THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

The Honorable Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2021-001400
Case No. 2012-CP-24-00576

IOS, LLC.....Appellant-Respondent

v.

Lander University .....Respondent-Appellant

FINAL REPLY BRIEF OF RESPONDENT-APPELLANT (CROSS-APPEAL)

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In its Brief, the Appellant-Respondent states that three grounds upon which the trial court's denial of summary judgment as to the breach of lease should be affirmed: 1) Appellant-Respondent has standing to sue for breach of the lease 2) the Respondent-Appellant's actions so damaged the hotel that it was forced into foreclosure; and 3) the issue of whether Appellant-Respondent's rights under the lease were assigned is now moot. (Appellant-Respondent's Response Brief, Cross-Appeal.)

FACTS

There should no dispute the Appellant-Respondent was already in default with its lenders prior to the negotiation of the lease in question. The record shows that the primary lender, Business Carolina, had previously entered a contract to sell its Note to a third party before any discussions between IOS and Lander regarding the lease took place. (R. pp. 620 (Banc Capital contract.)) Closing was initially to take place on or before June 29, 2009. It was Mr. Huffman's testimony that he did not speak with Lander representatives until "mid-July" or shortly after. (R. p. 733, Deposition of John Huffman, Day 1, condensed transcript, p. 26, l. 15-16.)) This contract was extended to July 31, due to the buyer's need to first "settle out a 1031 exchange." (R. pp. 629-630 (Credit Notes.))

This information was never disclosed by IOS, LLC to Lander during lease negotiations. (R. p. 836 and p. 837 (Deposition of John Huffman, Day 2, condensed p. 64, lines 21-25 and, p. 65, 1-5.) Discovery indicates that when Mr. Huffman learned of this predicament, he began advising the bank that "his line of credit had been canceled and he could no longer fund" the hotel." (R. pp. 629-630 (Credit Notes.)) On August 6, 2009, he was quoted in the local newspaper, The Index Journal, as confirming he was in lease negotiations with Lander after the recession "sacked his ability to keep the Inn on the Square running as a hotel." (R. pp. 168-177 (From Inn to Dorm.))

The article states that Huffman stressed that the plan for closing the Inn was contingent upon a **lease** agreement being struck with Lander, with no mention of a sale. (Id.)

During his deposition, which was taken during 2015, he testified that the hotel really struggled that last year, which is why the LLC decided to "go ahead and put the hotel up for sale." Despite this admission, he periodically stated the exact opposite. On Day 3 of his deposition, p. 147, ln. 156, he said the business was "turning around" (R. p.901, Deposition of John Huffman, Day 3, condensed transcript, p. 147, l. 3-6.) On Day 1 of his deposition, the business was "marginally profitable" and "holding its own." (R. p. 732 (Deposition of John Huffman, Day 1, condensed, p. 21, lines 12, 23.))

The credit notes of Todd Lucas, dated August 3, 2009, indicate a different picture was presented to the bank. Elsewhere in his deposition, Mr. Huffman admits "everyone knew I didn't have the money." (R. p. 739 (Deposition of John Huffman, Day 1, condensed p. 51, line 19.)) In response to the question of whether he was in default at the time he was negotiating with Lander, he said "I was behind, but not in default." (R. p. 836 (Deposition of John Huffman, Day 2, condensed p. 64, line 21.)) This contradicts the Forbearance Agreement, in which IOS, LLC admits default. (R. pp. 631-637 (Forbearance Agreement.))

The loan officer's credit notes, indicate the bank objected Mr. Huffman's proposal to Lease the property to Lander, as the prospective buyer did not want the hotel closed, and asked him to keep it open. (R. pp. 629-630 (Credit Notes.)) Mr. Huffman flatly refused, stating he was unable to do so and that operations would totally cease by August 15, 2009. (Id.) Following this exchange, the bank began to explore whether it could force the borrower to remove Mr. Huffman as the manager of the property. (Id.) Mr. Huffman's refusal to comply was successful in frustrating the attempted sale of the note and designed to allow him to maintain control of the property. Had the

sale of the note gone through, his wife, a member of the LLC, stood to lose an investment in the business (R. p. 845 (Deposition of John Huffman, Day 2, condensed transcript, p. 99, lines 15-17.)) and he, individually, stood to lose a real estate commission (R. p. 786 (Deposition of John Huffman, Day 1, condensed transcript, p. 238, lines 20-21))

Respondent-Appellant would also show that the Appellant-Respondent's causes of action are largely without proof other than Mr. Huffman's bare assertions. His actual representations vary depending on the party to whom they are made and he often contradicts himself. His claim that despite the housing crash that IOS, LLC could have successfully weathered the storm is necessary to support Appellant-Respondent's allegation that Lander's conduct, not IOS's, caused the foreclosure, which it currently seeks to include as an element of damages. This is in stark contrast to his other testimony, where Mr. Huffman admits his line of credit is canceled and he could not continue operations on his own. Conspicuously absent from Mr. Huffman's deposition is the fact that the bank was already moving forward with a sale of the note and that his own conduct prevented the sale.

More importantly, the Appellant-Respondent's argument that Lander caused the foreclosure presumes without ANY PROOF that IOS had the ability to resume operations and that Business Carolina would have allowed it, given IOS was in default and the sale note had been thwarted. In point of fact, there is no evidence in the record that IOS intended to reopen as a hotel in the future, as it acknowledged default on the note in the forbearance agreement, sold assets to Lander and others, and reported a mass sale of furniture and fixtures on its 2009 tax return (R. p. 631 (Forbearance Agreement), R. pp. 675-680 (Plaintiff's federal tax return indicating mass sale of assets on 12/31/2009) and R. pp. 550-556 (Handwritten Bill of Sale from IOS, LLC to Diane Newton on behalf of Lander University.))

A review of the 2009 Forbearance Agreement further indicates that IOS, LLC, was required to reaffirm the debt, acknowledge an ongoing default and reiterate IOS, LLC's previous waiver of defenses in the event of future foreclosure. (R. pp. 631 (Forbearance Agreement, IOS, LLC 2009.) It also required IOS, LLC to attest that its interest was subordinate all of the prior loan documents, including the assignment of leases and rents to Business Carolina. The original Assignment provided (in pertinent part) that:

"**for good and valuable consideration, Assignor absolutely assigns and transfers to assignee**" the following:

> (a). The income, rents, receivables, security or other similar deposits, revenues, issues, royalties, profits, earnings, products and proceeds from any and all of the Property (collectively, the "rents, issue and profits") together with the right, power and authority to collect same;
>
> (b.) All leases, **written or oral**, **now in existence or hereafter arising** (emphasis added) all other agreements for the use and occupancy of all or any portion of the Property, and any and all extensions or renewals of any thereof (individually collectively, the "Lease" or "Leases" together with the right, power and authority of the Assignor to alter, modify, or change the terms thereof, or surrender, cancel or terminate same; and
>
> (c.) Any and all guarantees of any obligations of any Lessee (the "lessee") under each of the leases.
>
> Assignor **irrevocably** (emphasis added) appoints Assignee its true and lawful **attorney-in-fact**, at any time and from time to time, at the option of the Assignee to demand, receive and enforce payment of rents, to give receipts, releases and satisfactions, and to sue, in the name of the Assignor or the Assignee, for all the rents, issues and profits and to apply the same to the indebtedness secured; provided however, that Assignor shall have the right and license to collect the rents, issues and profits prior to or at any time there is no continuing default hereunder or under any of the other loan documents evidencing and securing the Note (as defined herein) ("Loan Documents"). The assignment of rents, issues and profits is an **absolute assignment** (emphasis added) from Assignor to Assignee and not merely the passing of a security interest.

> "**Upon payment in full of the indebtedness**, this Assignment shall become and be void and of no effect, but the affidavit, certificate, letter or statement of any officer, agent, or attorney of the Assignee showing any part of the Indebtedness to remain unpaid or unperformed shall be and constitute conclusive evidence of the validity, effectiveness and continuing force of this Assignment and any person may, and is hereby authorized to, rely thereon. The Assignor, as the lessor under any Lease, hereby authorizes and directs the lessee named in any such Lease or any other or future lessee or occupant of the premises described therein upon receipt from the Assignee is then the holder of the Note to pay over to the Assignee all rents, and profits or accruing under such Leases or from the premises described therein and to continue to do until otherwise notified by the Assignee." Id.

The new Forbearance Agreement also specifically excluded acceptance of rent pursuant to the lease as a waiver of default. (Id).

A new Subordination/Non-Disturbance agreement further provided in paragraph 9 that the

> **Lender would be entitled, but not obligated, to exercise the claims, rights, power, privileges and remedies of the landlord under the Lease, and shall be entitled to the benefits of, and to receive and enforce performance of, all of the covenants to be performed by the Tenant under the lease as though the lender were named therein as the Landlord** (emphasis added).

After discovering during due diligence that Lander would not be able to exercise the option, IOS did not begin preparations to reopen the hotel but instead attempted to negotiate a longer term lease with Lander. IOS had already admitted insufficient capital with which to operate to the bank, who also gave no indication of any intention of allowing it to re-open under any circumstances.

Only after the termination of the lease extension in June of 2011, did IOS ever make mention reopening as a hotel, which was pretextual and in the form of a demand for liquidated damages submitted without any proof that alleged missing personal property had been removed by tenant, rather than sold by the Appellant-Respondent at the time they turned over possession of

the property as shown by the IOS, LLC tax return. (R. pp. 225-229.) More importantly, the Appellant-Respondent submitted no evidence that Business Carolina, who refiled its foreclosure proceeding on July 22, 2011, would have let IOS, LLC out of default to resume operation of the hotel given that their circumstances had not changed.

Contrary to the actual evidence is Mr. Huffman's bare assertion that Lander was responsible for missing or damaged equipment, there is actual evidence of a bulk sale at the commencement of the lease, and that many of the items IOS claimed were missing were in storage on the property when it was foreclosed and the bank asserted the right to transfer these items under the security agreements to a new purchaser after the judicial sale. (R. pp. 675-680 (Bill of Sale from Business Carolina, Inc. to 104 East Court, LLP.)) As to the condition of the building, there is evidence that IOS, LLC failed to mitigate by allowing the building to remain without power after Lander turned it over, resulting in the growth of mildew and mold. (R. pp. 871-872 (Deposition of John Huffman, condensed transcript, p. 26, 21-25, p. 27. l. 1-23, p. 28, l. 1-25, p. 29, l. 1-5.))

Ultimately, the property was sold at foreclosure and a deficiency judgment in the amount of $425,218.84 was entered on May 2, 2012. (Respondent-Appellant's Reply Brief in Support of Summary Judgment, Ex. 30 Foreclosure Order and Judgment. (R. pp. 652-674)) This action was not filed until after that sale was reported and the foreclosure was concluded.

In its initial response to the Complaint filed in this matter on May 29, 2022, Respondent-Appellant filed an Answer asserting that the IOS had been divested of any legal rights to the real property, furniture, fixtures or equipment by virtue of the Assignment as well as the Foreclosure. Lander has maintained this assertion for the entire ten years this case has been in litigation. In support of its position, Respondent-Appellant's filed a motion for summary judgment in 2014.

During the pendency of this litigation, the foreclosure was completed and a deficiency judgment of $425,218.84 was entered in favor of Business Carolina. As has been expected, Appellant-Respondent now argues that the issue of whether IOS, LLC has standing to bring suit for breach of the lease is now moot, as the deficiency judgment expired on May 3, 2012. Respondent-Appellant has expected this argument, as it now appears to have been the plan all along, in light of the confessions of judgment recorded on junior mortgages owed by IOS to the principals of the LLC, which were filed after the foreclosure was concluded.

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ARGUMENT

I. LANDER UNIVERSITY IS ENTITLED TO SUMMARY JUDGMENT AS TO IOS, LLC'S REMAINING CAUSE OF ACTION FOR BREACH OF LEASE AS APPELLANT-RESPONDENT LACKS STANDING FOR TWO REASONS:

A. THE IRREVOCABLE ASSIGNMENT OF LEASES AND RENTS ASSIGNED THE RIGHT TO SUE TO BUSINESS CAROLINA IN THE EVENT OF IOS, LLC'S DEFAULT. THE ISSUE IS NOT MOOT BECAUSE THE SECURED DEBT REMAINED UNPAID AT THE TIME IOS, LLC BROUGHT SUIT, DEPRIVING THEM OF STANDING. AS THE DEFIENCY REMAINED UNPAID UNTIL THE STATUTE OF LIMITATIONS EXPIRED ON THE CONTRACT ACTION, ONLY BUSINESS CAROLINA EVER HAD THE RIGHT TO SUE;

Before any action can be maintained, there must exist a justiciable controversy. Byrd v. Irmo High School, 321 S.C. 426, 430, 468 S.E. 2d 861, 864 (1996). Justiciability encompasses several doctrines, including ripeness, mootness and standing. Wilson v. Dallas, 403 S.C. 411, 743 S.E.2d 746 (2013). In its most basic sense, "standing" refers to a party's right to make legal claim or seek judicial enforcement of a duty or right. Preservation Society of Charleston v. South Carolina Department of Health and Environmental Control, 430 S.C. 220, 845 S.E. 2d 481 (2020) and Bank of America v. Draper, 405 S.C. 214, 746 S.E.2d 478 (2013). Standing to sue is a fundamental requirement in instituting an action. Id. S.C. Code Ann. § 36-3-203(b) (1976, as amended) provides that transfer of an instrument vests in the transferee any rights the transferor had. An assignee stands in the shoes of its assignor. Twelfth RMA Partners, L.P. v. Nat'l Safe Corp. 335 S.C. 635, 639, 518 S.E.2d 44, 46, (Ct. App. 1999). The party seeking to establish standing **has the burden of proof**. Sea Pines Ass'n for the Protection of Wildlife, Inc. v. S.C. Dept. of Natural Resources, 345 S.C. 594, 601, 550 S.E. 2d 287, 291 (2001). Respondent-Appellant would show that there are no genuine issues of material fact in controversy on this issue.

An assignment of leases and rents made upon good consideration is valid. S. C. Code Ann. 29-3-100 (1976, as amended). A recording of a written document containing an assignment of leases and rents, issue or profits is valid from the time of recording, and is perfected from the time of recording against subsequent assignees, lien creditors and purchasers for valuable consideration from the assignor. S. C. Code Ann. 29-3-100(B) (1976, as amended) (emphasis added). The assignment of a lease or the subletting of leased premises conveys an interest in the land. An assignment is a conveyance of the lessee's entire interest in the demised premises without retaining any reversionary interest in the leasehold. Neal v. Craig Brown, Inc., 356 S.E.2d 912 (1987).

When an assignor retains no rights to assigned property, an assignor lacks standing to enforce any agreements regarding that property. Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 493 S.E. 2d 826 (1997). Crestwood, which contained a very complicated fact pattern, is distinguishable from the case at bar. It involved the sale of real property and improvements (a golf course, restaurant and bar) by a partnership as well as the separate sale of the carts, equipment, and personal property from a different corporation who owned a Golf Club. Id. The partnership owned only the real property and the Club owned only the personal property and equipment. Id. The Purchasers financed the sale with a loan from South Carolina National, who took a mortgage on the real property, as well as security interest in the personal property. The bank required the Sellers to issue a continuing guaranty of the Purchaser's debt to the bank. The Purchasers also borrowed money from the Sellers to finance the purchase. This was secured by a second mortgage and a second security interest in the equipment. The Sellers assigned their interest in the second Note, Mortgage and Guaranty taken from the Purchasers, as well as various leases. This Collateral Assignment gave the Sellers the right to use and enjoy the property which is the subject of the

Assignment, as long as the Sellers did not default under the terms of the Assignment. The Assignment itself, also placed affirmative responsibilities upon the Sellers to:

> "(i) give prompt notice to the Lender [Bank] of any default under the Assigned Documents which is not timely cured herein; (ii) at the sole cost and expense of the Assignor [Sellers], enforce the payment and observance of each and every covenant and condition of the Assigned Documents and (iii) appear and defend any action growing out of the in any manner connected with the Assigned Documents." [emphasis added]

When the Purchasers defaulted, the Sellers brought a foreclosure action against them under the second mortgage and security agreement, along with a separate lawsuit against the individual guarantors. The trial court affirmed the Sellers right to recover in this second suit under the Guaranty.

The Purchasers argued in the foreclosure that Sellers lacked standing to enforce the Mortgage and related documents which had been assigned to the bank. In holding that the Collateral Assignment did not divest the Sellers of standing, the Court held that language of the Assignment reserved not only the right, but the obligation of the Sellers to pursue foreclosure.

The case at bar is distinguishable, because although the Assignment contains a similar right and obligation to enforce the Lease, IOS, LLC failed to bring an action under the lease to enforce the time of the alleged breach of the lease against Lander, as required by the language of the assignment itself. (Defendant Lander University's Brief in Support of Motion for Summary Judgment, Ex. 3(f). (R. pp. 388-395)) The assignment states that:

> "Assignor irrevocably appoints Assignee as its true and lawful attorney-in-fact, at any time and from time to time, at the option of the Assignee, to demand, receive and enforcement payment of rent, to give receipts, releases and satisfactions, and to sue in the name of the Assignor or Assignee, for all the rents, issues and profits and to apply the same to the indebtedness secured; provided, however, that Assignor shall have the right and license to collect the rents, issues and profits prior to or at any time *there is no continuing default hereunder* or under any of the other loan documents evidencing and

> securing the Note (as defined herein) (Loan Documents). The assignment of rents, issues and profits in this Assignment is an absolute assignment from Assignor to Assignee and not merely the passing of a security interest." (Respondent-Appellant's Reply Brief in Support of Summary Judgment, Ex.3(f) (R. pp. 388-395))

Via this Assignment of Leases and Rents, as well as the Forbearance documents, which IOS, LLC subsequently executed, Business Carolina was specifically assigned an interest in "all" leases "whether written or oral." (Id.) This would, by definition, include any alleged oral 'side deal lease, though as argued in Respondent-Appellant's Brief in the primary appeal, oral amendment of the written lease was precluded by the integration language of the written lease and also never pled in the complaint.

The language of the Assignment further stated that only upon "**payment in full of the indebtedness**" would this Assignment be void and of no effect. Id. Lander asserts that IOS, LLC remained in default until the foreclosure proceeding was concluded. In fact, the indebtedness, which has never been paid, remained outstanding, after Appellant-Respondent was divested of any ownership interest in the property by virtue of the foreclosure.

Moreover, in the event of default, the Assignee was entitled to "take possession of the property, either in person or by agent, with or without the necessity of bringing an action or proceeding" and demand, sue and otherwise collect and receive all rents, issues and profits of the Property. Id. at Ex. 3(f). As the language of the assignment itself vests in the Assignee, Business Carolina, all rights of enforcement in the event of default, IOS, LLC cannot have standing. This is critically distinguishable from Crestwood, where the Seller was not in default, choosing to continue to pay the Note while it foreclosed the second mortgage and guaranty against the Purchasers.

At the time the alleged breaches occurred, IOS, LLC was formally in default, having acknowledged default and waived any defense to a future foreclosure in the Forbearance Agreement of August 31, 2009. (Defendant Lander University's Brief in Support of Motion for Summary Judgment, Ex. 29. (R. pp. 631-651)) In the event of default, both Palmetto Inns, the original Assignor, and IOS, LLC, who agreed to be bound by the Assignment in the Forbearance Documents, lost their contractual rights to enforce any covenant of the lease in favor of Business Carolina. (Id.) There is even a provision that Business Carolina could be liable to IOS, LLC in connection with its management of the property if it asserted these rights in the event of default, if such loss was caused by "willful conduct or gross negligence." (Id. at Ex. 3(f) and Ex. 29.)

It is clear from this language of this document that as long as there was a continuing default and the indebtedness remained unpaid, the right, power and authority to sue for any monies, including damages for breach under the written lease, was transferred to Business Carolina and IOS, LLC was deprived of standing. As the debt remained unpaid until the expiration of the statute of limitations for bringing an action for breach of the Lease, IOS, LLC was never a proper property party in interest to bring the action at bar and summary judgment should be granted. From the time of the breach until the expiration of the statute of limitations for breach of the lease agreement, the debt also remained unsatisfied; therefore, IOS, LLC could not have had standing to sue. For this reason, the contractual operation of the Assignment is also not Moot, as the Appellant-Respondent argues. This is because the debt was still owed when the statute of limitations expired for Business Carolina to enforce the lease, making it impossible for IOS, LLC to ever have standing absent a further agreement.

B. IOS, LLC'S INTEREST IN THE REAL OR PERSONAL PROPERTY TERMINATED AT FORECLOSURE;

1. IOS, LLC WAIVED ITS RIGHT TO A CAUSE OF ACTION FOR BREACH OF LEASE WHEN IT FAILED TO BRING A COMPULSORY COUNTERCLAIM AGAINST BUSINESS CAROLINA, THE ASSIGNEE

A foreclosure is both an *in personam* as well as *in rem* proceeding, Perpetual Building & Loan Association v. Braun, 270 S.C. 338, 242 S.C. 407 (1978). IOS, LLC also lacks standing as the foreclosure was completed prior to the Appellant-Respondent asserting any cause of action related to the assignment, lease or property.

An action for foreclosure adjudicates and cuts off the mortgagor's interest in real property. Bartles v. Livingston, 282 S.C. 448, 319 S.E.2d 707 (Ct. App. 1984). As in Bartles, it is important to note that IOS, LLC filed no answer to the foreclosure, choosing instead to default instead of asserting defenses.

If IOS, LLC felt aggrieved by the manner in which the bank chose to enforce its rights under the loan documents and subsequent forbearance agreements, it was obligated to assert these as affirmative defenses to the debt, and seek the satisfaction of the Note before it had standing to sue. In the alternative, IOS, LLC could have filed compulsory counterclaims in the foreclosure action to set aside or offset the debt and obtain standing.

As stated above, the Assignment contained a provision which did not preclude the liability of the Bank to the Borrower in the event of "willful conduct or gross negligence," which Palmetto Inns or IOS could have easily argued to offset the debt.

Likewise, if IOS, LLC believed it was (1) deprived of personal property, which appears to have been sold by Business Carolina to a subsequent purchaser following the judicial sale (2) damaged by the actions of the tenant, who only Business Carolina was authorized to sue for breach

of any lease covenant pursuant to the power of attorney granted in the assignment or (3) deprived of any right to redemption of the property due to conduct on the part of the assignee or the tenant, IOS should have asserted those causes of action during the foreclosure prior to being divested of any interest in the property, particularly considering it continued to be divested of standing following the Foreclosure, as long as any part of the debt remains unpaid – which was the case until the expiration of the statute of limitations for Business Carolina to sue.

Respondent-Appellant would also argue that IOS, LLC was further deprived of standing when it failed to answer the foreclosure or assert defenses as any action to construe the Assignment between the parties was by necessity, part of the same transaction or occurrence as the foreclosure. Had IOS, LLC believed that any damages were owed due to breach of the lease, the proper remedy was a compulsory counterclaim against the assignee, Business Carolina, seeking to construe, enforce or invalidate the assignment due to their conduct and establish standing, along with a cross claim against Lander for damages.

In a foreclosure action, a compulsory counterclaim arises out of the same transaction or occurrence when there is a logical relationship between the counterclaim and the enforceability of the agreement. N.C. Fed Sav. & Loan Ass'n v. DAV Corp., 298 SC 514, 381 S.E.2d 903 (1989). In South Carolina Community Bank v. Salon Proz, LLC this court found a claim was compulsory in a foreclosure action when, if the allegation were true, "it could affect the loan's enforceability." 420 S.C. 89, 97-98, 800 S.E. 2d 488, 492 (Ct. App. 2017).

Although IOS, LLC was a named Defendant in the foreclosure action taken by Business Carolina against Palmetto Inns, LLC, it filed no answer and was in default when the judgment of foreclosure was entered, thereby waiving its argument to assert standing.

Pursuant to the language of the Assignment (see above), any amounts found due and owing under the lease contract would have operated to offset the debt under the Note and Mortgage at the time of foreclosure. Because the Assignment was executed as part and parcel of the loan package, it is part of the same occurrence or transaction. S.C.R. Civ. P. 13(a) and N.C. Fed. Sav. & Loan Ass'n v. DAV, Corp. 298 SC 514, 381 S.E.2d 903 (1989). If IOS, LLC believed it was aggrieved by the Assignment, or corresponding Forbearance and Subordination/Non-Disturbance Agreements, as well as Business Carolina's failure to assert a claim under the Assignment against Lander for breach of the lease, it should have defended the action and filed compulsory counterclaims against Business Carolina to establish standing to sue under the Assignment.

As discussed above, an action for foreclosure adjudicates and cuts off any interest in real property. Once the Bank obtained title to the property at the foreclosure sale, any interest IOS, LLC held in the property or the lease terminated.

In this case, Business Carolina chose to foreclose the mortgage, and resold the real property to 104 East Court LLP. Furthermore, on September 20, 2013, Business Carolina executed an "as is" Bill of Sale for any and all tangible personal property found when it took possession of the Inn on the Square to 104 East Court LLP. (Ex. 27 (R. pp. 620-628)) Claims for damage, loss or impairment of that interest were assigned to Business Carolina by virtue of the loan documents and Forbearance agreements, such that prior to any funds being recovered by IOS, LLC, they must be applied to the indebtedness. When IOS, LLC waived the right to litigate the validity of the assignment, it waived any right to entitlement of funds outside of the foreclosure. In attempting to maintain a separate suit without standing, IOS, LLC seeks the assistance of the Court to help them avoid the Assignment and payment of the debt, much like an "end around" play would avoid defensive linemen during a football game. At its essence, Lander University's primary objection

that under the Assignment, IOS, LLC remained ineligible to sue for damages as long as the debt was unpaid as the purpose of the assignment was to reduce the debt in the event of foreclosure. Furthering the football analogy, allowing them to recover despite the fact they were in default and never paid the debt, is akin to a 'trick play' with an ineligible receiver, should result in a penalty.

C. THE APPELLANT-RESPONDENT'S ARGUMENT THAT DENIAL OF SUMMARY JUDGMENT SHOULD BE AFFIRMED BECAUSE LANDER UNIVERSITY'S ACTIONS FORCED IT INTO FORECLOSURE IGNORES THE IRREVOCABLE ASSIGNMENT AND IS NOT SUPPORTED BY THE RECORD. THERE ARE NO GENUINE ISSUES OF MATERIAL FACT IN CONTROVERSY AS MR. HUFFMAN'S OWN TESTIMONY IS CONSISTENT ON THAT ISSUE

As set forth in the facts above, the record is replete with evidence that IOS, LLC was in default long before any negotiations with Lander regarding a lease or option began. In fact, the primary reason IOS, LLC sought to obtain approval of a lease from Business Carolina, was to avoid the sale of the note which was already in progress. All of this, of course, was unbeknownst to the Respondent-Appellant until after the foreclosure was complete and this suit was brought, as the Appellant-Respondent concealed this information until it was obtained during discovery. As detailed at length above, Mr. Huffman's own testimony does not support this assertion, as he claims multiple times that he "could no longer fund the hotel" on the one hand, but that the Inn would have survived without the Lease had the opportunity not arisen.

One would think that with the mountain of evidence available that the loan was in default, the note had been sold, IOS, LLC acknowledged the default in writing and Mr. Huffman, himself, made multiple representations to the lender that he had no money with which to continue to operate the hotel, that the Appellant-Respondent would be hard pressed to proceed with this argument.

CONCLUSION

For the reasons stated above, this Court should reverse the circuit court's denial of summary judgment on IOS, LLC's cause of action for breach of lease.

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