THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
In the Court of Common Pleas

L. Casey Manning, Presiding Judge

Case No: 2012-CP-40-0249

BRANCH BANKING AND TRUST COMPANY.....Respondent,

v.

GRAPHIC EXPRESS, LLC, LANNY R. GUNTER, II
and HARRY B. BENENHALEY.....Appellants.

RESPONDENT'S REPLY TO APPELLANTS' MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS AND/OR EXCLUDE

This matter is before the Court on Respondent Branch Banking and Trust Company's Motion to Dismiss or, Alternatively, Motion to Exclude Matter. Pursuant to Rule 240(f), SCACR, BB&T hereby submits its Reply to Appellants' "Memorandum in Opposition to Motion to Dismiss and/or Exclude" (the "Memorandum"). Further, because much of Appellants' recent submission is little more than a restatement of the claims raised in their Initial Brief, BB&T hereby restates and incorporates herein by reference the entirety of its previously filed Motion, including all legal authority and argument, as if fully set forth herein.

As even further evidenced by the content of their recent filing, this appeal should be dismissed because Appellants have failed to preserve *any* issue for this Court's review. Further, Appellants have consciously failed to offer any opposition to BB&T's motion to exclude the deposition transcript of Lanny Gunter, and thus have arguably conceded that such material must be excluded from the Court's review and that all references to the deposition must therefore be stricken. See Rule 240(e), SCACR. In this regard, though Appellants have eliminated all *citations* to this deposition testimony in their recent filing, they continue to rely exclusively upon this transcript to support their claims. Because it is uncontroverted that there is no matter in the Record upon which Appellants can rely in support of their arguments, BB&T again submits that dismissal of the appeal is also warranted on this basis.

Because sections II and III of Appellants' Memorandum are merely restatements of arguments set forth in their Initial Brief, BB&T's Reply will address only the arguments set forth in Section I of Appellants' Memorandum.

ARGUMENT

I. Appellants' Claim that a Purported "Violation of South Carolina Code Section 36-9-610 is Properly Before this Court" is in Direct Conflict with the Law of this State.

In addition to the fact that South Carolina Code § 36-9-610 is completely and entirely irrelevant to the underlying action, see BB&T Motion, fn.2, it is further not preserved for review by this Court. It was neither raised to nor ruled upon by the trial court.

A. This Issue Was Not Raised to the Trial Court.

Appellants base their contention that this issue was "properly raised" to the trial court *solely* upon the fact that their counsel made certain, albeit vague, statements to this effect during oral arguments on the motion for summary judgment. (Memorandum, § I, A). Pursuant to well-established South Carolina law, this is wholly insufficient to qualify as having "raised" the issue to the trial court, as this Court repeatedly has held that representations made by counsel at a summary judgment hearing, where unsupported by any matter in the record, will not qualify as having "raised" such issues to the trial court. Cobb v. Benjamin, 325 S.C. 573, 482 S.E.2d 589 (S.C. Ct. App. 1997) (holding that "a representation of fact by counsel . . . made during oral argument[] may not be considered by the court where it is unsupported by the record"); Gilmore v. Ivey, 290 S.C. 53, 348 S.E.2d 180 (S.C. Ct. App. 1986) ("factual statements of counsel, whether made during oral argument or in written briefs or memoranda," are not "entitled to consideration by the court in determining whether a genuine issue of material fact exists"). South Carolina law plainly and clearly provides that Appellants' argument on appeal was not raised to the trial court.

Further support for the fact that such issue was not properly "raised" to the lower court can actually be found in one of the cases relied upon by Appellants in their Memorandum. Adams v. B&D, Inc., 297 S.C. 416, 377 S.E.2d 315 (S.C. 1989). In Adams, the state Supreme Court held that it would not consider an issue raised for the first time on appeal where the matter should have been pleaded by the defendant as an affirmative defense in its answer. Adams, 297

S.C. at 419, 416, 377 S.E.2d at 317 (relying upon Rule 8(c), SCRCP). This Court has held that these new issues raised by Appellants pertaining to compliance with Title 36 of the South Carolina Code—regarding notification of the sale of collateral, disputes related to value of collateral, and commercial reasonableness of the sale of collateral—are precisely the types of issues which must be pleaded as affirmative defenses and for which evidence must be offered at the trial stage in order to be preserved for appellate review. Mathias v. Hicks, 294 S.C. 305, 306, 363 S.E.2d 917, 915-16 (S.C. Ct. App. 1987) (holding it was confined on appeal to consider only the narrow issue regarding notification of the sale of collateral under S.C. Code § 36-9-504, and not any challenges regarding value or reasonableness of sale under § 36-9-610, because this was the only of the three issues raised in the answer and for which evidence was produced at trial). In the present case, Appellants did not raise a single affirmative defense in their answer. Their failure to raise this issue in their pleadings, coupled with their failure to offer any supporting evidence prior to judgment, warrants dismissal of their appeal.

The survivability of Appellants' appeal hinges on the question of whether there are, in fact, any issues preserved for this Court's consideration on appeal. There simply is not any such issue here. Appellants' total and exclusive reliance upon the unsupported professions of counsel during oral arguments, which unquestionably do not amount to having "raised" an issue under South Carolina law, evidences the fact that their arguments are not preserved for appellate review. Their appeal is thus procedurally barred.

B. This Issue Was Not Ruled Upon by the Trial Court.

Assuming, *arguendo* that an issue which was not raised to a trial court can be ruled upon by it, such was not the case here. South Carolina law provides that a losing party in lower court must obtain an explicit ruling from the trial court on all issues upon which a subsequent appeal will be based, and if the court does not so explicitly rule, the party must file a motion for reconsideration or his argument is thereafter "procedurally barred" and cannot be addressed on appeal. I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (S.C. 2000); Metts v. Mims, 384 S.C. 491, 499, 682 S.E.2d 813, 817-18 (S.C. 2009); Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (S.C. 1991).

In their Memorandum, Appellants concede that Judge Manning's "order failed to make any findings regarding the collateral or any potential sale of the collateral." (Memorandum, § I, B). They admit, then, that they did not obtain an explicit ruling with respect to their new claim on appeal that a "violation of South Carolina Code § 36-9-610" occurred. They apparently argue, in contravention of state law, that such failure does not preclude preservation of the issue on appeal. Appellants offer two cases, each of which is inapposite to the present facts, for the proposition that they were not required to file a motion for reconsideration of this issue, which admittedly was not addressed by Judge Manning's order.

First, in Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (S.C. 1998), wherein a buyer and seller provided amortization schedules to the master-in-equity reflecting their competing views of the buyer's payment obligation, the appellate court held that the master-in-equity "ruled" on the arguments of the

seller where the court expressly adopted as its order the buyer's schedule and thereby expressly rejected the schedule submitted by the seller. The seller was thus not required to file a motion for reconsideration. This case presents an entirely different factual and procedural scenario from that of the present matter, wherein Appellants presented *no* materials to Judge Manning in support of their position and made no specific claims or objections. Second, Appellants' proffered case of Spence v. Wingate, 381 S.C. 487, 674 S.E.2d 169 (S.C. 2009) is likewise not instructive. There, the court held that the petitioner's argument to the lower court—that the respondent owed her a duty based on the existence of an attorney-client relationship—was "ruled upon" where the court "explicitly" held in its order that respondents "owed no duty or obligation" to petitioner. In this regard, unlike under the present facts, the petitioner's argument was explicitly ruled upon in the trial court's order.

Appellants admittedly did not obtain an explicit ruling from Judge Manning with respect to their new claim on appeal that a "violation of South Carolina Code § .36-9-610" occurred. They further admittedly did not file a motion for reconsideration. Pursuant to the clear mandates of South Carolina law, Appellants' claims are procedurally barred from consideration on appeal.

CONCLUSION

BB&T submits that its unopposed Motion to Exclude the deposition transcript of Lanny Gunter must be granted, whereby the material must be excluded from the Record on Appeal and all references made thereto by Appellants stricken. Further, based upon the foregoing authority and argument,

BB&T submits that this appeal must be dismissed because it is procedurally barred due to Appellants' failure to preserve any issue for appeal.

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CERTIFICATE OF SERVICE
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I certify that I have served the Respondent's Reply to Appellants' Memorandum in Opposition to Motion to Dismiss and/or Exclude on the Clerk of Court for the South Carolina Court of Appeals and Counsel for the Appellant by serving copies of the same via U.S. Mail on May 9, 2013 to the following:

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