property is the 'second home' of the Defendants and is not the Defendants' principal residence.

The Foreclosure Intervention Order provides that its terms and conditions "apply to all mortgage foreclosure proceedings concerning Owner-Occupied dwellings in this State." The Foreclosure Intervention Order defines the term "Owner-Occupied dwelling" as "mortgaged real property that is the principal residence of the mortgagor." The term "principal residence," however, is not defined by the Foreclosure Intervention Order, and there is no case law addressing what constitutes "principal residence" with respect to the Foreclosure Intervention Order.

South Carolina courts have, however, construed the word "reside" and "residence" in various instances. In *Estate of Nicholson v. S.C. HHS*, 377 S.C. 590, 596 (S.C. Ct. App. 2008), the South Carolina Court of Appeals discussed the various definitions as follows:

"Reside" has been defined as (1) to dwell permanently or continuously; (2) to have a settled abode for a time; or (3) to have one's residence or domicile. Webster's Third New International Dictionary 1931 (1986). However, in the legal field, the term "reside" has been defined as to "[l]ive, dwell, abide, sojourn, stay, remain, [or] lodge." BLACK'S LAW DICTIONARY 1176 (5th ed. 1979). Additionally, the term "residence" has been defined as "[t]he place where one actually lives, as distinguished from a domicile . . . ." BLACK'S LAW DICTIONARY 1050 (7th ed. 2000). "Domicile" has been defined as "[t]he place at which a person is physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere." *Id.* at 396.

In light of these definitions, "residence" is a somewhat general and fluid term. When read alone, the word "residence" is susceptible to varying



interpretations. *Phillips v. S.C. Tax Comm'n*, 195 S.C. 472, 476, 12 S.E.2d 13, 15 (1940). It may have a restricted or enlarged meaning, and therefore, the precise meaning of the term is dependent upon the explanatory context. *Id.* at 476-77, 12 S.E.2d at 15-16.


The following outlines how the South Carolina courts have addressed the issue of what constitutes a person's residence in various contexts:

1. Homestead Exemption:

Under S.C. Code Ann § 15-41-30(1), a debtor is entitled to exempt certain equity in real property from collection by creditors if the debtor uses that real property "as a residence." In determining whether a debtor is entitled to this exemption for real property as a debtors "residence", the South Carolina Bankruptcy Court defined a residence as a "[p]lace where one actually lives or has his home; a person's dwelling place or place of habitation; an abode; house where one's home is; a dwelling house." *In re Jones*, 397 B.R. 765, 771 (Bankr. D.S.C. Nov. 26, 2008) (quoting Black's Law Dictionary 1309 (7th ed. 1999)). In *Jones*, the Bankruptcy Court found that the testimony of the debtors established that they have made the house at issue their "home" prior to filing bankruptcy and pictures introduced into evidence showed that the house was maintained and contained "all the appointments necessary for comfortable living." *Id.* at 771. The Bankruptcy Court also noted that the Debtors used the house at issue as their home for a number of years previously. *Id.*

2. Under the Recording Statute:

In *G.A.C. Finance Corp. v. Citizens & Southern Nat'l Bank*, 234 S.C. 205, 107 S.E.2d 315 (1959), the court defined the term residence in connection with the recording statutes at that time to mean "something more than a mere physical presence in a place, and something less than a domicile. The term clearly imports a fixed abode for the time being." In *G.A.C.*, the Court heard testimony on declarations and statements made by the mortgagor as to his place of




residence, however, the Court found that his declarations were "not conclusive," and submitted the issue of residency to the jury. *Id.*

3. Under the Venue Statute:

In *Miller v. Miller*, 248 S.C. 125, 129, 149 S.E.2d 336 (1966), the Court determined residency under the venue statutes enacted at the time the case was decided. The Court stated that the question of a person's place of residence is largely one of intent to be determined under the facts and circumstances of each case. In deciding the defendant was a non-resident for venue purposes, the court noted that "the act and intent as to domicile and not the duration of residence, [were] the determining factors" in making its decision.

This Court holds that while "residence" is a "somewhat general and fluid term, .... [i]t may have a restricted or enlarged meaning, and therefore, the precise meaning of the term is dependent upon the explanatory context." *Estate of Nicholson v. S.C. HHS*, 377 S.C. 590, 596 (S.C. Ct. App. 2008). The context in which "principal residence" is used in the Foreclosure Intervention Order indicates the phrase has a restricted meaning of physical presence at the property which is being foreclosed, rather than a broader meaning of domicile. The requirement that a mortgagor must actually be living in the property for the Foreclosure Intervention Order is in line with the policy for which the Foreclosure Intervention Order was entered, namely, to "insure that eligible homeowners and lender-servicers have been afforded the benefits of loan modification or other loss mitigation where possible." See Foreclosure Intervention Order. This restricted meaning of physical presence is bolstered by the emphasis added by the adverb "principal."

In this case, the Defendants are not actually living in the subject Property. Furthermore, it is clear from the evidence presented at the Hearing that the Defendants represented to Plaintiff at the time of applying for and entering into the subject loan that they intended for the mortgaged




Property to be for their 'second home.' See Second Home Rider to Mortgage attached as Exhibit C to Plaintiff's Complaint. The evidence further establishes that the Defendants are not, and have not been, actually living in the subject Property as their principal residence. Accordingly, the Property is not the principal residence of the Debtors as required by the Foreclosure Intervention Order. Therefore, the Foreclosure Intervention Order does not apply to the subject Property.

Based upon the foregoing, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

1. The South Carolina Supreme Court's Administrative Order 2011-05-02-01 defines "Owner-Occupied dwelling" as being the principal residence of the mortgagor;
2. The mortgagors in this action are the Defendants.
3. The Property owned by the Defendants which is the subject of this foreclosure action is not the principal residence of the Defendants;
- 3 The South Carolina Supreme Court's Administrative Order 2011-05-02-01 does not apply to the Property which is the subject of this foreclosure action; therefore, Plaintiff has fully complied with the requirements of the South Carolina Supreme Court's Administrative Order 2011-05-02-01;
4. Plaintiff's foreclosure action may proceed without further hearing, the foreclosure hearing already having been held and all issues, other than the one addressed by this Order, having been previously decided by the Court; and

IT IS SO ORDERED.

3-14- 2013

  
Ellis B. Drew, Jr.  
Anderson County Master-in-Equity

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