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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Carmen T. Mullen, Circuit Court Judge;
The Honorable Maite Murphy;
and
The Honorable Marvin H. Dukes, III, Master-in Equity and Special Circuit Judge

Appellate Case No. 2022-001132
Case No. 2019-CP-07-1666

Stevens Builders, LLC.....Appellant,

v.

Michael C. Garraway, Alicia M. Garraway, and TD Bank, N.A. Defendants,

Of whom TD Bank, N.A. is the.....Respondent.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

STEVENS BUILDERS, LLC,

Plaintiff,

vs.

MICHAEL C. GARRAWAY, ALICIA M.
GARRAWAY, and TD BANK, N.A.,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL CASE NO.: 2019-CP-07-1666

ENTRY OF DEFAULT

It appears, by Affidavit of Default of Benjamin T. Coppage, attorney for the Plaintiffs, that Defendant TD Bank, N.A., a party against which a judgment for affirmative relief is sought in the above-captioned matter, has failed to plead or otherwise defend as provided in the South Carolina Rules of Civil Procedure. To wit, Defendant TD Bank, N.A. was served by personal service with a copy of the Summons and Complaint in this action on September 30, 2019, more than thirty (30) days passed from the date of service without any answer or response to the Complaint, and Defendant TD Bank, N.A. has failed to plead or otherwise defend within thirty (30) days as required by Rule 12(a), SCRPC.

Accordingly, Defendant TD Bank, N.A. is in default.

_____, 2019
Beaufort, South Carolina

Jerri Ann Roseneau
Clerk of Court
Beaufort County, South Carolina



Beaufort Common Pleas

Case Caption: Stevens Builders Llc VS Michael C Garraway , defendant, et al

Case Number: 2019CP0701666

Type: Order/Entry of Default

So Ordered

s/Jerri Ann Roseneau, Beaufort County Clerk of
Court

Electronically signed on 2019-12-03 17:13:00 page 2 of 2

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CIVIL CASE NO: 2019-CP-07-01666
	)	
STEVENS BUILDERS, LLC,	)	
	)	
Plaintiff,	)	
	)	CONSENT ORDER
v.	)	
	)	
MICHAEL C. GARRAWAY,	)	
ALICIA M. GARRAWAY, and	)	
TD BANK, N.A.,	)	
	)	
Defendants.	)	
_____	)	

BACKGROUND

Defendants Michael C. Garraway and Alicia M. Garraway (“Garraway”) filed a Notice of Motion and Motion for Partial Summary Judgment seeking an Order of the Court dismissing with prejudice the Plaintiff’s Fourth Cause of Action to foreclose on an alleged Mechanic’s Lien against the Garraways’ and their real property generally known as, 140 Front St., St. Helena Island, SC 29920. This matter was set to be heard on February 26th, 2020 at 2:00 p.m. at the Beaufort County, South Carolina Courthouse.

Prior to the call of the motion, the Parties have informed the Court they had reached a settlement agreement with regards to the Garraways’ motion and that they wished for the Court to enter an order dismissing the Plaintiff’s Fourth Cause of Action, “Foreclosure of Mechanic’s Lien” with prejudice. As to the issues of the Cancellation and Release of the Notice and Certificate of Mechanic’s Lien, Cancellation of Lis Pendens, and attorney’s fees and costs, the Parties have handled those issues pursuant to a written and signed Settlement Agreement.

Based on the Parties' agreement, it is therefore **ORDERED, JUDGED** and **DECREED** that the Plaintiff's Fourth Cause of Action for foreclosure of Mechanic's Lien is hereby dismissed with prejudice.

AND IT IS SO ORDERED.

Honorable Carmen T. Mullen
Judge, Fourteenth Judicial Circuit
Beaufort County Court of Common Pleas

February _____, 2020
Beaufort, South Carolina

[THIS ORDER DOES NOT END THE CASE]

WE SO CONSENT:

WEIDNER, WEGMANN & HARPER, LLC

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ATTORNEY FOR PLAINTIFF, STEVENS BUILDERS, LLC



Beaufort Common Pleas

Case Caption: Stevens Builders Llc VS Michael C Garraway , defendant, et al

Case Number: 2019CP0701666

Type: Order/Consent Order

So Ordered

s/Carmen T Mullen 2142

Electronically signed on 2020-03-02 16:27:03 page 3 of 3

State of South Carolina

County of Beaufort

Stevens Builders, LLC,

Plaintiff,

vs.

Michael C. Garraway, Alicia M. Garraway,
and TD Bank, N.A.,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Case No.: 2019-CP-07-1666

**ORDER GRANTING TD BANK'S MOTION TO
BE RELIEVED FROM ENTRY OF DEFAULT**

THIS MATTER is before the Court for hearing on Defendant, TD Bank, N.A.'s Motion to be Relieved from Entry of Default ("**Motion**"). A hearing on the Motion was held on February 26, 2020. Present at the hearing were Benjamin Coppage counsel for the Plaintiff, James Wegman, counsel for Michael C. Garraway and Alicia M. Garraway, and J. Martin Page, counsel for TD Bank, N.A. ("**TD Bank**"). For the reasons set forth below, the Court grants TD Bank's Motion.

FINDINGS OF FACT

1. On or around, July 18, 2019, Plaintiff, Stevens Builders, LLC, ("**Plaintiff**") filed a *Lis Pendens*, Summons and Complaint seeking, among other things, the foreclosure of a Mechanics' Lien on real property known as Lot 40 as shown on that certain plat entitled "Bermuda Bluff" St. Helena Township, Beaufort County South Carolina recorded in Plat Book 35 at Pages 164 in the Records of Charleston County (Complaint ¶ 6).
2. Thereafter, TD Bank, was served with the Complaint on or around, September 30, 2019.
3. Thereafter, Plaintiff filed a Motion for Default Judgment ("**Motion for Default Judgment**") on December 2, 2019.

4. A damages hearing on the Motion for Default Judgment was held on January 31, 2020.
5. TD Bank filed the present Motion on February 7, 2020.

DISCUSSION AND CONCLUSIONS OF LAW

TD Bank is entitled to be relieved from default. Entry of default is a ministerial act, which a clerk must perform once default is made to appear by the affidavit of the moving party. Start Truss Co., Inc. v. Superior Const. Corp., 360 S.C. 503, 602 S.E.2d 99 (S.C. App. 2004). Once an entry of default has been made, the standard for granting relief from such entry of default is mere “good cause.” Regions Bank v. Owens, 402 S.C. 642, 648 741 S.E.2d 51, 54 (S.C. App. 2013). The “good cause” standard for a party seeking relief must provide an explanation for the default and reasons why vacation of the default entry serves the interests of justice. Id. If there is a satisfactory explanation for the default, the court must also consider: (1) the timing of the motion for relief; (2) the existence of a meritorious defense; and (3) the degree of prejudice to the nonmoving party if relief is granted. Id. A motion under Rule 55(c) is addressed to the sound discretion of the court. Id., (quoting Wham v. Shearson Lehman Bros., Inc. 298 2.C. 462, 465, 381 S.E.2d 499, 501-02 (S.C. App. 1989)).

TD Bank has shown that “good cause” exists here as to why an answer to the Complaint was not filed.

TD Bank further meets the requirements of the remaining factors: (1) even though no default has been entered, upon being referred the action, TD Bank’s counsel immediately filed this Motion, (2) a meritorious defense exists and (3) there would be no prejudice to the Plaintiff in allowing TD Bank to answer or otherwise response to the Complaint.

IT IS, THEREFORE, ORDERED THAT:

1. TD Bank's Motion to be Relieved from Default is **granted**; and
2. TD Bank shall file an answer or other pleading to the Complaint within **fifteen**
(15) days from entry of this Order.

AND IT IS SO ORDERED.

[ELECTRONIC SIGNATURE TO FOLLOW]



Beaufort Common Pleas

Case Caption: Stevens Builders Llc VS Michael C Garraway , defendant, et al

Case Number: 2019CP0701666

Type: Order/Other

So Ordered

s/Carmen T Mullen 2142

Electronically signed on 2020-03-06 12:00:24 page 4 of 4

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Beaufort
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP0701666

Stevens Builders Llc
PLAINTIFF(S)

Michael C Garraway et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Plaintiff's Motion to Reconsider, Alter, and Amend Order is hereby respectfully denied without a hearing.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 03/18/2020 .

James John Wegmann for Michael C Garraway, Alicia M Garraway
Benjamin Terrell Coppage for Stevens Builders Llc
James Martin Page for Td Bank N A

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Beaufort Common Pleas

Case Caption: Stevens Builders Llc VS Michael C Garraway , defendant, et al

Case Number: 2019CP0701666

Type: Order/Electronic Form 4

So Ordered

s/Carmen T Mullen 2142

Electronically signed on 2020-03-18 15:29:25 page 3 of 3

The Supreme Court of South Carolina

RE: Operation of the Trial Courts During the Coronavirus
Emergency

Appellate Case No. 2020-000447

ORDER

(a) Purpose. The purpose of this order is to provide guidance on the continued operation of the trial courts during the current coronavirus (COVID-19) emergency. The measures contained in this order are intended to allow essential operations to continue while minimizing the risk to the public, litigants, lawyers and court employees.

In the past, the South Carolina Judicial Branch has shown great resilience in responding to hurricanes, floods, and other major disasters, and this Court is confident that the same will be true in this emergency. This emergency, however, differs from these prior emergencies in many aspects. The current emergency will significantly impact every community in South Carolina while the prior emergencies, although potentially horrific for the individuals and communities directly impacted, did not. The impact of the prior emergencies could be minimized or avoided by traveling away from the site of the disaster; this is not the case for the current emergency. Further, in the prior emergencies, the circumstances giving rise to the emergency involved a single event with a beginning and a predictable end. This is not the case for the coronavirus, and even conservative estimates indicate the direct impacts of this pandemic will continue for many months.

In light of the extraordinary challenges presented by the current emergency, this Court finds it necessary to supplement and, in some situations, to alter significantly, the current practices regarding the operation of the trial courts. In the event of a conflict between this order and the South Carolina Rules of Civil Procedure (SCRCP), the South Carolina Rules of Criminal Procedure (SCRCrimP), the South Carolina Rules of Family Court (SCRFC), the South Carolina Rules of Probate Court (SCRPC), the South Carolina Rules of Magistrates Court (SCRMG), the South Carolina Court-Annexed Alternative Dispute Resolution Rules (SCADR), South Carolina Rules of Evidence (SCRE) or any other rule or administrative order regarding the operation of a trial court, this order shall control.

(b) Terminology. The following terminology is used in this order.

(1) **Judge:** a judge of the circuit court, family court, probate court, magistrate court and municipal court, including masters-in-equity and special referees.

(2) **Remote Communication Technology:** technology such as video conferencing and teleconferencing which allows audio and/or video to be shared at differing locations in real time.

(3) **Summary Court:** the magistrate and municipal courts.

(4) **Trial Court:** the circuit court (including masters-in-equity court), family court, probate court, magistrate court and municipal court.

(c) **General Guidance.** This section provides general guidance applicable to all trial courts or to several court types, and later sections will provide guidance that is limited to one court type. While this order remains in effect, the following general guidance shall apply:

(1) Jury Trials. All jury selections and jury trials in all criminal and civil cases are continued until further notice.

(2) Non-Jury Trials. The appropriate Chief Judge for Administrative Purposes, or in the case of any court that does not have a Chief Judge for Administrative Purposes, the appropriate judge responsible for scheduling matters, may authorize a non-jury trial to occur if the parties consent, or the matter involves an emergency or other circumstance warranting immediate resolution. To proceed, the Chief Judge or the appropriate judge responsible for scheduling matters must find that the trial can be conducted in a manner to minimize the risk such as limiting the persons present to the parties, counsel and necessary witnesses, or that the trial may be conducted using remote communication technology to avoid the need for a physical appearance of all or some of the parties, counsel or witnesses. If an in-person non-jury trial is conducted, only attorneys, the parties, and necessary witnesses will be allowed to appear. Hearings must be staggered to minimize the number of people appearing at the same time.

(3) Hearings. A hearing on a motion or other matter may be conducted using remote communication technology to avoid the need for a physical appearance by any party, witness or counsel. Only if a judge determines that the hearing cannot be conducted adequately using remote communication technology and the matter involves an emergency or other circumstance warranting immediate determination, will an in-person hearing be conducted. If an in-person hearing is conducted, only attorneys, the parties, and necessary witnesses will be allowed to appear. The total number of participants should not exceed ten (10) people. Hearings must be staggered to minimize the number of people appearing at the same time.

(4) Minimizing Hearings on Motions. While the practice has been to conduct hearings on virtually all motions, this will not be possible during this emergency. If, upon reviewing a motion, a judge determines that the motion is without merit, the motion may be denied without waiting for any return or other response from the opposing party or parties. In all other situations except those where a motion may be made on an ex parte basis, a ruling shall not be made until the opposing party or parties have had an opportunity to file a return or other response to the motion. A trial judge may elect not to hold a hearing when the judge determines the motion may readily be decided without further input from the lawyers. If a hearing is held, the hearing shall be conducted in the manner specified by (c)(3) above. Consent motions should be decided without a hearing; in the event a party believes that the order issued exceeds the scope of the consent, the party must serve and file a motion raising that issue within ten (10) days of receiving written notice of entry of the order.

(5) Determination of Probable Cause Following Warrantless Arrest. When a warrantless arrest has occurred, the arresting officer shall provide the appropriate judge with an affidavit setting forth the facts on which the

warrantless arrest was made within eight (8) hours of the arrest. The judge shall consider this affidavit and, if appropriate, may have the officer or others supplement the affidavit with sworn testimony given over the telephone or other remote communication technology. The judge may administer any necessary oath using the telephone or other remote communication technology. If the judge finds a lack of probable cause for the arrest, the defendant shall be released. The goal is to have this determination of probable cause be made within twenty-four (24) hours of the arrest. Only in the most extraordinary and exceptional circumstances should this determination not be made within forty-eight (48) hours of the arrest. If this determination is not made within forty-eight (48) hours after arrest, the judge making the determination shall explain in writing the facts and circumstances giving rise to this delay, and a copy of this explanation shall be provided to the Office of Court Administration.

(6) Preliminary Hearings in Criminal Cases. Until further order of this Court, preliminary hearings will not be conducted.

(7) Remote Administration of Oaths. Where this order authorizes a hearing, trial or other matter to be conducted using remote communication technology, any oath necessary during that hearing, trial or other matter may be administered by the same remote communication technology. While it is preferable that the person administering the oath have both audio and visual communication with the person taking the oath, the oath may be administered if only audio communication is available, provided the person administering the oath can reasonably verify the identity of the person taking the oath. Notaries who are authorized to administer oaths may administer oaths utilizing remote communication technology in the case of depositions. Nothing in this order shall be construed as authorizing remote administration of oaths for any other purpose than those contained in this order.

(8) Scheduling Orders. All deadlines under all existing scheduling orders are hereby extended for forty-five (45) days following the date on which the Governor lifts or rescinds the emergency orders relating to the coronavirus emergency. This does not prevent a judge from issuing a new scheduling order, if appropriate.

(9) Extensions of Time and Forgiveness of Procedural Defaults.

(A) Extensions of Time. This crisis will increase the need for extensions to be granted. While this order remains in effect, no filing fee will be required for a motion for an extension for any motion filed on or after the date of this order. Further, since it is important for lawyers and self-represented litigants appearing before the trial courts to have time to take actions to protect themselves and their families, the due dates for all trial court filings due on or after the effective date of this order are hereby extended for thirty (30) days.

(B) Forgiveness of Procedural Defaults Since March 13, 2020. In the event a party to a case or other matter pending before a trial court was required to take certain action on or after March 13, 2020, but failed to do so, that procedural default is hereby forgiven, and the required action shall be taken within thirty (30) days of the date of this order. If a dismissal or other adverse action has been taken, that adverse action shall be rescinded.

(C) Extensions by Consent. The provision in Rule 6(b), SCRCP, which permits the granting of only one extension of time by agreement of counsel, is suspended. Counsel may agree to further extensions of time without seeking permission from the court, and parties are strongly encouraged to do so upon request.

(D) Limitation. The provisions of (A) thru (C) above shall not extend or otherwise affect the time for taking action under Rules 50(b), 52(b), 59, and 60(b), SCRCP, or Rule 29, SCRCrimP. Further, these provisions do not extend or otherwise affect the time for the serving of a notice of appeal under the South Carolina Appellate Court Rules, or the time to appeal from a lower court to the circuit court.

(10) Alternatives to Court Reporters and Digital Courtrooms. A trial or hearing in the court of common pleas (including the master-in-equity court), the court of general sessions or the family court is usually attended by a court reporter (before the master-in-equity this is usually a private court reporter) or is scheduled in one of the digital courtrooms with a court reporter or court monitor. While every effort will be made to continue these practices, this may not be possible as this emergency progresses. In the event such resources are not reasonably available, a trial or hearing authorized under this order may proceed if a recording (preferably both audio and video) is made. The judge shall conduct the proceedings in a manner that will allow a court reporter to create a transcript at a later date. This would include, but is not limited to, making sure the names and spelling of all of the persons speaking or testifying are placed on the record; ensuring exhibits or other documents referred to are clearly identified and properly marked; controlling the proceeding so that multiple persons do not speak at the same time; and noting on the record the start times and the time of any recess or adjournment.

(11) Courthouses.

(A) Filings. To the extent possible, courthouses should remain open to accept filings and payments, and to report criminal information to the South Carolina Law Enforcement Division and the National Crime Information Center. For the acceptance of documents or payments submitted by delivery to the courthouse, this may be accomplished by providing access to a portion of the courthouse even if the rest of the courthouse is closed to the public; providing an alternate location where the documents or payments may be delivered; or by providing a drop box where filings may be deposited. Adequate signage should be provided at the courthouse to alert persons about how to make filings by delivery, and this information should also be posted to the court's website, if available.

(B) Closure. In the event of the closure of a courthouse, information about the closure shall be provided by signage at the courthouse, and on the court's website if available.

(C) Quarantine of Incoming Paper Documents. To protect the safety of the staff of the trial courts, incoming paper documents, whether delivered or mailed to the trial court, may be quarantined for a period of up to forty-eight (48) hours once the documents are physically received by the trial court.¹ Once the quarantine period has ended, these documents will be file stamped with the date on which they were received, and court staff will then process the documents.

(12) Statute of Limitations, Repose and Other Similar Statutes. This Court is aware this emergency has already affected the ability of litigants to commence legal actions and this adverse impact will most likely increase significantly as this pandemic progresses. The Judicial Branch has raised this concern to the leadership of the General Assembly as this issue relates to the statute of limitations, statutes of repose and similar statutes such as S.C. Code Ann. § 15-36-100. While this Court has recognized the existence of judicial authority to toll a statute of limitations in other situations, it would be inappropriate for this Court to consider at this time what relief, if any, may be afforded to a litigant who is unable to file a civil action or take other actions under these statutory provisions due to this emergency.

(13) Service Using AIS Email Address. A lawyer admitted to practice law in this state may serve a document on another lawyer admitted to practice law in this state using the lawyer's primary email address listed in the Attorney Information System (AIS).² For attorneys admitted pro hac vice, service on the associated South Carolina lawyer under this method of service shall be construed as service on the pro hac vice attorney; if appropriate, it is the responsibility of the associated lawyer to provide a copy to the pro hac vice attorney. For documents that are served by email, a copy of the sent email shall be enclosed with the proof of service, affidavit of service, or certificate of service for that document. This method of service may not be used for the

service of a summons and complaint, subpoena, or any other pleading or document required to be personally served under Rule 4 of the South Carolina Rules of Civil Procedure, or for any document subject to mandatory e-filing under Section 2 of the South Carolina Electronic Filing Policies and Guidelines. In addition, the following shall apply:

(A) Documents served by email must be sent as an attachment in PDF or a similar format unless otherwise agreed by the parties.

(B) Service by email is complete upon transmission of the email. If the serving party learns the email did not reach the person to be served, the party shall immediately serve the pleading or paper by another form of service in Rule 5(b)(1), SCRCP, or other similar rule, together with evidence of the prior attempt at service by email.

(C) In those actions governed by the South Carolina Rules of Civil Procedure, Rule 6(e), SCRCP, which adds five days to the time a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, shall also apply when service is made by email under this provision.

(D) Lawyers are reminded of their obligation under Rule 410(g), SCACR, to ensure that their AIS information is current and accurate at all times.

(14) Signatures of Lawyers on Documents. A lawyer may sign documents using "s/[typed name of lawyer]," a signature stamp, or a scanned or other electronic version of the lawyer's signature. Regardless of form, the signature shall still act as a certificate under Rule 11, SCRCP, that the lawyer has read the document; that to the best of the lawyer's knowledge, information, and belief there is good ground to support it; and that the document is not interposed for delay.

(15) Optional Filing Methods. During this emergency, clerks of the trial courts may, at their option, permit documents to be filed by electronic methods such as fax and email. If the clerk elects to do so, the clerk will post detailed information on the court's website regarding the procedure to be followed, including any appropriate restrictions, such as size limitations, which may apply. Documents filed by one of these optional filing methods shall be treated as being filed when received by the clerk of court and a document received on or before 11:59:59 p.m., Eastern Standard Time, shall be considered filed on that day. These optional filing methods shall not be used for any document that can be e-filed under the South Carolina Electronic Filing Policies and Guidelines. If a trial court does not have a clerk of court, the court shall determine whether to allow the optional filing methods provided by this provision.

(16) Certification in Lieu of Affidavit. If a statute, court rule or other provision of law requires an affidavit to be filed in an action, the requirement of an affidavit may be satisfied by a signed certification of the maker stating, "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment by contempt."

(d) Court of General Sessions. The following additional guidance is provided regarding the Court of General Sessions:

(1) Rule 3(c), SCRCrimP. Based on this emergency, the ninety (90) day period provided by Rule 3(c), SCRCrimP, is hereby increased to one-hundred and twenty (120) days.

(2) County Grand Juries. While a physical meeting of the members of the county grand jury shall not be held, the Solicitor or the Attorney General is hereby authorized to present an indictment to the grand jury using remote communication technology such as video conferencing and teleconferencing, and any necessary oath may be administered using this same remote communication technology pursuant to (c)(7) above.

(3) Guilty Pleas. If consented to by both the defendant and the prosecutor, a hearing on a guilty plea may be held subject to the standards specified in (c)(3) above. If the defendant will participate by remote communication technology, the trial court must make a determination that the defendant is knowingly and intelligently waiving his right to be physically present for the plea. If the defendant's counsel will participate by remote communication technology, the trial court must determine that the defendant is knowingly and intelligently waiving any right to have counsel physically present, and the court must ensure that the defendant has the ability to consult privately with counsel during the plea proceeding as may be necessary. Finally, if other persons will address the court or testify during the plea proceedings by remote communication technology, the court must find that the defendant is knowingly and intelligently waiving any right to have those persons physically present for the plea.

(e) Court of Commons Pleas. The following additional guidance is provided regarding the Court of Common Pleas, including the Master-in-Equity Courts:

(1) Isolation and Quarantine Orders. As this pandemic continues, it is possible the provisions of the South Carolina Emergency Health Powers Act, S.C. Code Ann. §§ 44-4-100 to 44-4-570, may be triggered as it relates to isolation and quarantine orders. Therefore, the Chief Judges for Administrative Purposes for Common Pleas should familiarize themselves with the procedures for judicial review and petitions under that Act, most notably section 44-5-540, and begin to formulate a strategy to meet the timelines specified in that statute for judicial action.

(2) Procedural Guidance Regarding Filing. While the trial court case management system does not have a case type and subtype for these matters, the clerks of court should use "Nature of Action Code 699 (Special/Complex Other)" for these matters, and these matters will be exempt from any ADR requirement. Detailed instructions for attorneys to Electronically File in these cases are available at <https://www.sccourts.org/efiling/ARGs/ARG-26%20Quarantine%20Petitions.pdf>. It is also anticipated that all of these hearings will be conducted using remote communication technology. In coordination with the Pro Bono Program of the South Carolina Bar, a list of lawyers willing to serve as counsel for individuals or groups of individuals who are or are about to be isolated and quarantined under section 44-5-540(F), has been compiled.

(f) Family Court. The following additional guidance is provided regarding the Family Court:

(1) Granting of Uncontested Divorces. The Family Court may grant an uncontested divorce without holding a hearing where:

(A) The parties submit written testimony in the form of affidavits or certifications of the parties and corroborating witnesses that address jurisdiction and venue questions, date of marriage, date of separation, the impossibility of reconciliation and the alleged divorce grounds.

(B) The written testimony must include copies of the parties' and witnesses' state-issued photo identifications.

(C) Any decree submitted by any attorney shall be accompanied by a statement, as an officer of the court, that all counsel approve the decree and that all waiting periods have been satisfied.

(D) Should either party request a name change in connection with a request for divorce agreement approval, that party shall submit written testimony to the Family Court in the form of an affidavit or certification addressing the appropriate questions for name change and the name which he or she wishes to resume. This relief shall be included in any proposed Order submitted to the Court for approval at the time of the submission of the documents related to the relief requested.

(2) Approval of Settlement Agreements and Consent Orders without a Hearing.

(A) General Orders. Consent orders resolving all matters, regardless of whether filed or heard prior to or after the declaration of this public health emergency, may be issued without the necessity of holding a hearing. Examples include consent orders resolving motions to compel, discovery disputes, motions to be relieved as counsel, or consent Orders appointing a Guardian ad Litem or addressing Guardian ad Litem fee caps. Any proposed order or agreement must be signed by the parties, counsel for the parties, and the Guardian ad Litem, if one has been appointed.

(B) Temporary Orders. Temporary consent orders resolving all matters, regardless of whether filed or heard prior to or after the declaration of this public health emergency, may be issued without requiring a hearing. Any proposed order or agreement must be signed by the parties, counsel for the parties, and the Guardian ad Litem, if one has been appointed, and may be submitted and issued without the necessity of filing supporting affidavits, financial declarations or written testimony.

(C) Final Orders. Final consent orders approving final agreements in all matters, regardless of whether filed or heard prior to or after the declaration of this public health emergency, may be issued without requiring a hearing. These final consent orders include marital settlement agreements, custody and visitation settlement agreements and enforcement agreements. Any proposed order or agreement must be signed by the parties, counsel for the parties, and the Guardian ad Litem, if one has been appointed.

These Consent Orders shall be submitted together with all of the following:

- (i)** The final agreement, such as a marital settlement agreement, signed by the attorneys and the parties.
- (ii)** Updated signed Financial Declarations for each party.
- (iii)** An affidavit or certification from the Guardian ad Litem, if one has been appointed, addressing the best interests of the children.
- (iv)** Written testimony of all parties in the form of affidavit or certification addressing and answering all questions the Family Court would normally ask the parties on the record, including but not limited to affirmations from the parties that:

- a. The party has entered into the Agreement freely and voluntarily, understands the Agreement, and desires for the Agreement to be approved by the Court, without the necessity of a hearing.
- b. Setting forth the education level obtained by the party, the employment status of the party and the health of the party.
- c. There are no additional agreements, and neither party has been promised anything further than that set out in the Agreement.
- d. The party fully understands the financial situation of each of the parties, the underlying facts, terms and effect of the Agreement.
- e. The party has given and received full financial disclosure.
- f. The party has had the benefit of an experienced family law attorney.
- g. The party has had the opportunity to ask any questions relating to procedures and the effect of the Agreement.
- h. The party is not acting under coercion or duress, and the party is not under the influence of any alcohol or drug.
- i. That the Agreement is fair and equitable, it was reached by the parties through arms-length negotiations by competent attorneys and the agreement represents some sacrifices and compromises by each party.
- j. The Agreement is in the best interests of the children, if there are any.
- k. That the parties have entered into a marital settlement agreement in full and final settlement of all issues arising from the marriage which have been raised or which could have been raised in the proceeding, other than issues relating to grounds for divorce.
- l. The party is aware of the applicable contempt sanctions associated with non-compliance.

(D) Consent Orders under S.C. Code Ann. § 63-7-1700(D). Where all the parties consent and the Family Court determines a child may be safely maintained in the home in that the parent has remedied the conditions that caused the removal, and the return of the child to the child's parent would not cause an unreasonable risk of harm to the child's life, physical health, safety, or mental well-being, the Family Court may order the child returned to the child's parent without holding a hearing.

(3) Hearings Generally. With respect to all contested hearings in family court, including agency matters and private actions, both temporary and permanent, all hearings should be conducted in accordance with section (c)(3)

of this order.

(g) Probate Court. The following additional guidance is provided:

Certification in Lieu of Affidavit. In the probate court, the certificate in section (c)(16) may also be used for a marriage license application under S.C. Code Ann. § 20-1-230, including any application which may be submitted electronically, or for any of the probate court forms available at www.sccourts.org/forms which are either an affidavit or require an oath or affirmation to be administered.

(h) Summary Court. The following additional guidance is provided regarding the Summary Courts:

(1) Bond Hearings in Criminal Cases. Bond hearings, which shall be conducted in the manner specified by (c)(3) above, should be held at least once a day. In addition to the normal factors for determining whether the defendant will be required to post a bond or will be released on a personal recognizance, the judge should consider the need to minimize the detention center population during this emergency. Further, judges should consider home detention or other options to help reduce detention center population. The summary court shall uphold victims' rights in accordance with the South Carolina Constitution, including seeking to ensure that a victim advocate/notifier is available for all bond hearings, subject to the rights of the defendant under the United States Constitution and the South Carolina Constitution.

(2) Transmission of Warrants for General Sessions Offenses. Warrants for general sessions offenses shall continue to be forwarded to the clerk of the court of general sessions as provided for Rule 3, SCRCrimP. As to an arrest warrant for a defendant who is already in the custody of the South Carolina Department of Corrections, or a detention center or jail in South Carolina, this Court hereby authorizes these defendants to be served with the warrant by mail. Therefore, if it is determined that the defendant is already in custody, the judge shall annotate the warrant to reflect that a copy has been mailed to the defendant, mail a copy of the annotated warrant to the defendant, and immediately forward the annotated warrant and any allied documents to the clerk of the court of general sessions for processing under Rule 3, SCRCrimP.

(3) Guilty Pleas. If consented to by both the defendant and the prosecutor, a hearing on a guilty plea may be held by the summary court. If the defendant will participate by remote communication technology, the trial court must make a determination that the defendant is knowingly and intelligently waiving his right to be physically present for the plea. If the defendant's counsel will participate by remote communication technology, the trial court must determine that the defendant is knowingly and

intelligently waiving any right to have counsel physically present, and the court must ensure that the defendant has the ability to consult privately with counsel during the plea proceeding as may be necessary. Finally, if other persons will address the court or testify during the plea proceedings by remote communication technology, the court must find that the defendant is knowingly and intelligently waiving any right to have those persons physically present for the plea.

(i) Effective Date and Revocation of Prior Order and Memoranda. This order is effective immediately. It shall remain in effect until modified or rescinded by this Court. This order replaces the following order and memoranda previously issued.

(1) Memoranda of the Chief Justice dated March 16, 2020, which are labeled as "Trial Courts Coronavirus Memo," and "Summary Courts Coronavirus Memo."

(2) Order dated March 18, 2020, and labeled "Statewide Family Court Order."

¹ One scientific study has reported that the coronavirus can live for up to 24 hours on cardboard.

<https://www.medrxiv.org/content/10.1101/2020.03.09.20033217v1.full.pdf>

² The email addresses for lawyers admitted in South Carolina can be accessed utilizing the Attorney Information Search at:

<https://www.sccourts.org/attorneys/dspSearchAttorneys.cfm>

s/Donald W. Beatty C.J.

s/John W. Kittredge J.

s/Kaye G. Hearn J.

s/John Cannon Few J.

s/George C. James, Jr. J.

Columbia, South Carolina
April 3, 2020

The Supreme Court of South Carolina

RE: Operation of the Trial Courts During the Coronavirus
Emergency
(As Amended April 14, 2020)¹

Appellate Case No. 2020-000447

ORDER

(a) Purpose. The purpose of this order is to provide guidance on the continued operation of the trial courts during the current coronavirus (COVID-19) emergency. The measures contained in this order are intended to allow essential operations to continue while minimizing the risk to the public, litigants, lawyers and court employees.

In the past, the South Carolina Judicial Branch has shown great resilience in responding to hurricanes, floods, and other major disasters, and this Court is confident that the same will be true in this emergency. This emergency, however, differs from these prior emergencies in many aspects. The current emergency will significantly impact every community in South Carolina while the prior emergencies, although potentially horrific for the individuals and communities directly impacted, did not. The impact of the prior emergencies could be minimized or avoided by traveling away from the site of the disaster; this is not the case for the current emergency. Further, in the prior emergencies, the circumstances giving rise to the emergency involved a single event with a beginning and a predictable end. This is not the case for the coronavirus, and even conservative estimates indicate the direct impacts of this pandemic will continue for many months.

In light of the extraordinary challenges presented by the current emergency, this Court finds it necessary to supplement and, in some situations, to alter significantly, the current practices regarding the operation of the trial courts. In the event of a conflict between this order and the South Carolina Rules of Civil Procedure (SCRCP), the South Carolina Rules of Criminal Procedure (SCRCrimP), the South Carolina Rules of Family Court (SCRFC), the South Carolina Rules of Probate Court (SCRPC), the South Carolina Rules of Magistrates Court (SCRMG), the South Carolina Court-Annexed Alternative Dispute Resolution Rules (SCADR), South Carolina Rules of Evidence (SCRE) or any other rule or administrative order regarding the operation of a trial court, this order shall control.

(b) Terminology. The following terminology is used in this order.

(1) Judge: a judge of the circuit court, family court, probate court, magistrate court and municipal court, including masters-in-equity and special referees.

(2) Remote Communication Technology: technology such as video conferencing and teleconferencing which allows audio and/or video to be shared at differing locations in real time.

(3) Summary Court: the magistrate and municipal courts.

(4) Trial Court: the circuit court (including masters-in-equity court), family court, probate court, magistrate court and municipal court.

(c) General Guidance. This section provides general guidance applicable to all trial courts or to several court types, and later sections will provide guidance that is limited to one court type. While this order remains in effect, the following general guidance shall apply:

(1) Jury Trials. All jury selections and jury trials in all criminal and civil cases are continued until further notice.

(2) Non-Jury Trials. The appropriate Chief Judge for Administrative Purposes, or in the case of any court that does not have a Chief Judge for Administrative Purposes, the appropriate judge responsible for scheduling matters, may authorize a non-jury trial to occur if the parties consent, or the matter involves an emergency or other circumstance warranting immediate resolution. To proceed, the Chief Judge or the appropriate judge responsible for scheduling matters must find that the trial can be conducted in a manner to minimize the risk such as limiting the persons present to the parties, counsel and necessary witnesses, or that the trial may be conducted using remote communication technology to avoid the need for a physical appearance of all or some of the parties, counsel or witnesses. If an in-person non-jury trial is conducted, only attorneys, the parties, and necessary witnesses will be allowed to appear. Hearings must be staggered to minimize the number of people appearing at the same time.

(3) Hearings. A hearing on a motion or other matter may be conducted using remote communication technology to avoid the need for a physical appearance by any party, witness or counsel. Only if a judge determines that the hearing cannot be conducted adequately using remote communication technology and the matter involves an emergency or other circumstance warranting immediate determination, will an in-person hearing be conducted. If an in-person hearing is conducted, only attorneys, the parties, and necessary witnesses will be allowed to appear. The total number of participants should not exceed ten (10) people. Hearings must be staggered to minimize the number of people appearing at the same time.

(4) Minimizing Hearings on Motions. While the practice has been to conduct hearings on virtually all motions, this will not be possible during this emergency. If, upon reviewing a motion, a judge determines that the motion is without merit, the motion may be denied without waiting for any return or other response from the opposing party or parties. In all other situations except those where a motion may be made on an ex parte basis, a ruling shall not be made until the opposing party or parties have had an opportunity to file a return or other response to the motion. A trial judge may elect not to hold a hearing when the judge determines the motion may readily be decided without further input from the lawyers. If a hearing is held, the hearing shall be conducted in the manner specified by (c)(3) above. Consent motions should be decided without a hearing; in the event a party believes that the order issued exceeds the scope of the consent, the party must serve and file a motion raising that issue within ten (10) days of receiving written notice of entry of the order.

(5) Determination of Probable Cause Following Warrantless Arrest. When a warrantless arrest has occurred, the arresting officer shall provide the

appropriate judge with an affidavit or a written statement with the certification provided by section (c)(16) below setting forth the facts on which the warrantless arrest was made within eight (8) hours of the arrest. The judge shall consider this affidavit or written statement with the certification and, if appropriate, may have the officer or others supplement the affidavit or written statement with the certification with sworn testimony given over the telephone or other remote communication technology. The judge may administer any necessary oath using the telephone or other remote communication technology. If the judge finds a lack of probable cause for the arrest, the defendant shall be released. The goal is to have this determination of probable cause be made within twenty-four (24) hours of the arrest. Only in the most extraordinary and exceptional circumstances should this determination not be made within forty-eight (48) hours of the arrest. If this determination is not made within forty-eight (48) hours after arrest, the judge making the determination shall explain in writing the facts and circumstances giving rise to this delay, and a copy of this explanation shall be provided to the Office of Court Administration.

(6) Preliminary Hearings in Criminal Cases. Until further order of this Court, preliminary hearings will not be conducted.

(7) Remote Administration of Oaths. Where this order authorizes a hearing, trial or other matter to be conducted using remote communication technology, any oath necessary during that hearing, trial or other matter may be administered by the same remote communication technology. While it is preferable that the person administering the oath have both audio and visual communication with the person taking the oath, the oath may be administered if only audio communication is available, provided the person administering the oath can reasonably verify the identity of the person taking the oath. Notaries who are authorized to administer oaths may administer oaths utilizing remote communication technology in the case of depositions. Nothing in this order shall be construed as authorizing remote administration of oaths for any other purpose than those contained in this order.

(8) Scheduling Orders. All deadlines under all existing scheduling orders are hereby stayed, retroactive to March 13, 2020. Forty-five (45) days following the date on which the Governor lifts or rescinds the emergency orders relating to the coronavirus emergency, this stay shall end. While a judge may issue a new or amended scheduling order which will not be subject to this stay, both the decision to issue such an order and the terms of that order must consider the impact the emergency has on the ability of the parties and counsel to proceed. Judges are encouraged to seek input from the parties and counsel before issuing a new or amended scheduling order.

(9) Extensions of Time and Forgiveness of Procedural Defaults.

(A) Extensions of Time. This crisis will increase the need for extensions to be granted. While this order remains in effect, no filing fee will be required for a motion for an extension for any motion filed on or after the date of this order. Further, since it is important for lawyers and self-represented litigants appearing before the trial courts to have time to take actions to protect themselves and their families, the due dates for all trial court filings due on or after the effective date of this order are hereby extended for thirty (30) days.

(B) Forgiveness of Procedural Defaults Since March 13, 2020. In the event a party to a case or other matter pending before a trial court was required to take certain action on or after March 13, 2020, but failed to do so, that procedural default is hereby forgiven, and the required action shall be taken within thirty (30) days of the date of this order. If a dismissal or other adverse action has been taken, that adverse action shall be rescinded.

(C) Extensions by Consent. The provision in Rule 6(b), SCRCP, which permits the granting of only one extension of time by agreement of counsel, is suspended. Counsel may agree to further extensions of time without seeking permission from the court, and parties are strongly encouraged to do so upon request.

(D) Limitation. The provisions of (A) thru (C) above shall not extend or otherwise affect the time for taking action under Rules 50(b), 52(b), 59, and 60(b), SCRCP, or Rule 29, SCRCrimP. Further, these provisions do not extend or otherwise affect the time for the serving of a notice of appeal under the South Carolina Appellate Court Rules, or the time to appeal from a lower court to the circuit court.

(10) Alternatives to Court Reporters and Digital Courtrooms. A trial or hearing in the court of common pleas (including the master-in-equity court), the court of general sessions or the family court is usually attended by a court reporter (before the master-in-equity this is usually a private court reporter) or is scheduled in one of the digital courtrooms with a court reporter or court monitor. While every effort will be made to continue these practices, this may not be possible as this emergency progresses. In the event such resources are not reasonably available, a trial or hearing authorized under this order may proceed if a recording (preferably both audio and video) is made. The judge shall conduct the proceedings in a manner that will allow a court reporter to create a transcript at a later date. This would include, but is not limited to, making sure the names and spelling of all of the persons speaking or testifying are placed on the record; ensuring exhibits or other documents referred to are clearly identified and properly marked; controlling the proceeding so that multiple persons do not speak at the same time; and noting on the record the start times and the time of any recess or adjournment.

(11) Courthouses.

(A) Filings. To the extent possible, courthouses should remain open to accept filings and payments, and to report criminal information to the South Carolina Law Enforcement Division and the National Crime Information Center. For the acceptance of documents or payments submitted by delivery to the courthouse, this may be accomplished by providing access to a portion of the courthouse even if the rest of the courthouse is closed to the public; providing an alternate location where the documents or payments may be delivered; or by providing a drop box where filings may be deposited. Adequate signage should be provided at the courthouse to alert persons about how to make filings by delivery, and this information should also be posted to the court's website, if available.

(B) Closure. In the event of the closure of a courthouse, information about the closure shall be provided by signage at the courthouse, and on the court's website if available.

(C) Quarantine of Incoming Paper Documents. To protect the safety of the staff of the trial courts, incoming paper documents, whether delivered or mailed to the trial court, may be quarantined for a period of up to forty-eight (48) hours once the documents are physically received by the trial court.² Once the quarantine period has ended, these documents will be file stamped with the date on which they were received, and court staff will then process the documents.

(12) Statute of Limitations, Repose and Other Similar Statutes. This Court is aware this emergency has already affected the ability of litigants to commence legal actions and this adverse impact will most likely increase significantly as this pandemic progresses. The Judicial Branch has raised this concern to the leadership of the General Assembly as this issue relates to the statute of limitations, statutes of repose and similar statutes such as S.C. Code Ann. § 15-36-100. While this Court has recognized the existence of judicial authority to toll a statute of limitations in other situations, it would be inappropriate for this Court to consider at this time what relief, if any, may be afforded to a litigant who is unable to file a civil action or take other actions under these statutory provisions due to this emergency.

(13) Service Using AIS Email Address. A lawyer admitted to practice law in this state may serve a document on another lawyer admitted to practice law in this state using the lawyer's primary email address listed in the Attorney Information System (AIS).³ For attorneys admitted pro hac vice, service on the associated South Carolina lawyer under this method of service shall be construed as service on the pro hac vice attorney; if appropriate, it is the responsibility of the associated lawyer to provide a copy to the pro hac vice attorney. For documents that are served by email, a copy of the sent email shall be enclosed with the proof of service, affidavit of service, or certificate of service for that document. This method of service may not be used for the service of a summons and complaint, subpoena, or any other pleading or

document required to be personally served under Rule 4 of the South Carolina Rules of Civil Procedure, or for any document subject to mandatory e-filing under Section 2 of the South Carolina Electronic Filing Policies and Guidelines. In addition, the following shall apply:

(A) Documents served by email must be sent as an attachment in PDF or a similar format unless otherwise agreed by the parties.

(B) Service by email is complete upon transmission of the email. If the serving party learns the email did not reach the person to be served, the party shall immediately serve the pleading or paper by another form of service in Rule 5(b)(1), SCRCP, or other similar rule, together with evidence of the prior attempt at service by email.

(C) In those actions governed by the South Carolina Rules of Civil Procedure, Rule 6(e), SCRCP, which adds five days to the time a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, shall also apply when service is made by email under this provision.

(D) Lawyers are reminded of their obligation under Rule 410(g), SCACR, to ensure that their AIS information is current and accurate at all times.

(14) Signatures of Lawyers on Documents. A lawyer may sign documents using "s/[typed name of lawyer]," a signature stamp, or a scanned or other electronic version of the lawyer's signature. Regardless of form, the signature shall still act as a certificate under Rule 11, SCRCP, that the lawyer has read the document; that to the best of the lawyer's knowledge, information, and belief there is good ground to support it; and that the document is not interposed for delay.

(15) Optional Filing Methods. During this emergency, clerks of the trial courts may, at their option, permit documents to be filed by electronic methods such as fax and email. If the clerk elects to do so, the clerk will post detailed information on the court's website regarding the procedure to be followed, including any appropriate restrictions, such as size limitations, which may apply. Documents filed by one of these optional filing methods shall be treated as being filed when received by the clerk of court and a document received on or before 11:59:59 p.m., Eastern Standard Time, shall be considered filed on that day. These optional filing methods shall not be used for any document that can be e-filed under the South Carolina Electronic Filing Policies and Guidelines. If a trial court does not have a clerk of court, the court shall determine whether to allow the optional filing methods provided by this provision.

(16) Certification in Lieu of Affidavit. If a statute, court rule or other provision of law requires an affidavit to be filed in an action, the requirement of an affidavit may be satisfied by a signed certification of the maker stating, "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment by contempt."

(d) Court of General Sessions. The following additional guidance is provided regarding the Court of General Sessions:

(1) Rule 3(c), SCRCrimP. Based on this emergency, the ninety (90) day period provided by Rule 3(c), SCRCrimP, is hereby increased to one-hundred and twenty (120) days.

(2) County Grand Juries. While a physical meeting of the members of the county grand jury shall not be held, the Solicitor or the Attorney General is hereby authorized to present an indictment to the grand jury using remote communication technology such as video conferencing and teleconferencing, and any necessary oath may be administered using this same remote communication technology pursuant to (c)(7) above.

(3) Guilty Pleas. If consented to by both the defendant and the prosecutor, a hearing on a guilty plea may be held subject to the standards specified in (c) (3) above. If the defendant will participate by remote communication technology, the trial court must make a determination that the defendant is knowingly and intelligently waiving his right to be physically present for the plea. If the defendant's counsel will participate by remote communication technology, the trial court must determine that the defendant is knowingly and intelligently waiving any right to have counsel physically present, and the court must ensure that the defendant has the ability to consult privately with counsel during the plea proceeding as may be necessary. Finally, if other persons will address the court or testify during the plea proceedings by remote communication technology, the court must find that the defendant is knowingly and intelligently waiving any right to have those persons physically present for the plea.

(e) Court of Commons Pleas. The following additional guidance is provided regarding the Court of Common Pleas, including the Master-in-Equity Courts:

(1) Isolation and Quarantine Orders. As this pandemic continues, it is possible the provisions of the South Carolina Emergency Health Powers Act, S.C. Code Ann. §§ 44-4-100 to 44-4-570, may be triggered as it relates to isolation and quarantine orders. Therefore, the Chief Judges for Administrative Purposes for Common Pleas should familiarize themselves with the procedures for judicial review and petitions under that Act, most notably section 44-5-540, and begin to formulate a strategy to meet the timelines specified in that statute for judicial action.

(2) Procedural Guidance Regarding Filing. While the trial court case management system does not have a case type and subtype for these matters, the clerks of court should use "Nature of Action Code 699 (Special/Complex Other)" for these matters, and these matters will be exempt from any ADR requirement. Detailed instructions for attorneys to Electronically File in these cases are available at <https://www.sccourts.org/efiling/ARGs/ARG-26%20Quarantine%20Petitions.pdf>. It is also anticipated that all of these hearings will be conducted using remote communication technology. In coordination with the Pro Bono Program of the South Carolina Bar, a list of lawyers willing to serve as counsel for individuals or groups of individuals who are or are about to be isolated and quarantined under section 44-5-540(F), has been compiled.

(f) Family Court. The following additional guidance is provided regarding the Family Court:

(1) Granting of Uncontested Divorces. The Family Court may grant an uncontested divorce without holding a hearing where:

(A) The parties submit written testimony in the form of affidavits or certifications of the parties and corroborating witnesses that address jurisdiction and venue questions, date of marriage, date of separation, the impossibility of reconciliation and the alleged divorce grounds.

(B) The written testimony must include copies of the parties' and witnesses' state-issued photo identifications.

(C) Any decree submitted by any attorney shall be accompanied by a statement, as an officer of the court, that all counsel approve the decree and that all waiting periods have been satisfied.

(D) Should either party request a name change in connection with a request for divorce agreement approval, that party shall submit written testimony to the Family Court in the form of an affidavit or certification addressing the appropriate questions for name change and the name which he or she wishes to resume. This relief shall be included in any proposed Order submitted to the Court for approval at the time of the submission of the documents related to the relief requested.

(2) Approval of Settlement Agreements and Consent Orders without a Hearing.

(A) General Orders. Consent orders resolving all matters, regardless of whether filed or heard prior to or after the declaration of this public health emergency, may be issued without the necessity of holding a hearing. Examples include consent orders resolving motions to compel, discovery disputes, motions to be relieved as counsel, or consent Orders appointing a Guardian ad Litem or addressing Guardian ad Litem fee caps. Any proposed order or agreement must be signed by the parties, counsel for the parties, and the Guardian ad Litem, if one has been appointed.

(B) Temporary Orders. Temporary consent orders resolving all matters, regardless of whether filed or heard prior to or after the declaration of this public health emergency, may be issued without requiring a hearing. Any proposed order or agreement must be signed by the parties, counsel for the parties, and the Guardian ad Litem, if one has been appointed, and may be submitted and issued without the necessity of filing supporting affidavits, financial declarations or written testimony.

(C) Final Orders. Final consent orders approving final agreements in all matters, regardless of whether filed or heard prior to or after the declaration of this public health emergency, may be issued without requiring a hearing. These final consent orders include marital settlement agreements, custody and visitation settlement agreements and enforcement agreements. Any proposed order or agreement must be signed by the parties, counsel for the parties, and the Guardian ad Litem, if one has been appointed.

These Consent Orders shall be submitted together with all of the following:

- (i) The final agreement, such as a marital settlement agreement, signed by the attorneys and the parties.
- (ii) Updated signed Financial Declarations for each party.
- (iii) An affidavit or certification from the Guardian ad Litem, if one has been appointed, addressing the best interests of the children.
- (iv) Written testimony of all parties in the form of affidavit or certification addressing and answering all questions the Family Court would normally ask the parties on the record, including but not limited to affirmations from the parties that:

- a. The party has entered into the Agreement freely and voluntarily, understands the Agreement, and desires for the Agreement to be approved by the Court, without the necessity of a hearing.
- b. Setting forth the education level obtained by the party, the employment status of the party and the health of the party.
- c. There are no additional agreements, and neither party has been promised anything further than that set out in the Agreement.
- d. The party fully understands the financial situation of each of the parties, the underlying facts, terms and effect of the Agreement.
- e. The party has given and received full financial disclosure.
- f. The party has had the benefit of an experienced family law attorney.
- g. The party has had the opportunity to ask any questions relating to procedures and the effect of the Agreement.
- h. The party is not acting under coercion or duress, and the party is not under the influence of any alcohol or drug.
- i. That the Agreement is fair and equitable, it was reached by the parties through arms-length negotiations by competent attorneys and the agreement represents some sacrifices and compromises by each party.
- j. The Agreement is in the best interests of the children, if there are any.
- k. That the parties have entered into a marital settlement agreement in full and final settlement of all issues arising from the marriage which have been raised or which could have been raised in the proceeding, other than issues relating to grounds for divorce.
- l. The party is aware of the applicable contempt sanctions associated with non-compliance.

(D) Consent Orders under S.C. Code Ann. § 63-7-1700(D). Where all the parties consent and the Family Court determines a child may be safely maintained in the home in that the parent has remedied the conditions that caused the removal, and the return of the child to the child's parent would not cause an unreasonable risk of harm to the child's life, physical health, safety, or mental well-being, the Family Court may order the child returned to the child's parent without holding a hearing.

(3) Hearings Generally. With respect to all contested hearings in family court, including agency matters and private actions, both temporary and permanent, all hearings should be conducted in accordance with section (c)(3) of this order.

(g) Probate Court. The following additional guidance is provided:

Certification in Lieu of Affidavit. In the probate court, the certificate in section (c)(16) may also be used for a marriage license application under S.C. Code Ann. § 20-1-230, including any application which may be submitted electronically, or for any of the probate court forms available at www.sccourts.org/forms which are either an affidavit or require an oath or affirmation to be administered.

(h) Summary Court. The following additional guidance is provided regarding the Summary Courts:

(1) Bond Hearings in Criminal Cases. Bond hearings, which shall be conducted in the manner specified by (c)(3) above, should be held at least once a day. In addition to the normal factors for determining whether the defendant will be required to post a bond or will be released on a personal recognizance, the judge should consider the need to minimize the detention center population during this emergency. Further, judges should consider home detention or other options to help reduce detention center population. The summary court shall uphold victims' rights in accordance with the South Carolina Constitution, including seeking to ensure that a victim advocate/notifier is available for all bond hearings, subject to the rights of the defendant under the United States Constitution and the South Carolina Constitution.

(2) Transmission of Warrants for General Sessions Offenses. Warrants for general sessions offenses shall continue to be forwarded to the clerk of the court of general sessions as provided for Rule 3, SCRCrimP. As to an arrest warrant for a defendant who is already in the custody of the South Carolina Department of Corrections, or a detention center or jail in South Carolina, this Court hereby authorizes these defendants to be served with the warrant by mail. Therefore, if it is determined that the defendant is already in custody, the judge shall annotate the warrant to reflect that a copy has been mailed to the defendant, mail a copy of the annotated warrant to the defendant, and immediately forward the annotated warrant and any allied documents to the clerk of the court of general sessions for processing under Rule 3, SCRCrimP.

(3) Guilty Pleas. If consented to by both the defendant and the prosecutor, a hearing on a guilty plea may be held by the summary court. If the defendant will participate by remote communication technology, the trial court must make a determination that the defendant is knowingly and intelligently waiving his right to be physically present for the plea. If the defendant's counsel will participate by remote communication technology, the trial court must determine that the defendant is knowingly and intelligently waiving any right to have counsel physically present, and the court must ensure that the defendant has the ability to consult privately with counsel during the plea proceeding as may be necessary. Finally, if other persons will address the court or testify during the plea proceedings by remote communication technology, the court must find that the defendant is knowingly and intelligently waiving any right to have those persons physically present for the plea.

(i) Effective Date and Revocation of Prior Order and Memoranda. This order is effective immediately. It shall remain in effect until modified or rescinded by this Court. This order replaces the following order and memoranda previously issued.

(1) Memoranda of the Chief Justice dated March 16, 2020, which are labeled as "Trial Courts Coronavirus Memo," and "Summary Courts Coronavirus Memo."

(2) Order dated March 18, 2020, and labeled "Statewide Family Court Order."

¹ This order was initially filed on April 3, 2020. This amended version makes changes to sections (c)(5) and (c)(8).

² One scientific study has reported that the coronavirus can live for up to 24 hours on cardboard.
<https://www.medrxiv.org/content/10.1101/2020.03.09.20033217v1.full.pdf>

³ The email addresses for lawyers admitted in South Carolina can be accessed utilizing the Attorney Information Search at: <https://www.sccourts.org/attorneys/dspSearchAttorneys.cfm>

s/Donald W. Beatty C.J.

s/John W. Kittredge J.

s/Kaye G. Hearn J.

s/John Cannon Few J.

s/George C. James, Jr. J.

Columbia, South Carolina
April 3, 2020

As Amended April 14, 2020

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Beaufort
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP0701666

Stevens Builders Llc
PLAINTIFF(S)

Michael C Garraway et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

This matter came before the Court on June 4, 2020 on Defendant TD Bank, N.A.'s (hereinafter "TD Bank") Motion to Dismiss, filed March 24, 2020. Representing the Plaintiff was Benjamin T. Coppage, Esq. Representing the Defendant TD Bank was J. Martin Page, Esq. Counsel advised the Court on May 28, 2020 that the case was appealed to the Court of Appeals and that the Appeal was dismissed, but that the remittitur had not yet been filed. The remittitur was subsequently filed on June 4, 2020.

Defendant's Motion is made pursuant to Rule 12(b)(6), SCRPC. A ruling on a motion to dismiss a claim pursuant to Rule 12(b)(6), SCRPC, must be based solely on the allegations set forth on the face of the complaint. United Educational Distributors, LLC, v. Educational Testing Service, 350 S.C. 7, 13, 564 S.E.2d 324, 328 (Ct. App. 2002). The motion will not be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☒ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 06/08/2020 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

Washington v. Lexington County Jail, 337 S.C. 400, 404, 523 S.E.2d 204, 206 (Ct. App.1999) ; McCormick v. England, 328 S.C. 627, 632–33, 494 S.E.2d 431, 433 (Ct. App.1997). “[A] judgment on the pleadings is considered to be a drastic procedure by our courts.” Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). Therefore, pleadings in a case should be construed liberally and the trial court and this Court must presume all well pled facts to be true so that substantial justice is done between the parties. See Justice v. Pantry, 330 S.C. 37, 42, 496 S.E.2d 871, 874 (Ct. App.1998). “The cause of action should not be struck merely because the court doubts the plaintiff will prevail in the action.” McCormick, 328 S.C. at 633, 494 S.E.2d at 434. Further, “a novel issue should not be summarily decided on a 12 (b)(6) motion.” Keiger v. Citgo, Coastal Petroleum Inc., 326 S.C. 369, 373, 482 S.E.2d 792, 794 (Ct. App. 1997). Viewed in the light most favorable to the non-moving party, the facts alleged and inferences deducible therefrom may entitle Plaintiff to relief on a theory of the case. Accordingly, the Motion is heard and respectfully Denied.



Beaufort Common Pleas

Case Caption: Stevens Builders Llc VS Michael C Garraway , defendant, et al

Case Number: 2019CP0701666

Type: Order/Electronic Form 4

IT IS SO ORDERED>

s/D.L. Jefferson Chief Administrative Judge 2128

Electronically signed on 2020-06-08 15:14:46 page 3 of 3

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Beaufort
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP0701666

Stevens Builders Llc
PLAINTIFF(S)

Michael C Garraway et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

After careful consideration, the Plaintiff's Motion for Default Judgment, heard on September 22, 2020, is respectfully denied, as the Court favors disposition on the merits and the Plaintiff's aren't prejudiced.

Furthermore, the Defendant-TD Bank NA's Motion for Judgment on the Pleadings, or in the Alternative, Motion for Summary Judgment, heard September 22, 2020, is respectfully denied, as there are issues of material fact.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 10/21/2020 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Beaufort Common Pleas

Case Caption: Stevens Builders Llc VS Michael C Garraway , defendant, et al

Case Number: 2019CP0701666

Type: Order/Electronic Form 4

So Ordered

s/ Maite Murphy 2166

Electronically signed on 2020-10-21 16:39:40 page 3 of 3

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Beaufort
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP0701666

Stevens Builders Llc
PLAINTIFF(S)

Michael C Garraway et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
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- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
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☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

As this Court has already considered and rejected the arguments raised by the Plaintiff, and the Plaintiff has failed to identify any issue that this Court has misunderstood or fully considered, the Plaintiff's Motion for Reconsideration, heard January 25, 2021, is respectfully denied.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 01/27/2021 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Beaufort Common Pleas

Case Caption: Stevens Builders Llc VS Michael C Garraway , defendant, et al

Case Number: 2019CP0701666

Type: Order/Electronic Form 4

So Ordered

s/ Maite Murphy 2166

Electronically signed on 2021-01-27 13:49:05 page 3 of 3

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Stevens Builders, LLC,

Plaintiff,

vs.

Michael C. Garraway, Alicia M. Garraway, and TD
Bank, N.A.

Defendant(s)

IN THE COURT OF COMMON PLEAS

C/A No.: 2019-CP-07-01666

**ORDER GRANTING TD BANK, N.A.'s MOTION FOR
SUMMARY JUDGMENT**

BCP No.: 20-40645

This matter is before the Court by way of a Motion for Summary Judgment filed by Defendant, TD Bank, N.A. ("**TD Bank**"). A hearing was held before this Court on May 23, 2022. Present at the hearing were J. Martin Page, Esq. for Defendant, TD Bank, Benjamin Coppage, Esq. for the Plaintiff, and James Wegmann, Esq. for Defendants Michael C. Garraway and Alicia M. Garraway. After considering the memoranda submitted by the parties, as well as oral arguments present by counsel, TD Bank's Motion for Summary Judgment is GRANTED.

FINDINGS OF FACT

In 2016, Michael C. Garraway and Alicia M. Garraway (collectively, the "**Garraways**") entered into a contract with Stevens Builders, LLC ("**Stevens Builders**") for the construction of a new home in South Carolina ("**Construction Contract**"). After the Garraways and Stevens Builders entered their Construction Contract, they both made an agreement with TD Bank ("**Construction Loan Agreement**"). Specifically, on February 6, 2017, the Garraways made a loan agreement with TD Bank for a construction loan of \$280,000. Stevens Builders became a party and executed the Construction Loan Agreement as the "Contractor."

The Construction Loan Agreement contains several clear and unambiguous terms about TD Bank's rights and obligations concerning construction loan disbursements.

Importantly, the Construction Loan Agreement states that TD Bank would make construction loan disbursements only if certain conditions were met. Specifically, construction loan disbursements:

- Were not to be made “***unless and until. . . the Borrower presents proper written demand from the Contractor***” (emphasis added);
- Were to be made “based upon the percentage of work completed”;
- Were to be made “only for work already completed and deposits for supplies as approved by Lender on a case by case basis, and only for work contemplated in the original Construction Contract and contract price”; and
- Were to be made “only as long as construction progresses in accordance with the specifications, drawings and plans (as determined by the Lender in its sole discretion, and for the Lender's benefit only), and only provided that there are no violations of any terms of this documents of any other documents signed in connection with this loan”.

Construction Loan Agreement, Sect. III, ¶ 1

Moreover, as to the timing and amount of disbursements, TD Bank “retain[ed] the option, in its sole discretion, to change the timing and amounts of disbursements provided in any schedule established by or in connection with this loan . . . [t]he method by which it disburses the money shall be at the discretion of [TD Bank], based upon the percentage of work completed.”

Construction Loan Agreement, Sect. III, ¶ 1.

TD Bank properly disbursed funds to Stevens Builders in compliance with the Construction Loan Agreement. It is undisputed that TD Bank was never presented with a written demand or draw request from the Garraways to pay Stevens Builders the amount Stevens Builders seeks to recover in this action. Per the Construction Loan Agreement, TD Bank was unable to disburse funds until this prerequisite was met. The Construction Loan Agreement specifically states: “The

advances will not be made unless and until, in addition to meeting the other requirements of this Agreement, the Borrower presents proper written demand from the Contractor.”

The Construction Loan Agreement also provided that an inspector, of TD Bank’s choosing, would periodically inspect the property to determine the progress of the work. Section III ¶ 1 of the Construction Loan Agreement provides:

The advances will be paid out only for work already completed and deposits for supplies as approved by Lender on a case by case basis, and only for work contemplated in the original Construction Contract and contract price. ***The advances will be paid out only as long as construction progresses in accordance with the specifications, drawings and plans (as determined by the Lender in its sole discretion, and for the Lender’s benefit only)*** The Lender retains the option, in its sole discretion, to change the timing and amounts of disbursements provided in any schedule established by or in connection with this loan. ***In order to determine whether adequate progress has been made, an individual selected by the Lender will visit the site to determine that the project is being completed according to plans and specifications (as determined by the Lender in its sole discretion, and for the Lender’s benefit only).*** (emphasis added)

The agreement does not specify any particular worksheet to be used in determining or tracking the progress made. *See generally id.* To the contrary, the Construction Loan Agreement clearly and unambiguously states that TD Bank retains the option, in its sole discretion, to change the timing and amounts of disbursements provided in any schedule. Construction Loan Agreement, Sect. III, ¶ 1.

On or about July 18, 2019, Stevens Builders filed its Complaint. On or about April 13, 2021, the case was referred to the undersigned. Thereafter, on or about December 2, 2021, TD Bank filed its Motion for Summary Judgment. I find that this matter is properly before the Court and the Motion is ripe for adjudication at this time.

SUMMARY JUDGMENT STANDARD

“Summary judgment shall be granted ‘if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law.’” *Loflin v. BMP Development, LP*, 2016 WL 11597897 *Mullen, J. (citing SCRCP 56(c)); *see also ARB, Inc. v. Integrated Recycling Group of SC, LLC*, 432 S.C. 545, 551, 854 S.E.2d 171, 174 (Ct. App. 2021), *reh’g denied* (Feb. 12, 2021).

When the moving party demonstrates no evidentiary basis for nonmoving party’s claims, the nonmoving party must “come forward with specific facts showing there is a genuine issue for trial.” *Id.* (citing *Singleton v. Sherer*, 377 S.C. 185, 197-98, 659 S.E.2d 196, 203 (Ct. Appl. 2008)). “It is not sufficient for one to create an inference that is not reasonable or an issue of fact that is not genuine.” *Id.* (citing *Evans. v Stewart*, 370 S.C. 522, 526, 636 S.E.2d 632, 635 (Ct. App. 2006)) (internal quotations omitted).

CONCLUSIONS OF LAW

1. TD Bank is Entitled to Summary Judgment on Stevens Builders’s Breach of Contract Claim.

It is black letter contract law in South Carolina that, if the language of a contract is unambiguous, then the contract’s language determines the force and effect. *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004). Courts “are without authority to alter an unambiguous contract by construction or to make new contracts for the parties. A court must enforce an unambiguous contract according to its terms . . .” *S.C. Dep’t of Transp. v. M & T Enters. Of Mt. Pleasant*, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008).

In its Complaint, Stevens Builders asserted a breach of contract claim against TD Bank on the basis that Stevens Builders “demanded payment from TD as required by the Construction Loan Agreement, but TD has failed and refused to disburse the same.” However, this claim fails as the Construction Loan Agreement is unambiguous in its requirement, among others, that the Garraways present a proper written demand to TD Bank for any disbursement to Stevens Builders, and there is no evidence in the record that the Garraways presented such a demand on TD Bank for the amount Stevens Builders seeks in this action.

In response to the Motion, Plaintiff has submitted (among other things) a series of emails, the contents of which do not meet the clear disbursement request requirements of the unambiguous contract. In fact, had T.D. disbursed on the documents submitted, it could be argued that T.D. could be subject to claims by the borrowers.

Viewing the facts in a light most favorable to the non-moving party, Stevens Builders has failed to submit evidence that TD Bank breached any contractual provision in this case. Because there is no genuine issue of material fact regarding Stevens Builders’s breach of contract claim, TD Bank is entitled to judgment as a matter of law.

CONCLUSION

For the reasons set forth above, this Court hereby orders, adjudges, and decrees that TD Bank’s Motion for Summary Judgment is GRANTED. Therefore, all cause of action asserted in the Complaint against TD Bank are hereby dismissed with prejudice.

AND IT SO ORDERED.

[JUDGE’S ELECTRONIC SIGNATURE PAGE TO FOLLOW]

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF Beaufort

IN THE COURT OF COMMON PLEAS

CASE NO. 2019-CP-07-01666

Stevens Builders, LLC

Michael C. Garraway, Alicia M. Garraway and
TD Bank, N.A.

PLAINTIFF

DEFENDANT(S)

Submitted by: Bell Carrington Price & Gregg, LLC

339 Heyward Street, 2nd Floor, Columbia SC 29201Attorney for : ☐ Plaintiff ☒ Defendant

or

☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER GRANTING TD BANK, N.A.'S MOTION FOR SUMMARY JUDGMENT

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : Dismisses TD Bank, N.A. from the case

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Judge Marvin H. Dukes

Judge Code

Date**For Clerk of Court Office Use Only**

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Benjamin Coppage, Esq.

J. Martin Page, SC Bar No. 100200

James Wegmann, Esq.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT**Court Reporter:**

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.



Beaufort Common Pleas

Case Caption: Stevens Builders Llc VS Michael C Garraway , defendant, et al

Case Number: 2019CP0701666

Type: Order/Other

So Ordered:

s/Marvin H. Dukes III #3069

Electronically signed on 2022-05-27 13:40:01 page 9 of 9

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019 CP-07-01666

Stevens Builders, LLC

Michael C. Garraway, et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: BEAUFORT COUNTY MASTER IN EQUITY

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

This came before me on Plaintiff's Motion for Reconsideration; filed June 6th, 2022. After review of the file and due consideration, I hereby deny the motion.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.

_____	3069	_____
Circuit Court Judge	Judge Code	Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Benjamin T. Coppage

ATTORNEY(S) FOR THE PLAINTIFF(S)

James J. Wegmann

James Martin Page

Lynne E. Evans

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: N/A



Beaufort Common Pleas

Case Caption: Stevens Builders Llc VS Michael C Garraway , defendant, et al

Case Number: 2019CP0701666

Type: Order/Other

So Ordered:

s/Marvin H. Dukes III #3069

Electronically signed on 2022-07-28 13:37:22 page 3 of 3

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

STEVENS BUILDERS, LLC,

Plaintiff,

vs.

MICHAEL C. GARRAWAY, ALICIA M.
GARRAWAY, and TD Bank, N.A.,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL CASE NO.:

SUMMONS

TO THE ABOVE-NAMED DEFENDANTS:

You are hereby summoned and required to Answer the Complaint in this action, a copy of which is herewith served upon you; and to serve a copy of you Answer to the Complaint upon the subscriber at his office at 1010 Carteret Street, Beaufort, South Carolina 29902, within thirty (30) days after the service hereof, exclusive of the date of such service; and if you fail to Answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court and judgment by default will be rendered against you for the relief demanded in the Complaint.

Coppage Law Firm, LLC

By: s/Benjamin T. Coppage
Benjamin T. Coppage
Attorney for the Plaintiff

July 18, 2019
Beaufort, South Carolina

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

CIVIL CASE NO.:

STEVENS BUILDERS, LLC,

Plaintiff,

COMPLAINT

vs.

MICHAEL C. GARRAWAY, ALICIA M.
GARRAWAY, and TD Bank, N.A.,

Defendants.

COMES NOW Stevens Builders, LLC, the above-named Plaintiff, and files this Complaint against the above-named Defendants, showing this Honorable Court the following:

Jurisdiction and Venue

1. Plaintiff is a South Carolina limited liability company having its principal place of business in Aiken County, South Carolina and is the proper party to bring this action.
2. Defendants Michael C. Garraway and Alicia M. Garraway (hereinafter the "Garraways") are residents of Beaufort County, South Carolina.
3. Defendant TD Bank, N.A. (hereinafter "TD") is, upon information and belief, a corporation organized and existing under the laws of the State of Delaware and authorized to do business in the State of South Carolina. TD is a mortgagee to the Garraways under a mortgage dated April 15, 2019 which secures payment on a promissory note from the Garraways to TD for the payment of \$467,250.00. As such, TD may claim an interest in the Property.

4. Venue is proper in this Court as all of the acts or omissions alleged herein took place in Beaufort County.

General Allegations

5. The Plaintiff incorporates herein by reference the allegations made in the foregoing paragraphs.
6. The Garraways are the owners of real property located at 140 Front Street, Saint Helena Island, South Carolina and more particularly described as that certain piece, parcel, or lot of land, situate lying and being on St. Helena Island Township, Beaufort County, South Carolina, and being shown as Lot 40, Phase I, Bermuda Bluff S/D, on a plat entitled "Bermuda Bluff," St. Helena Township, Beaufort County, South Carolina, prepared by R.D. Trogon, Jr., recorded in Plat Book 35 at Page 164 in the Office of the Register of Deeds for Beaufort County, South Carolina. For a more complete description of said lot, reference may be had to an individual plat prepared by David E. Gasque, RLS, dated March 25, 2016, a copy of which is recorded in Book 3498 at Page 1848 in the Office of the Register of Deeds for Beaufort County, South Carolina (hereinafter the "Property").
7. On or about December 8, 2016, the Plaintiff and the Garraways entered into a written agreement by which the Plaintiff agreed to perform contracting services associated with the construction of a house on the Property and other improvements to the Property and the Garraways agreed to pay the Plaintiff for those services (hereinafter "Agreement").
8. Pursuant to the Agreement, certain work was performed and certain materials were

supplied for the improvement of the Property.

9. The Garraways have failed and refused to pay \$93,575.27 due to the Plaintiff for labor and materials supplied, despite the Plaintiff's demand for the same.
10. On or about February 6, 2017, the Plaintiff and TD entered into a Construction Loan Agreement which provided for the payment of construction loan monies to the Plaintiff for labor and materials rendered.
11. The Plaintiff has demanded payment from TD as required by the Construction Loan Agreement, but TD has failed and refused to disburse the same.

First Cause of Action
Breach of Contract as to the Garraways

12. The Plaintiff incorporates herein by reference the allegations made in the foregoing paragraphs.
13. The Plaintiff and the Garraways entered into a binding contract as set out above by executing the Agreement.
14. The Garraways have breached the Agreement by failing to pay the plaintiff for labor and materials rendered pursuant to the terms of the Agreement.
15. The Plaintiff has suffered damages as a direct and proximate result of the Garraways' breach of the Agreement.

Second Cause of Action
Breach of Contract as to TD

16. The Plaintiff incorporates herein by reference the allegations made in the foregoing paragraphs.

17. The Plaintiff and TD entered into a binding contract as set out above by executing the Construction Loan Agreement.
18. TD breached the Construction Loan Agreement by failing to pay the plaintiff for labor and materials rendered as required by the Construction Loan Agreement.
19. The Plaintiff has suffered damages as a direct and proximate result of the TD's breach of the Construction Loan Agreement.

Third Cause of Action
Quantum Meruit

20. The Plaintiff incorporates herein by reference the allegations made in the foregoing paragraphs.
21. The Plaintiff conferred benefits to the Garraways in that it made improvements to the Property.
22. The Garraways have realized those benefits.
23. It is unjust for the Garraways to retain the benefits without paying for their value.

Fourth Cause of Action
Foreclosure of Mechanic's Lien

24. The Plaintiff incorporates herein by reference the allegations made in the foregoing paragraphs.
25. As set out above, the Plaintiff provided labor and materials for the improvement of the Property.
26. The agreed upon and reasonable value of the labor and materials provided is \$93,575.27.

27. By virtue of the furnishing of the labor and materials, the Plaintiff has and claims a mechanic's lien to secure the payment of the debt due the Plaintiff in an amount equal to the agreed upon and reasonable value of the labor and materials provided, together with prejudgment interest, costs, and reasonable attorney fees.
28. The Plaintiff gave timely written notice to the Garraways of the furnishing of labor and materials, which last occurred on or about January 18, 2019, as well as the value thereof.
29. The Plaintiff on April 18, 2019, filed at the Register of Deeds Office for Beaufort County, South Carolina under file number 2019019317, and served upon the Garraways, a Notice of Certificate of Mechanic's Lien and a statement of just and true account as to the work performed, materials furnished, and the amount due and owing, pursuant to S.C. Code Ann. § 29-5-90 and other applicable law.
30. Within six months of the Plaintiff's last furnishing labor and materials, the Plaintiff commenced this action to enforce the Mechanic's Lien and filed a notice of pendency of action in accordance with S.C. Code §§ 29-5-120 and 29-5-140.
31. TD's encumbrance of the Property is described in a mortgage dated April 15, 2019 and recorded in the Beaufort County Register of Deeds Office for Beaufort County, South Carolina in Book 3752 at Page 369.
32. The Plaintiff is entitled to the foreclosure of its lien upon the Property and the application of the proceeds of the sale of the Property to the debt due the Plaintiff, including prejudgment interest, costs, and reasonable attorney fees.

Prayer

WHEREFORE the Plaintiff prays the Court to inquire into the facts and matters alleged herein and to grant relief in the following manner, to wit:

- A. Judgment in favor of the Plaintiff and against the Defendants in the amount of \$93,575.27 in actual damages, together with prejudgment interest at the rate of 8.75% per annum;
- B. Judgment in favor of the Plaintiff and against the Defendants in the amount of the Plaintiff's reasonable attorney fees and costs of this action;
- C. Judgment (1) foreclosing the Mechanic's Lien against the Property, (2) determining the priority of all liens against the property, (3) directing the sale of the Property, after proper notice, at public auction, and (4) directing the application of the proceeds realized from the sale first to pay the costs of the sale and then to pay the sums due and owing to the Plaintiff; and
- D. Such other relief as this Court may deem just and equitable.

Coppage Law Firm, LLC

By: s/Benjamin T. Coppage
 Benjamin T. Coppage
 SC Bar No. 100055
 Attorney for the Plaintiff
 Post Office Box 2473
 Beaufort, South Carolina 29901
 Telephone: 843-379-9601
 E-Mail: ben@coppagelawfirm.com

July 18, 2019
 Beaufort, South Carolina



Richland County Sheriff's Department

SEP 25 2019

AFFIDAVIT OF SERVICE
or NON-SERVICE

Date Entered: 09/24/2019
File Number: C20190677
DSS Number: 0
Foreign Case #: 2019CP0701666

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

Date _____

Plaintiff Attorney

Coppage Law Firm PO Box 2473 Beaufort, SC 29901
Phone: (843)379-9601 Work:

Plaintiff

Stevens Builders, LLC , 0
Phone: Work:

Defendant(s)

TD Bank, NA Rgt. Agt. Corp. Service Co. 1703 Laurel St. Columbia, SC 29201
Phone: Work:

PERSONALLY APPEARED Before Me P. Wilkes, duty sworn says that he/she served, or attempted to serve, the following civil paper(s):

Summons & Complaint

1

on the defendant, TD BANK, NA, as follows:

() By personally handing the process to the defendant at _____, _____, SC
(Street) (City)
on _____
(Date/Time)

() By handing the process to _____ at _____
(Name of Person Served/Relationship) (Street)
_____, SC on _____, a person of suitable age and discretion then residing in
(City) (Date/Time)
the defendant's usual place of abode.

() By handing the process to Trey Williams, the registered corporate agent or officer of the company at
(Name of Person Served/Company Name)
1703 Laurel St. Columbia, SC on 09/30/19 - 9:30 AM and leaving him/her a copy.
(Street) (City) (Date/Time)

() WAS UNABLE to locate and serve the above process on the defendant, after diligent efforts by checking the City/Telephone Directory, and going to the address given for the defendant, and by questioning persons in the vicinity of the address.
THE PROCESS IS RETURNED UNEXECUTED.

() COMMENTS: _____

Deponent knows the person served to be the defendant and Deponent is not a party to the action.
SWORN TO Before me this

30 day of September, 2019.

P. Wilkes
Deputy Sheriff, Richland County

P. WILKES
S# 1195

Kenneth Coleman
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES July 15, 2024
P.O. Box 143 Columbia, SC 29202

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
CIVIL CASE NO.: 2019-CP-07-1666

STEVENS BUILDERS, LLC,
Plaintiff,

AFFIDAVIT OF DEFAULT

vs.

MICHAEL C. GARRAWAY, ALICIA M.
GARRAWAY, and TD Bank, N.A.,
Defendants.

Personally appeared Benjamin T. Coppage, attorney for the Plaintiff, in the above-captioned action, who states that Defendant TD Bank, N.A. (hereinafter "TD") was served with a copy of the Summons and Complaint in this action on September 30, 2019. TD was served by personal service and an Affidavit of Service has been filed with this Court. He further states that:

1. More than 30 days passed from the date of service without any answer or response to the Complaint;
2. Defendant failed to plead or otherwise defend within 30 days as required by Rule 12(a), SCRCF; and
3. Defendant is now in default.

Sworn to before me this
2nd day of December, 2019


Devon Smith
Notary Public of South Carolina
My Commission expires: March 9, 2027


Benjamin T. Coppage
Attorney for the Plaintiff
Post Office Box 2473
Beaufort, South Carolina 29901
Telephone: 843-379-9601
E-Mail: ben@coppagelawfirm.com

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

STEVENS BUILDERS, LLC,

Plaintiff,

vs.

MICHAEL C. GARRAWAY, ALICIA M.
GARRAWAY, and TD Bank, N.A.,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL CASE NO.: 2019-CP-07-1666

NOTICE OF HEARING

TO: DEFENDANTS MICHAEL C. GARRAWAY, ALICIA M. GARRAWAY, and
TD Bank, N.A.:

YOU WILL TAKE NOTICE that the undersigned, as counsel of record on behalf of the Plaintiff herein, will appear before the Hon. Carmen T. Mullen of the Court of Common Pleas of Beaufort County, South Carolina, located at 102 Ribaut Road, Beaufort, South Carolina 29902, on January 31, 2020 at 9:00 a.m. for a damages hearing on his Motion for Default Judgment as to Defendant T.D. Bank, N.A., in the above-captioned action.

YOU ARE INVITED TO BE PRESENT AND PARTICIPATE

s/Benjamin T. Coppage
Benjamin T. Coppage
Coppage Law Firm, LLC
Attorney for the Plaintiff
Post Office Box 2473
Beaufort, South Carolina 29901
Telephone: 843-379-9601
E-Mail: ben@coppagelawfirm.com

Beaufort, South Carolina
January 21, 2020

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
CIVIL CASE NO.: 2019-CP-07-1666

STEVENS BUILDERS, LLC,
Plaintiff,

vs.

MICHAEL C. GARRAWAY, ALICIA M.
GARRAWAY, and TD Bank, N.A.,
Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below I served the **Notice of Hearing** upon to the below listed party by delivering a copy to it via first class, postage paid U.S. mail at the following address:

TD Bank, N.A.
1701 Route 70 East
Cherry Hill, New Jersey 08034

Defendants Michael C. Garraway and Alicia M. Garraway were served electronically by and through their attorney of record.

January 21, 2020.

Coppage Law Firm, LLC

By: s/Benjamin T. Coppage
Benjamin T. Coppage
Attorney for the Plaintiff
Post Office Box 2473
Beaufort, South Carolina 29901
Phone: 843-379-9601
Email: ben@coppagelawfirm.com

State of South Carolina

County of Beaufort

Stevens Builders, LLC,

Plaintiff,

vs.

Michael C. Garraway, Alicia M.
Garraway, and TD Bank, N.A.,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Case No.: 2019-CP-07-1666

**NOTICE OF MOTION AND TD
BANK, N.A.'S MOTION TO SET
ASIDE ENTRY OF DEFAULT
PURSUANT TO RULE 55(C) SCRPC**

PLEASE TAKE NOTICE that the Defendant, TD Bank, N.A. ("***TD Bank***"), shall move the Court pursuant to Rule 55(c) of the *South Carolina Rules of Civil Procedure* for an Order setting aside the entry of default filed on December 4, 2019, and permitting TD Bank to file an answer or other responsive pleading to Plaintiff's Complaint.

Good cause exists to set aside the entry of default and to permit TD Bank to file an answer or other responsive pleading to Plaintiff's Complaint because:

First, there is a satisfactory explanation for the default because (a) TD Bank is served with a high volume of mechanics' lien cases due to mortgages and the majority of these do not require an answer because S.C. Code Ann. § 29-5-70 provides that a mechanics' lien and resulting foreclosure is junior to a properly perfected mortgage lien; and (b) the failure to file a timely response was inadvertent and unintentional; and

Second, the remaining factors the Court must consider weigh in favor of relieving TD Bank from the default because (1) TD Bank's counsel immediately filed this motion once engaged; (2) TD Bank has several meritorious defenses to Plaintiff's claims, including that TD Bank's interest in the subject property is superior to and cannot be extinguished by Plaintiff's lien foreclosure, and Plaintiff's breach of contract claim is barred by the terms of the parties' agreement; and (3) there would be no prejudice to the Plaintiff in allowing TD Bank to answer or otherwise respond to the Complaint.

TD Bank respectfully requests that this Court relieve TD Bank from default and permit it to file an answer or other responsive pleading to Plaintiff's Complaint.

/s/J. Martin Page
J. Martin Page, Esq.
BELL CARRINGTON PRICE & GREGG, LLC
339 Heyward Street, 2nd Floor
Columbia, SC 29201
Phone: 803 272-0556
Attorneys for TD Bank, N.A.

Columbia, South Carolina

February 6, 2020

State of South Carolina

County of Beaufort

Stevens Builders, LLC,

Plaintiff,

vs.

Michael C. Garraway, Alicia M.
Garraway, and TD Bank, N.A.,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Case No.: 2019-CP-07-1666

**TD BANK, N.A.'S MEMORANDUM
SUPPORTING ITS MOTION TO
SET ASIDE ENTRY OF DEFAULT
PURSUANT TO RULE 55(C) SCRPC**

Defendant TD Bank, N.A. (“**TD Bank**”) respectfully submits this Memorandum in Support of its Motion to be Relieved from Default pursuant to Rule 55(c) of the *South Carolina Rules of Civil Procedure* (“**Motion**”). Good cause exists and TD Bank’s Motion should be granted because:

First, there is a satisfactory explanation for the default because (a) TD Bank is served with a high volume of mechanics’ lien cases due to mortgages and the majority of these do not require an answer because S.C. Code Ann. § 29-5-70 provides that a mechanics’ lien and resulting foreclosure is junior to a properly perfected mortgage lien; and (b) the failure to file a timely response was inadvertent and unintentional; and

Second, the remaining factors the Court must consider weigh in favor of relieving TD Bank from the default because (1) TD Bank’s counsel immediately filed this motion once engaged; (2) TD Bank has several meritorious defenses to Plaintiff’s

claims, including that TD Bank's interest in the subject property is superior to and cannot be extinguished by Plaintiff's lien foreclosure, and Plaintiff's breach of contract claim is barred by the terms of the parties' agreement; and (3) there would be no prejudice to the Plaintiff in allowing TD Bank to answer or otherwise respond to the Complaint.

PROCEDURAL HISTORY

1. On or around July 18, 2019, Plaintiff, Stevens Builders, LLC, ("***Plaintiff***") filed a *Lis Pendens*, Summons and Complaint ("***Complaint***") seeking, among other things, the foreclosure of a Mechanics Lien on real property known as Lot 40, Phase I, Bermuda Bluff S/D on a plat entitled "Bermuda Bluff," St. Helena Township, Beaufort County, South Carolina recorded in Plat Book 35 at Page 164 in the Records of Beaufort County (Complaint ¶ 6).
2. On September 30, 2019, Plaintiff served the registered agent for "TD Bank US Holding Corporation", according to the affidavit of service filed October 14, 2019.
3. On February 5, 2020, the undersigned counsel was retained by TD Bank to defend this action.

ARGUMENT

TD Bank is entitled to be relieved from default because there is good cause for TD Bank's request. Entry of default is a ministerial act, which a clerk must perform once default is made to appear by the affidavit of the moving party. *Start Truss Co., Inc. v. Superior Const. Corp.*, 360 S.C. 503, 602 S.E.2d 99 (S.C. App. 2004). Once an entry of default has been made, the Court may grant relief from entry of default on a

mere showing of “good cause.” *Regions Bank v. Owens*, 402 S.C. 642, 648 741 S.E.2d 51, 54 (S.C. App. 2013).

“Good cause” exists where a party seeking relief provides an explanation for the default and reasons why vacation of the default entry serves the interests of justice. *Id.* If there is a satisfactory explanation for the default, then the court must also consider: (1) the timing of the motion for relief; (2) the existence of a meritorious defense; and (3) the degree of prejudice to the nonmoving party if relief is granted. *Id.* A motion under Rule 55(c) is addressed to the sound discretion of the court. *Id.*, (quoting *Wham v. Shearson Lehman Bros., Inc.* 298 2.C. 462, 465, 381 S.E.2d 499, 501-02 (S.C. App. 1989)).

The South Carolina Court of Appeals has further provided Rule 55(c) is to be “liberally construed to promote justice and dispose of cases on the merits.” *Dixon v. Besco Engineering, Inc.*, 320 S.C. 174, 463 S.E.2d 636, 638 (Ct. App. 1995)

Here, “good cause” exists as to why an answer to the Complaint was not filed because TD Bank is served with a high volume of mechanics’ lien cases due to mortgages and the majority of these do not require an answer because S.C. Code Ann. § 29-5-70 provides that a mechanics’ lien and resulting foreclosure is junior to a properly perfected mortgage lien. Further, the failure to file a timely response was inadvertent and unintentional.

The remaining factors also weigh in favor of granting TD Bank relief from the default because:

- (1) TD Bank’s counsel immediately filed this motion once engaged;

(2) TD Bank has several meritorious defenses to Plaintiff's claims, including that (a) in accord with S.C. Code Ann. § 29-5-70, TD Bank's interest in the subject property is superior to and cannot be extinguished by Plaintiff's lien foreclosure, and (b) the breach of contract claim against TD Bank is barred by the Construction Loan Agreement ("**CLA**"), including because Plaintiff agreed, under the CLA, to hold harmless, indemnify and defend TD Bank against any and all claims arising from Plaintiff's action or failure to act, and the CLA does not allow TD Bank to pay the Plaintiff without proper written demand and the borrowers' consent; and

(3) there would be no prejudice to the Plaintiff in allowing TD Bank to answer or otherwise respond to the Complaint.

CONCLUSION

TD Bank has shown "good cause" as to why it did not respond to the Complaint and should be permitted to respond to the Complaint because;

First, there is a satisfactory explanation for the default because (a) TD Bank is served with a high volume of mechanics' lien cases due to mortgages and the majority of these do not require an answer because S.C. Code Ann. § 29-5-70 provides that a mechanics' lien and resulting foreclosure is junior to a properly perfected mortgage lien; and (b) the failure to file a timely response was inadvertent and unintentional; and

Second, the remaining factors the Court must consider weigh in favor of relieving TD Bank from the default because (1) TD Bank's counsel immediately filed this motion once engaged; (2) TD Bank has several meritorious defenses to Plaintiff's

claims, including that TD Bank's interest in the subject property is superior to and cannot be extinguished by Plaintiff's lien foreclosure, and Plaintiff's breach of contract claim is barred by the terms of the parties' agreement; and (3) there would be no prejudice to the Plaintiff in allowing TD Bank to answer or otherwise respond to the Complaint.

/s/J. Martin Page
J. Martin Page, Esq.
BELL CARRINGTON PRICE & GREGG, LLC
339 Heyward Street, 2nd Floor
Columbia, SC 29201
Phone: 803 272-0556
Attorneys for TD Bank

Columbia, South Carolina

February 6, 2020

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

CIVIL CASE NO.: 2019-CP-07-1666

LIS PENDENS NO.: 2019-LP-07-0366

STEVENS BUILDERS, LLC,

Plaintiff,

vs.

RELEASE OF LIS PENDENSMICHAEL C. GARRAWAY, ALICIA M.
GARRAWAY, and TD Bank, N.A.,

Defendants.

Comes now the Plaintiff herein, and hereby releases the below-referenced property from *Lis Pendens* number 2019-LP-07-0366 filed July 18, 2019 in the Office of the Clerk of Court for Beaufort County, South Carolina for case number 2019-CP-07-1666. The Property released is further known as:

All that certain piece, parcel, or lot of land, situate lying and being on St. Helena Island Township, Beaufort County, South Carolina, and being shown as Lot 40, Phase I, Bermuda Bluff S/D, on a plat entitled "Bermuda Bluff," St. Helena Township, Beaufort County, South Carolina, prepared by R.D. Trogon, Jr., recorded in Plat Book 35 at Page 164 in the Office of the Register of Deeds for Beaufort County, South Carolina. For a more complete description of said lot, reference may be had to an individual plat prepared by David E. Gasque, RLS, dated March 25, 2016, a copy of which is recorded in Book 3498 at Page 1848 in the Office of the Register of Deeds for Beaufort County, South Carolina.

This is the same property conveyed to the Lienees by deed of Frank T. Bauer, Trustee of the Revocable Trust Agreement of Mary M. Bauer, dated June 13, 2016 and recorded in Book 3498 at Page 1845 in the Office of the Register of Deeds for Beaufort County, South Carolina.

Street Address: 140 Front Street
Saint Helena Island, South Carolina 29920

TMS Number: R300 028 000 0056 0000

Respectfully Submitted March 2, 2020.

Coppage Law Firm, LLC

By: s/Benjamin T. Coppage
Benjamin T. Coppage
Attorney for the Plaintiff
SC Bar No.: 100055
Post Office Box 2473
Beaufort, South Carolina 29901
843-379-9601
ben@coppagelawfirm.com

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

STEVENS BUILDERS, LLC,

Plaintiff,

vs.

MICHAEL C. GARRAWAY, ALICIA M.
GARRAWAY, and TD Bank, N.A.,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL CASE NO.: 2019-CP-07-1666

**NOTICE OF MOTION AND MOTION
TO RECONSIDER, ALTER, AND
AMEND ORDER**

TO THE ATTORNEY FOR DEFENDANT TD BANK, N.A.: J. MARTIN PAGE

PLEASE TAKE NOTICE that the Plaintiff, Stevens Builders, LLC, shall move the Court to alter or amend its order dated March 6, 2020, as follows:

Facts and Procedural History

The Plaintiff filed a Summons and Complaint on July 18, 2019 alleging that TD Bank, N.A. (hereinafter "TD") breached its contract by failing to pay the Plaintiff for services rendered.¹ TD was served by personal service on September 30, 2019.² TD failed to answer, raise defenses, assert counterclaims, or otherwise respond to the Complaint. The Plaintiff filed an Affidavit of Default on December 2, 2019 and the Clerk of Court entered the Default on December 4, 2019.³

On January 21, 2020, TD was given notice of the damages hearing on the Motion for Default Judgment by first class mail at its last known address.⁴ The damages hearing was held as scheduled and TD did not attend or otherwise participate. The Plaintiff offered evidence of its

¹ See Summons and Complaint

² See Affidavit of Service

³ See Affidavit of Default

⁴ See Notice of Hearing

damages. The court announced a judgment from the bench in favor of the Plaintiff and against TD in the amount of \$110,550.18.

TD's Motion for Relief

TD filed a Notice of Motion and Motion to “Set Aside Entry of Default Pursuant to Rule 55(c) SCRCF” and a memorandum in support of that motion on February 7, 2020. The Plaintiff subsequently filed a memorandum in response to that motion. TD asserted in its motion and memorandum that “[o]nce an entry of default has been made, the Court may grant relief from entry of default on a mere showing of ‘good cause.’”⁵ It then states that “[g]ood cause’ exists where a party seeking relief provides an explanation for the default and reasons why vacation of the default entry serves the interests of justice.”⁶ It then states that “[i]f there is a satisfactory explanation for the default, then the court must also consider” the factors which amount to good cause as set out in *What v. Shearson Lehman Bros., Inc.*, 298 2.C. 462, 465, 381 S.E.2d 499, 501-02 (S.C. App. 1989).⁷

TD’s motion and memorandum claimed that its explanation for the default and reasons why vacation thereof would serve the interests of justice was that (1) TD is “served with a high volume of mechanics’ lien cases,” (2) S.C. Code Ann. § 29-5-70 provides that a mechanics’ lien and resulting foreclosure is junior to a properly perfected mortgage lien, and (3) “the failure to file a timely response was inadvertent and unintentional.”⁸ It asserted that it timely filed a motion for relief because its “counsel immediately filed this motion once engaged.”⁹ It claimed that it had meritorious defenses because its “interest in the subject property is superior to and cannot be

⁵ TD Bank, N.A.’s Memorandum Supporting its Motion to Set Aside Entry of Default Pursuant to Rule 55(c) SCRCF, p. 3.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

extinguished by Plaintiff's lien foreclosure and the breach of contract claim against TD Bank is barred by the Construction Loan Agreement . . ."¹⁰ It then stated that there would be no prejudice to the Plaintiff if the relief were granted, but offered nothing further in support of that statement.¹¹

Prior to the hearing on the motion on February 26, 2020, TD did not submit to the court any affidavits in support of its motion or other items of evidence. Likewise, at the hearing, TD did not proffer any evidence in support of its motion. After counsel for TD had presented his argument at the hearing and it became clear that TD would not be presenting any evidence in support of its motion, counsel for the Plaintiff objected to the court's consideration of any facts not in the record. Counsel for the Plaintiff cited Rule 43(e), SCRCF, which requires evidence to be presented in support of motions which are based on facts not appearing of record.

The Plaintiff's Response to TD's Motion

The Plaintiff filed its "Response and Memo in Opposition to TD Bank N.A.'s Motion to Set Aside Entry of Default on February 24, 2020" (hereinafter "Response"). The Response asserted that, since the court had rendered a default judgment, Rule 60(b), SCRCF was the appropriate rule under which to seek relief, and not Rule 55(c), SCRCF.¹² During the hearing, the court acknowledged that it had issued its judgment during the damages hearing on January 31, 2020 and TD did not argue that there was no judgment.

The Response addressed the standard for relief pursuant to Rule 55(c), SCRCF. It stated that "the party seeking the relief must provide the court with a reasonable explanation for its failure to respond to the Summons and Complaint" before the court could address the "good cause" factors as stated in the *Wham* decision.¹³ It claimed that no such explanation had been given and cited

¹⁰ *Id.* at p. 4.

¹¹ *Id.*

¹² Plaintiff's Response and Memo in Opposition to TD Bank N.A.'s Motion to Set Aside Entry of Default on February 24, 2020, p. 2

¹³ *Id.* at pp. 2-3.

several cases in which the Court of Appeals and Supreme Courts of South Carolina had upheld lower courts' findings that defaulting defendants with similar or stronger explanations than TD's should not be relieved from entry of default.¹⁴

With regard to the *Wham* factors, the Plaintiff called the court's attention to the fact that TD did not claim that it sought relief from default in a timely fashion – only that its attorneys made the motion expeditiously after being retained.¹⁵ It also pointed out that TD's assertions that it had meritorious defenses were not relevant (TD's claim that its interest in a co-defendant's property was senior to the Plaintiff's was irrelevant to the Plaintiff's breach of contract claim) and baseless (the Plaintiff never waived its right to sue TD).¹⁶ Finally, the Plaintiff argued that there would be substantial prejudice to it if the motion were granted because the Plaintiff is a small business which had already expended a great deal of its resources in the prosecution of the action. Requiring it to start back at “square one” against such a large, sophisticated party would be patently prejudicial.¹⁷

Law and Analysis

On motion made pursuant to Rule 52(b), SCRPC and Rule 59(e), SCRPC, a court may alter or amend its order. A motion to alter or amend is proper pursuant to both rules when an issue is presented to the court but not decided upon.¹⁸ Rule 52(b), SCRPC allows a party to raise the question of the sufficiency of the evidence to support the findings of the court. A party may move the court to alter or amend its order when the court has misunderstood or failed to fully consider an argument or issue and the party wishes for the court to reconsider it.¹⁹ It is inherently unfair to disallow a party an opportunity to call the court's attention to a possible misapprehension of an

¹⁴ *Id.* at p. 3.

¹⁵ *Id.* at pp. 3-4.

¹⁶ *Id.* at p. 4.

¹⁷ *Id.* at p. 5.

¹⁸ *SSI Medical Servs., Inc. v. Cox*, 301 S.C. 493, 392 S.E.2d 789 (1990)

¹⁹ *Elam v. S.C. DOT*, 361 S.C. 9, 602 S.E.2d 772 (2004).

earlier argument and also revisit a previously raised argument, even if it means rehashing all or part of those arguments.²⁰

Here, issues have been presented to the court which have not been decided on and the court has possibly misapprehended prior arguments of the Plaintiff. In the Response and at the hearing on TD's motion on February 26, 2020, the Plaintiff raised the following issues:

1. There was no evidentiary support for TD's motion;
2. Since the court had rendered a default judgment, Rule 60(b), SCRCF was the appropriate rule under which to seek relief, not Rule 55(c), SCRCF;
3. In order for a court to consider relieving a party from default, the party seeking the relief must provide the court with a reasonable explanation for its failure to respond to the Summons and Complaint; and
4. TD did not show "good cause" for why it should be relieved from default.

These issues were not addressed in the court's Order and, as such, it is necessary for the court to reconsider them and alter or amend the Order accordingly.

Lack of Evidentiary Support for TD's Motion

The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge.²¹ The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion.²² An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support.²³

²⁰ *Id.*

²¹ *Harbor Island Owners' Ass'n v. Preferred Island Props., Inc.*, 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006).

²² *Mitchell Supply Co., Inc. v. Gaffney*, 297 S.C. 160, 162-63, 375 S.E.2d 321, 322-23 (Ct. App. 1988).

²³ *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997).

The basis for TD's motion was the assertion of a set of alleged facts which, according to it, amounted to "good cause" for relief from default. However, there was absolutely no evidentiary support in the record for the allegations. The Order reflects this. The court's only findings of fact were (1) that the Plaintiff filed a Summons and Complaint, (2) that TD was served, (3) that the Plaintiff filed a Motion for Default Judgment, (4) a damages hearing was held, and (5) TD filed its motion for relief.²⁴ None of these facts provide any basis for relief from default. As such, there is no evidentiary support for the court's decision and its Order must be amended accordingly. Absent such alteration or amendment, the findings in the Order will remain a clear abuse of discretion.

Rule 60(b), SCRCP Applies

In its Response and during the hearing, the Plaintiff argued that, since the court had already rendered a judgment in favor of the Plaintiff that relief could only be sought under Rule 60(b), SCRCP.²⁵ The court acknowledged that the judgment had been rendered and counsel for TD made no argument to the contrary. However, the Order does not address this issue and must be altered or amended to include a ruling on the same.

No Satisfactory Explanation for Default

The Order acknowledges that a party must provide a satisfactory explanation for default.²⁶ However, there is no finding in the Order that such an explanation has been given or that the explanation is satisfactory. As such, it appears that this is an issue that has been presented to the court on which there has been no ruling.

Also, it appears that the court possibly misapprehended the law regarding the necessity for a satisfactory explanation. The Order states that "TD Bank has shown 'good cause' exists here as

²⁴ Order, pp. 1-2.

²⁵ A judgment is "any decree or order which dismisses the action as to any party or finally determines the rights of any party." Rule 54(a), SCRCP

²⁶ Order, p. 2.

to why an answer to the Complaint was not filed” and that “TD Bank further meets the requirements of the remaining factors.”²⁷ This suggests that the court sees the requirement for a satisfactory explanation as another factor to consider in its determination of “good cause” in addition to the *Wham* factors. This is an erroneous application of the law. First, the court must determine that the defaulting party has put forth a satisfactory explanation and *then* decide whether “good cause” exists based on its consideration of the *Wham* factors.²⁸ Since the court did not make a finding that there was a satisfactory explanation for the default, it should not have moved on to the consideration of whether “good cause” existed and, instead, denied TD’s motion.

No “Good Cause” Shown

As stated above, TD failed to provide the court with any evidence in support of its motion. Even if TD had presented evidence on all of its factual allegations, it would not have made a case that would support a finding of “good cause” under the *Wham* facts. The factors to be considered in determining whether “good cause” exist are (1) the timing of the request for relief; (2) the existence of a meritorious defense; and (3) the prejudice to the opposing party. TD did not argue that it made a timely request for relief – only that its attorneys acted expeditiously after they were retained. The rapidity with which a law firm acts bears no relationship to the timeliness of the request for relief when the defaulting party waits four months after being served to retain the firm.

Also as discussed above, TD’s assertions that it had meritorious defenses were not relevant and baseless. Finally, TD offered nothing on the third factor, except to state that there would be no prejudice to the Plaintiff.

²⁷ Order, p. 2.

²⁸ See *Limehouse v. Hulsey*, 404 S.C. 93, 744 S.E.2d 566 (2013) (“Once a party has put forth a satisfactory explanation . . . the trial court must also consider [the *Wham* factors] . . .”).

Conclusion

For the foregoing reasons, the court must reconsider its decision and alter or amend its Order to conform to the facts and law in this matter. This alteration and amendment must include a denial of TD's motion for relief from default and a requirement that the judgment rendered following the damages hearing on January 31, 2020 be entered immediately.

Submitted March 16, 2020.

Coppage Law Firm, LLC

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STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

STEVENS BUILDERS, LLC,

Plaintiff,

v.

MICHAEL C. GARRAWAY, ALICIA M.
GARRAWAY, and TD Bank, N.A.,

Defendants.

)
)
) IN THE COURT OF COMMON PLEAS

)
) CIVIL CASE NO.: 2019-CP-07-1666

)
) **TD BANK, N.A.'S NOTICE OF**
) **MOTION TO DISMISS**
)
)
)
)
)
)

TO: Benjamin T. Coppage, Esq.
Attorney for Plaintiff

YOU WILL PLEASE TAKE NOTICE, that Defendant, TD Bank, N.A. ("**TD Bank**") will move before the presiding judge of the Court of Common Pleas for this circuit for an order dismissing Plaintiff Stevens Builders, LLC ("**Stevens Builders**")'s allegations against it pursuant to SCRCP Rule 12(b)(6).

TD Bank moves the Court pursuant to SCRCP Rule 12(b)(6) to dismiss the sole remaining breach of contract claim against TD Bank and allegations asserted against TD Bank because Stevens Builders fails to state a claim for which relief can be granted.

There are three reasons why this Court should dismiss the Complaint as to TD Bank under SCRCP Rule 12(b)(6):

First, the breach of contract claim fails, as a matter of law, because Stevens Builders never alleges that TD Bank failed to perform a specific contractual obligation.

Second, the breach of contract claim fails, as a matter of law, because Stevens Builders's allegations ignore – and are inconsistent with – the express, clear, and unambiguous terms of the Loan Agreement.

Third, the breach of contract claim fails because Stevens Builders fails to allege that Stevens Builders satisfied conditions precedent to payment.

Respectfully Submitted,

/s/ J. Martin Page

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Duane Morris LLP

30 S. 17th Street

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Dated: March 24, 2020
Columbia, South Carolina

Attorneys for Defendant, TD Bank, N.A.

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

STEVENS BUILDERS, LLC,

Plaintiffs,

V.

MICHAEL C. GARRAWAY, ALICIA M.
GARRAWAY, and TD Bank, N.A.,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL CASE NO.: 2019-CP-07-1666

**MEMORANDUM OF LAW SUPPORTING
TD BANK, N.A.'S MOTION TO DISMISS**

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Dated: March 24, 2020
Columbia, South Carolina

Attorneys for Defendants, TD Bank, N.A.

INTRODUCTION

This case involves a dispute between a building contractor, Plaintiff Stevens Builders, LLC (“**Stevens Builders**”) and two of its customers, Defendants Michael and Alicia Garraway (collectively, “**Garraways**”). The dispute concerns amounts Stevens Builders and the Garraways respectively claim the other owes for work Stevens Builders did or did not complete on the Garraways’ home. TD Bank, N.A. (“**TD Bank**”) was only involved as the Garraways’ lender under a construction loan agreement (“**Loan Agreement**”) that Stevens Builders also signed.¹ But, in chasing a deep pocket, Stevens Builders tries to manufacture a breach of contract claim against TD Bank by arguing that TD Bank was obligated to release construction loan funds to Stevens Builders simply because Stevens Builders “demanded payment.”

TD Bank respectfully moves this Court, pursuant to SCRCP Rule 12(b)(6), to dismiss all claims against TD Bank because Stevens Builders fails to state a claim for which relief can be granted.

There are three reasons why this Court should dismiss the Complaint as to TD Bank:

First, the breach of contract claim fails, as a matter of law, because Stevens Builders never alleges that TD Bank failed to perform a specific contractual obligation.

Second, the breach of contract claim fails, as a matter of law, because

¹ A copy of the Loan Agreement is attached and incorporated as **Exhibit A**. Because the Complaint references, but does not attach, the Loan Agreement, it is appropriate for consideration by this Court on a motion to dismiss without converting it to a motion for summary judgment. *Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009) (“[A]llowing a trial court to consider documents that are incorporated by reference in the complaint but not actually attached thereto prevents a plaintiff from benefiting from his own oversight or from surviving a motion to dismiss by intentionally omitting documents upon which their claims are based.”).

Stevens Builders's allegations ignore – and are inconsistent with – the express, clear, and unambiguous terms of the Loan Agreement.

Third, the breach of contract claim fails because Stevens Builders fails to allege that Stevens Builders satisfied conditions precedent to payment.

BACKGROUND

The Garraways Hired Stevens Builders, and Then Made the Loan Agreement with TD Bank.

In 2016, the Garraways contracted with Stevens Builders for the construction of a new home in South Carolina. Compl. ¶ 7. After the Garraways and Stevens Builders made their construction contract, they both made the Loan Agreement with TD Bank. Specifically, on February 6, 2017, the Garraways (as “**Borrower**”), Stevens Builders (as “**Contractor**”) and TD Bank (as “**Lender**”) made the Loan Agreement, under which TD Bank agreed to lend \$280,000 to the Garraways, with the loan proceeds to be disbursed in accord with the terms of the Loan Agreement. Ex A, Loan Agreement.

The Garraways and Stevens Builders Agreed to the Express, Clear and Unambiguous Loan Agreement Terms Concerning Construction Loan Disbursements.

The Loan Agreement states several clear and unambiguous terms about TD Bank's rights and obligations concerning construction loan disbursements.

Importantly, the Loan Agreement states that ***TD Bank would make construction loan disbursements only if certain conditions were met.***

Specifically, construction loan disbursements:

- Were not to be made “unless and until . . . the Borrower presents proper written demand from the Contractor”;
- Were to be made “based upon the percentage of work completed”;

- Were to be made “only for work already completed and deposits for supplies as approved by Lender on a case by case basis, and only for work contemplated in the original Construction Contract and contract price”; and
- Were to be made “only as long as construction progresses in accordance with the specifications, drawings and plans (as determined by the Lender in its sole discretion, and for the Lender’s benefit only), and only provided that there are no violations of any terms of this document or any other documents signed in connection with this loan”.

Ex. A, Loan Agreement, Sect. III, ¶ 1.

The Loan Agreement states that **TD Bank “retain[ed] the option, in its sole discretion, to change the timing and amounts of disbursements** provided in any schedule established by or in connection with this loan . . . The method by which it disburses the money shall be **at the discretion of the Lender**, based upon the percentage of work completed.”² Ex. A, Loan Agreement, Sect. III, ¶ 1.

In the Loan Agreement, Stevens Builders further agreed to **defend, indemnify and hold harmless TD Bank** for any and all claims arising out of the construction project. Ex. A, Loan Agreement, Sect. II, ¶ 6(d) (“The Contractor shall hold harmless, indemnify and defend the Lender against any and all claims, liability, losses, damages, costs or expenses, including but not limited to attorneys' fees, which Lender may incur and which arise from any action or failure to act by Contractor and/or any failure to conform with the Construction Contract or this Agreement, except where such claims, liabilities, losses,

² Emphasis added throughout unless indicated to the contrary.

damages, costs, or expenses result from the Lender's willful malfeasance or gross negligence.”).³

Stevens Builders Sued The Garraways and TD Bank.

Stevens Builders sued the Garraways, alleging that that they failed and refused to pay Stevens Builders \$93,575.27 for labor and materials supplied, asserting claims for breach of the Construction Contract, quantum meruit, and foreclosure of a mechanic’s lien. Compl. ¶¶ 9, 12-15, 20-23, 24-32. The foreclosure claim was dismissed on March 2, 2020. See Release Of Lis Pendens filed on March 2, 2020; Consent Order/Dismissal of 4th Cause of Action with Prejudice on March 2, 2020.

Against TD Bank, Stevens Builders alleges that it “demanded payment from TD as required by the Construction Loan Agreement, but TD has failed and refused to disburse the same.” Compl. ¶ 11. On that allegation alone, Stevens Builders asserts that TD Bank breached the Loan Agreement. *Id.* at ¶¶ 16-19.

ARGUMENT

The Governing Standard Warrants Dismissal In TD Bank’s Favor.

³ Underscoring TD Bank’s narrow arms-length role as a lender, the Garraways likewise agreed to defend, indemnify and hold harmless TD Bank for any and all claims arising out of the construction project. Ex. A, Loan Agreement, Sect. IV, ¶ 7 (“I agree to hold harmless, indemnify and defend the Lender against all claims, liability, losses, damages, cost or expenses, including but not limited to attorney's fees, which Lender may incur in connection with this loan and construction project, except as arise from Lender's willful malfeasance or gross negligence.”).

“Under Rule 12(b)(6), SCRCP, a defendant may move for dismissal based on a failure to state facts sufficient to constitute a cause of action.” *Ashley River Properties I, LLC v. Ashley River Properties II, LLC*, 374 S.C. 271, 277, 648 S.E.2d 295, 298 (Ct. App. 2007). “A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court.” *Id.* If the facts alleged in the complaint do not support relief under any theory of law, then the motion to dismiss should be granted. *Id.* at 278.

**The Breach of Contract Claim (Second Cause of Action) Fails
Because The Complaint Never Alleges A Breach of One or More
Contract Terms.**

For breach of contract, a plaintiff must plead that a contract existed, a breach of that contract, and that the breach caused plaintiff damages. *Maro v. Lewis*, 389 S.C. 216, 222, 697 S.E.2d 684, 688 (S.C. Ct. App. 2010). “The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach.” *Id.* (quoting *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)). “The purpose of an award of damages for breach of contract is to put the plaintiff in as good a position as he would have been in if the contract had been performed.” *Id.* (quoting *Minter v. GOCT, Inc.*, 322 S.C. 525, 528, 473 S.E.2d 67, 70 (S.C. Ct. App. 1996)).

It is fundamental contract law that a party cannot breach a contract where the alleged obligation under the contract does not exist. *See Allegro, Inc. v. Scully*, 791 S.E.2d 140, 145 (S.C. 2016); *Staley v. Computer Scis. Corp.*, No. 3:13-CV-

00280-MGL, 2014 WL 6473703, at *11 (D.S.C. Nov. 18, 2014) (“To prevail on a breach of contract claim under South Carolina law, ***a plaintiff bears the burden of establishing the existence and terms of the contract, defendant’s breach of one or more of the contractual terms, and damages resulting from the breach.***”).

Here, Stevens Builders fails to allege a single Loan Agreement term that TD Bank breached. The Complaint alleges only that Stevens Builders “demanded payment from TD as required by the Construction Loan Agreement, but TD has failed and refused to disburse the same.” Compl. ¶ 11.

No term in the Loan Agreement states that TD Bank must pay Stevens Builders simply because Stevens Builders “demanded payment.” To the contrary, as shown above, the Loan Agreement specifies the conditions precedent for disbursements in Sect. III, ¶ 1. Ex. A, Loan Agreement. Accordingly, because Stevens Builders fails to identify a single contract term TD Bank breached, the breach of contract claim must be dismissed. *Scully*, 791 S.E.2d at 145.

**The Breach of Contract Claim (Second Cause of Action) Fails
Because It Is Inconsistent With The Express, Clear and
Unambiguous Loan Agreement Terms.**

It is well settled contract law that, if the language of a contract is unambiguous, then the contract’s language determines the force and effect. *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct.App.2004). Courts “are without authority to alter an unambiguous contract by construction or to make new contracts for the parties. A court must enforce an unambiguous contract

according to its terms...” S.C. *Dep't. of Transp. v. M & T Enters. of Mt. Pleasant*, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct.App.2008).

Here, the breach of contract claim further fails because the Complaint allegation – that Stevens Builders was entitled to a construction loan disbursement simply because it “demanded payment” – ignores and is inconsistent with the unambiguous provisions of the Loan Agreement. Instead of stating that TD Bank must pay the Contractor whenever the Contractor makes a demand, the Loan Agreement expressly states that TD Bank would only make construction loan disbursements if specified conditions were met. Specifically, construction loan disbursements:

- Were not to be made “unless and until . . . the Borrower presents proper written demand from the Contractor”;
- Were to be made “based upon the percentage of work completed”;
- Were to be made “only for work already completed and deposits for supplies as approved by Lender on a case by case basis, and only for work contemplated in the original Construction Contract and contract price”; and
- Were to be made “only as long as construction progresses in accordance with the specifications, drawings and plans (as determined by the Lender in its sole discretion, and for the Lender’s benefit only), and only provided that there are no violations of any terms of this document or any other documents signed in connection with this loan”.

Ex. A, Loan Agreement, Sect. III, ¶ 1.

Further, the Complaint fails to allege that **any** of these conditions to payment were met. The Complaint does not allege that the Garraways presented TD Bank with a written demand for payment. To the contrary, **the Complaint**

admits that the Garraways “failed and refused to pay” Stevens Builders, despite Stevens Builders’s demand. Compl. ¶ 9. The Complaint also does not allege that Stevens Builders’s demand was based on “the percentage of work completed”, “work already completed and deposits for supplies” as approved by TD Bank, “work contemplated in the original Construction Contract and contract price”, or that construction had progressed “in accordance with the specifications, drawings and plans (as determined by the Lender in its sole discretion)”. These terms, and not Stevens Builders’s mere “demand for payment”, are the clear and unambiguous controlling contract terms.

The Breach of Contract Claim Fails Because The Complaint Fails To Allege That Stevens Builders Satisfied The Conditions Precedent to Payment.

“A condition precedent to a contract is ‘any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises.’ *Brewer v. Stokes Kia, Isuzu, Subaru, Inc.*, 364 S.C. 444, 449, 613 S.E.2d 802, 805 (Ct.App.2005) (citing *Worley v. Yarborough Ford, Inc.*, 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct.App.1994)). “The question of whether a provision in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ.” *Id* (internal quotations and citations omitted). ***“If a contract contains a condition precedent, that condition must either occur or it must be excused before a party's duty to perform arises.”*** *McGill v. Moore*, 381 S.C. 179, 187, 672 S.E.2d 571, 575 (2009).

Here, Stevens Builders's claim fails because it fails to allege that it satisfied the conditions precedent to payment. The clear and unambiguous Loan Agreement terms explicitly state that Stevens Builders was only to receive payment when certain conditions were met – including that the Garraways presented TD Bank with a written demand for disbursement, such demand was based on the percentage of work completed, only for work already completed and only as long as construction progressed in accordance with the specifications, drawings and plans, as determined by TD Bank.

The Complaint fails to allege that Stevens Builders satisfied any of these conditions precedent to TD Bank making an additional disbursement of construction loan funds. *See* Section III(C), *supra*. In short, TD Bank had no obligation to disburse any funds to Stevens Builders because Stevens Builders did not meet the conditions precedent to payment.

CONCLUSION

There are three reasons why this Court should dismiss the Complaint as to TD Bank under SCRCP Rule 12(b)(6):

First, the breach of contract claim fails, as a matter of law, because Stevens Builders never alleges that TD Bank failed to perform a specific contractual obligation.

Second, the breach of contract claim fails, as a matter of law, because Stevens Builders's allegations ignore – and are inconsistent with – the express, clear, and unambiguous terms of the Loan Agreement.

Third, the breach of contract claim fails because Stevens Builders fails to allege that Stevens Builders satisfied conditions precedent to payment.

Respectfully Submitted,

/s/ J. Martin Page

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Dated: March 24, 2020
Columbia, South Carolina

Attorneys for Defendants, TD Bank, N.A.

EXHIBIT A

**Bank**

America's Most Convenient Bank®

CONSTRUCTION LOAN AGREEMENT

Loan #: [REDACTED] 7162

In this Agreement the words "I", "me", "my", "mine" and "Borrower" mean each person who signs as a Borrower below. The word "Contractor" means each person or entity that signs as Contractor below. The words "you", "your" or "Lender" mean TD Bank, N.A. I will give the Lender a Note for Two Hundred Eighty Thousand and 00/100 Dollars (\$280,000.00) which will be secured by a mortgage on real estate with all the buildings and improvements thereon. The real estate is located at 140 Front St., St. Helena Island, County of Beaufort, State of Commonwealth of South Carolina. The real estate is described more precisely in the mortgage.

I. MY RESPONSIBILITIES AS A BORROWER

The Lender has agreed to make periodic advances of money to me under the Note I will sign. In exchange for this loan, I agree to do the following:

- 1. TIMELY COMPLETION.** The Borrower agrees to complete the construction as soon as possible under the terms of the Construction Contract, and that in any event the construction and improvements will be complete by 02/28/2018 (Completion Date). The Construction term is set for 12 months and the Bank will not extend the period of construction beyond that time. If construction is not complete by the Rider Completion Date or by the 12th payment whichever comes first, Principal and Interest payment will begin on the 13th payment and the Lender may take action as described under Section III.2.
 - 2. NO LIENS OR CLAIMS.** I will keep the property and any buildings on the property free from any mechanic's liens or other liens or claims. If the Lender asks me to, I will get waivers of liens from any person who may have a potential lien or claim on the property or buildings.
 - 3. REPAIR AND MAINTENANCE.** I will keep the property and any buildings on the property in good repair.
 - 4. INSURANCE.** I promise to keep all buildings on the property insured against loss by fire or other casualty. The insurance will be in an amount satisfactory to the Lender and with an insurance company acceptable to the Lender. I will make all payments necessary to maintain the insurance. The insurance policy will contain a standard mortgagee clause and builder's risk coverage to protect the Lender. If the property is damaged by fire or other cause and insurance proceeds are paid to the Lender, the Lender, at its option, may use the insurance proceeds to pay off or reduce the debt or it may use the proceeds to rebuild or repair the property.
- If there is no person or entity signing as Contractor below, I promise to provide the Lender evidence of the Sub-Contractor's Insurance described in Section II.7. Sub-Contractor's Insurance must be in force until the construction and improvements are complete to the Lender's satisfaction. Sub-Contractor's Insurance will be with an insurance company acceptable to the Lender. The sub-contractor or I will make all payments necessary to maintain the Sub-Contractor's Insurance. Each policy of Sub-Contractor's Insurance will contain a provision for the Lender to be notified upon the cancellation or expiration of the insurance. I agree to provide the Lender with evidence of the required Sub-Contractor's Insurance upon request, but in no event later than the loan closing.
- 5. PROTECTION OF LENDER'S INTEREST.** If the Lender asks me for any reason, I will furnish any documents which will establish and protect the Lender's interest including surveys of the property, assurances that Contractors have performed and have been paid and a financial bond or other document which makes the Lender financially more secure. The Lender has the right to make periodic inspections of the construction project. If, because of an inspection, the Lender decides that the construction may not be proceeding in accordance with the plans and specifications, good building practices or commonly accepted safety standards, I agree to pay for additional costs, if any, such as engineering or architectural studies.

NMLS#:

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6. PROMISE TO PAY AND COMPLY WITH CONTRACTS. I agree to pay all money that I owe to the Lender under other related contract documents. I also agree to comply with all promises which are included in this Agreement and other contract documents. Other related contract documents include, but are not limited to the Note, Mortgage, security agreement, conditional approval letter, loan application or other agreement that I may sign in connection with this loan and construction project.

7. BORROWER'S FUNDS. ☐ **Deposit of Borrower's Funds.** If the box at the beginning of this paragraph is checked, I agree to deposit \$_____ of my own money in a non-interest bearing escrow account with the Lender. I also agree to sign any Escrow Agreement or similar document required by the Lender. I must deposit this money before the Lender is required to begin advances of the construction loan proceeds. This money which I have deposited in the non-interest bearing escrow account will be the first money disbursed by the Lender for the construction project. It will be disbursed in accordance with Section III.1 of this Agreement. I also agree to put more of my own money into a non-interest bearing escrow account within a reasonable time after the Lender asks me to, if the Lender decides that there may be construction or other costs which exceed the original estimates and that those costs must be paid to complete the construction project. I agree to put enough money in the non-interest bearing escrow account to cover these costs. So long as the Lender holds any money in this non-interest bearing escrow account, the money will also be security for my obligations to the Lender under this Agreement and the Note. If I am in default, the Lender may apply these monies to the debt I owe under the Note or to complete the construction project without my prior approval.

If the box at the beginning of the preceding paragraph is not checked, I understand and agree that the Lender will not disburse the proceeds of the Note until I have provided evidence to the Lender that I have contributed \$ 305,000.00 of my own money to the construction project (for example, a paid receipt from the Contractor and a copy of my canceled check made payable to the Contractor and/or fully executed waivers of rights to a lien or claim on the property). I also agree to put more of my own money into the construction project within a reasonable time after the Lender asks me to, if the Lender decides that there may be construction or other costs which exceed the original estimates and that those costs must be paid to complete the construction project. I will provide the Lender with evidence of such additional payments upon request.

8. COPIES OF DOCUMENTS FOR LENDER. I agree to give the Lender signed copies of all Construction Contracts, sub-contracts, change orders, invoices and estimates. I will also give the Lender statements, which give the names of any Contractors or sub-contractors or any other persons who furnish labor, materials or services to the construction. This statement will include any amount due to those persons, any amount paid to those persons and the total price of any contract with those persons.

9. COMPLIANCE WITH LAWS. I agree to comply with all federal, state and local laws, regulations and codes regarding the property.

10. NO CHANGES WITHOUT NOTICE. The Construction Contract may be amended provided that the changes, in the aggregate, do not result in an increase in the contract price of more than one percent (1%). Otherwise, amendments to the Construction Contract require prior written notice to the Lender. I am responsible for any payments for changes prior to the Lender's next disbursement. The Lender is under no obligation to make advances of loan funds to pay for increases to the contract price related to changes, regardless of the amount of these increases.

11. INSPECTION. I agree to allow the Lender, or any person the Lender designates, to inspect the construction project at any time that is reasonable. I agree that each request for an advance of the kind described at Section III.1 of this Agreement will require that such an inspection be made. The Lender agrees to pay the cost of each such inspection. THESE INSPECTIONS ARE FOR THE BENEFIT OF THE LENDER TO PROTECT ITS INTEREST AND I CANNOT RELY ON THE INSPECTIONS FOR MY PROTECTION.

II. THE CONTRACTOR'S RESPONSIBILITIES

1. CONSTRUCTION IN COMPLIANCE WITH PLANS AND LAWS. The construction and improvements will be made



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according to the specifications, drawings and plans agreed upon between Borrower and Contractor ("Construction Contract"). The Contractor warrants and represents that the construction and improvements will be made to comply with all applicable federal, state and local laws, regulations and codes. The Contractor agrees to complete the construction as soon as possible under the terms of the Construction Contract, and that Contractor shall not substantially stop construction for fourteen (14) calendar days without cause, and that in any event the Contractor will complete the construction and improvements by the Completion Date established in Section I.1.

2. NO LIENS OR CLAIMS. The Contractor agrees to keep the property and any buildings or improvements on the property free from any mechanic's liens or claims, and in good repair.

3. WAIVER OF LIENS. If required by Lender, the Contractor must provide the Lender with waivers, on forms to be provided by the Lender or its agent, from anyone who may have rights to a lien or claim on the property. These waivers must be provided to the Lender or its agent when demand is made for payment and must cover all work done up to the date of the previous demand for payment.

4. COPIES OF DOCUMENTS FOR LENDER. The Contractor agrees to provide the Lender with copies of all Construction Contracts, change orders, invoices and Contractor estimates. The Contractor also promises to give statements which include the names of all Contractors, sub contractors and any other persons who provide labor, materials and services for the construction who may have rights to a lien or claim on the property. The Contractor shall not allow any sub-contractors or material suppliers to work on or supply materials to the construction project without prior notice to Lender or its agent in order for Lender to track those persons or entities who may have rights to a lien or claim on the property. The Lender is under no obligation to make advances of loan funds to pay for increases to the contract price related to changes, regardless of the amount of these increases.

5. INSPECTION. The Contractor agrees to allow the Lender or anyone designated by the Lender to inspect the construction project at any reasonable time. THESE INSPECTIONS ARE SOLELY FOR THE BENEFIT OF THE LENDER TO PROTECT ITS INTEREST.

6. COMPLETION, TERMINATION, AMENDMENT, INDEMNIFICATION. Each Contractor who signs this Agreement also agrees to the following:

- a.) If the Borrower defaults and if the Lender asks the Contractor to complete construction under the terms of its Construction Contract with the Borrower, the Contractor shall complete the construction and shall comply with other terms of the Construction Contract and shall recognize the Lender's right under its Note, Mortgage and this Agreement, subject to any lien rights of the Contractor. The Contractor's agreement to complete the Construction Contract is dependent on the Lender's written agreement to perform all obligations that the Borrower has under the Construction Contract and Lender shall have no liability to the Contractor under the Construction Contract until such written agreement is made. Lender may terminate the Construction Contract by giving Contractor a written notice of termination.
- b.) The Contractor agrees to provide Lender with fifteen (15) business days advance written notice prior to terminating the Construction Contract. The Lender, in its sole discretion, may cure any breach of contract by the Borrower within the fifteen (15) business days advance notice period.
- c.) The Construction Contract may be amended provided that the changes, in the aggregate, do not result in an increase in the contract price of more than one percent (1%). Otherwise, amendments to the Construction Contract require prior written notice to the Lender.
- d.) The Contractor shall hold harmless, indemnify and defend the Lender against any and all claims, liability, losses, damages, costs or expenses, including but not limited to attorneys' fees, which Lender may incur and which arise from any action or failure to act by Contractor and/or any failure to conform with the Construction Contract or this Agreement, except where such claims, liabilities, losses, damages, costs, or expenses result from the Lender's willful malfeasance or gross negligence.





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7. INSURANCE. The Contractor agrees to obtain and keep in force the following insurance coverage (the "Contractor's Insurance"): a) public liability insurance with limits of liability equal to at least \$500,000 per occurrence; and b) if the Contractor has employees, worker's compensation insurance as required by applicable state law.

The Contractor also agrees to ensure that sub-contractors working on the project are covered by the following insurance coverage (the "Sub-Contractor's Insurance"), through an insurance policy maintained by either the Contractor or the Sub-Contractor: a) public liability insurance with limits of liability equal to at least \$500,000 per occurrence; and b) if the Sub-Contractor has employees, worker's compensation insurance as required by applicable state law.

Contractor's and Sub-Contractor's Insurance must be in force until the construction and improvements are complete to the Lender's satisfaction. Both Contractor's Insurance and Sub-Contractor's Insurance will be with an insurance company acceptable to the Lender. The Contractor or sub-contractor will make all payments necessary to maintain the Contractor's Insurance and the Sub-Contractor's Insurance. Each policy of Contractor's Insurance will contain a provision for the Lender to be notified upon the cancellation or expiration of the insurance.

The Contractor agrees to provide the Lender with evidence of the required Contractor's Insurance upon request, but in no event later than the loan closing. The Contractor agrees to provide evidence of required Sub-Contractor's Insurance upon the Lender's request.

III. LENDER'S, BORROWER'S AND CONTRACTOR'S JOINT RESPONSIBILITIES

1. ADVANCES, DISBURSEMENTS AND BASIS FOR PAYMENT. The Lender agrees with the Borrower to lend and make periodic advances of the principal sum of the Note, and interest will accrue on these advances at the rate provided in the Note. The Lender's Agreement to lend and advance money is subject to the terms and conditions of this Agreement. The advances will not be made unless and until, in addition to meeting the other requirements of this Agreement, the Borrower presents proper written demand from the Contractor. The advances will be paid out only for work already completed and deposits for supplies as approved by Lender on a case by case basis, and only for work contemplated in the original Construction Contract and contract price. The advances will be paid out only as long as construction progresses in accordance with the specifications, drawings and plans (as determined by the Lender in its sole discretion, and for the Lender's benefit only), and only provided that there are no violations of any terms of this document or any other documents signed in connection with this loan. The payment method described in this Agreement replaces any payment method in the Construction Contract that is contrary. Contractor agrees to the payment method contained in this Agreement. The Lender retains the option, in its sole discretion, to change the timing and amounts of disbursements provided in any schedule established by or in connection with this loan. In order to determine whether adequate progress has been made, an individual selected by the Lender will visit the site to determine that the project is being completed according to plans and specifications (as determined by the Lender in its sole discretion, and for the Lender's benefit only). Borrower agrees to pay any inspection fees. Within five (5) business days after the Lender has received this information and approved it, the Lender will make advances. The method by which it disburses the money shall be at the discretion of the Lender, based upon the percentage of work completed. The Lender may retain from any advance a percentage of the cost of construction from the date of the prior advance (if any).

In the Lender's sole discretion, the advances of the loan may be made directly to one or more of the following: the Borrower, the Contractor or any sub-contractor, or any other person who provided labor, services or material to the construction project. However, advances may only be paid directly to sub-contractors if (i) the Borrower or the Lender has received legal notice of a lien claim from such sub-contractor; or (ii) the Contractor is no longer working on the project.

2. MONEY RETAINED AND COMPLETION OF PROJECT. If the Lender still holds money, including undisbursed loan proceeds or borrower funds beyond the Completion Date as defined in this Agreement, the Lender may, at its option (without notice to Borrower or prior approval from Borrower), (a) apply the money to the principal of the debt and convert the loan from interest only payments to principal and interest payments; or (b) pay the money to Contractors, subcontractors or others if it decides that this is necessary to complete the work in order to protect its interest; or (c) put the undisbursed loan funds into a non-interest bearing escrow account and convert the entire loan from interest only payments to principal and interest payments. If the Lender does apply the money to the principal of the debt, the Lender does not waive its right of foreclosure.



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Lender may, at its option, retain a percentage of the final advance (final disbursement) until, in the Lender's sole discretion, construction is confirmed complete and all terms and conditions of this Agreement and related documents are satisfied. Any such amounts to be retained are to be determined in the Lender's sole discretion, and for the Lender's benefit only. Any retention of the final advance may be withheld until the Lender has conducted a final inspection satisfactory to it showing the project 100% completed, and receives (i) an affidavit from the Borrower and the Contractor sufficient for the Lender's title insurer to remove any exceptions for mechanic's liens, (ii) a final title insurance policy acceptable to the Lender; (iii) a hazard insurance and, if applicable, flood insurance, binder upon the completed construction in an amount, and from an insurance company, acceptable to the Lender, (iv) a copy of the certificate of occupancy if the municipality where the construction occurred issues such certificates, (v) evidence of satisfactory water test and septic certification (if applicable), (vi) final mortgage loan inspection plan satisfactory to Lender, (vii) a final certification of value from an appraiser acceptable to the Lender, (viii) evidence satisfactory to the Lender that all other conditions contained in the Borrower's conditional approval letter which were to be satisfied prior to final disbursement have been met, (ix) evidence that no default exists under any of the other loan documents, and (x) satisfaction of all other requirements contained in this Agreement. If the final advance is approved by the Lender, it will include all unadvanced proceeds of the Note. If that amount exceeds the last disbursement request, the excess amount will be applied to the principal of the debt.

IV. ADDITIONAL AGREEMENTS OF THE BORROWER AND THE LENDER

1. EVENTS OF DEFAULT, CONSEQUENCES. The Lender shall not be required to advance any undisbursed principal of the Note or release from any escrow account created pursuant to this Agreement, if any of the following things happen before the entire loan has been advanced and construction is confirmed complete by the Lender in its sole discretion:

- a.) The property is no longer owned by Borrower because of a sale, a death or for any other reason.
- b.) Borrower is determined to be bankrupt or insolvent.
- c.) A court action is begun which affects any part of the loan proceeds that have not yet been advanced.
- d.) The property or building is substantially damaged.
- e.) Borrower "defaults"; "default" means Borrower has broken any of the promises under this Agreement, or any Note, mortgage, security agreement or other agreement that Borrower may sign in conjunction with this loan and/or construction project.

If any of these events occurs, the Lender may also choose to demand immediate payment in full of all advances made under the Note, obtain the appointment of a receiver, take possession of the property for purposes of completion of construction, or foreclose the Mortgage on the property. The Lender may exercise any or all of these remedies together or separately, and may also exercise any other remedy available to a creditor under applicable law.

2. UNADVANCED REMAINDER. If any of the loan has not been advanced, no creditor of mine or any other person, entity or court shall have any claim upon the unadvanced remainder of the loan, and the Lender will not hold the unadvanced remainder for the benefit of any creditor or any other person.

3. WAIVER. The Lender, may, at any time, waive any condition, agreement or requirement of this Agreement. However, the Lender's waiver on one occasion shall not be considered as a waiver of its rights in the case of future defaults.



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4. THE LENDER MAY COMPLETE CONSTRUCTION. If Borrower has defaulted or broken any promises under this Agreement or other documents, or if the construction is not completed by the date established at Section I.1 of this Agreement, or if any of the Contractor's responsibilities listed in this Agreement are not met, the Lender may refuse to make further advances and/or may take control of the property and complete the construction of the building and improvements to an extent satisfactory to the Lender. Any construction materials which belong to me and which are on or near the property when the Lender takes control of the property under this section shall become the property of the Lender without payment for the materials, and the materials may be used to complete the construction. The Lender has the power to enter into contracts as necessary to accomplish the complete construction. Any money spent by the Lender to complete construction (including the amount, if any, to cure my default which the Lender may make under Section II.6 (b) of this Agreement) shall be added to the principal amount of the loan and secured by the Mortgage and shall be payable by me at a rate of interest per year equal to the interest rate set forth in the Note.

5. BORROWER'S AUTHORIZATION AND ASSIGNMENT TO LENDER REGARDING CONSTRUCTION

CONTRACTS. Borrower gives, assigns and transfers all his/her rights in any existing or future construction contracts to the Lender for the Lender's use in the event that the Lender takes control of the property for the purpose of completing the construction. Even though I have given the Lender these rights, the Lender is not bound by these construction contracts and is not bound by any other obligation to fulfill my commitment unless and until the Lender decides to be bound by notifying the various Contractors, materialmen or other parties to the construction contracts in writing. If the Lender decides to complete any construction on the property, Borrower appoints the Lender as his/her agent with full authorization to bind Borrower to any contracts that would be reasonably necessary to complete the construction in accordance with the plans and specifications. Further, Borrower agrees and acknowledges that the plans and specifications may be changed by the Lender.

6. LENDER IS NOT RESPONSIBLE FOR SELECTION OF ARCHITECT AND OTHER PROCEDURES, OR FOR QUALITY OF MATERIALS OR WORKMANSHIP. I have selected all architects, engineers, Contractors, sub-contractors, materialmen and other persons furnishing services or materials to the construction project. The Lender has no responsibility for the selection of these persons or for the quality of their materials or workmanship or the timeliness of the completion of work. This is because the Lender's only function is that of a Lender and the Lender's only involvement in the construction project is to advance loan proceeds subject to the terms of this Agreement. I HAVE NO RIGHT TO RELY ON ANY INSPECTIONS OR OTHER PROCEDURES REQUIRED BY THE LENDER BECAUSE SUCH PROCEDURES ARE FOR THE PROTECTION OF THE LENDER AND NO ONE ELSE.

7. BORROWER'S LIABILITY TO THE LENDER FOR CLAIMS AGAINST THE LENDER. I agree to be responsible for any claims, injuries or judgments against the Lender arising out of the construction, use, occupancy or possession of the property. My agreement to assume this responsibility extends to any claim of any person arising out of the project, including the following persons: myself and employees of mine, the Contractor and Contractor's employees, any tenant or subtenant of mine, and any person invited on the property by any of these persons. I agree to hold harmless, indemnify and defend the Lender against all claims, liability, losses, damages, cost or expenses, including but not limited to attorneys fees, which Lender may incur in connection with this loan and construction project, except as arise from Lender's willful malfeasance or gross negligence. I understand that attorney's fees may be awarded to me in the event that I prevail in any legal action brought against me by the Lender in connection with this loan and construction project.

8. SECURITY INTEREST. I will give to the Lender a security interest in the personal property described below. The security interest includes any additions to this property, any substitutions for this property, any replacements for this property and any proceeds of this property: All construction materials, machinery and equipment which is or will be located on the real estate owned by me at the property location described in the first paragraph of this Agreement, all funds in any escrow account existing in connection with this Agreement, and the Construction Contract described in Section II of this Agreement. The real estate is described more precisely in the real estate Mortgage, which will be recorded as described in the first paragraph, including all other tangible personal property that becomes affixed to the real estate. This security interest shall secure payment and performance of all my obligations as set forth in the Note, the Mortgage and this Agreement. Default in payment or performance of any obligation entitles the Lender to all default remedies allowed by the applicable state laws as well as all pertinent federal laws and regulations.



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9. SEVERABILITY/APPLICABLE LAW. If any part of this Agreement is held to be unenforceable or void, the remaining part of the Agreement remains enforceable and valid. Except where expressly stated otherwise, this Agreement shall be interpreted under the laws of the State or Commonwealth where the real property securing the loan is located, except its choice of laws rules.

10. EACH SIGNER LIABLE. If two or more persons, corporations or other entities sign this Agreement as the Borrowers, they are equally responsible for compliance with the Agreement and a breach or violation by any signer is a breach or violation by all of them.

11. RELATION TO OTHER AGREEMENTS. In addition to the Note and Mortgage, the terms of my construction loan are also governed by my loan application, conditional approval letter and any other related documents. If there is any inconsistency between those documents and this Agreement, this Agreement shall govern. The Note, Mortgage, this Agreement and other related documents are the entire agreement of the Borrower and the Lender regarding this construction loan.

12. ASSIGNMENT. Borrower may not assign or transfer any rights or responsibilities under this Agreement. The Lender may assign its rights hereunder to another financial institution that agrees to perform the Lender's responsibility under this Agreement.

Michael C Garraway

Date

Contractor

H.L. Stevens (STEVENS Builders)

Print Name

Raymond Young

TD Bank, N.A.

Raymond Young

Print Name

By

Sub owner

2/6/2017

Title

Date

By

Loan Processor

02/03/2017

Title

Date

Signature Required.

Please Return: Fax: (866) 809-0845

scan and e-mail to Raymond.Young2@td.com
or return to a Store nearest you.**YOUR MORTGAGE LOAN PROCESSOR****Name:** Raymond A Young**Phone:** (864) 315-4148**Fax:** (866) 809-0845**Email:** Raymond.Young2@td.com

Construction Loan Agreement

9. SEVERABILITY/APPLICABLE LAW. If any part of this Agreement is held to be unenforceable or void, the remaining part of the Agreement remains enforceable and valid. Except where expressly stated otherwise, this Agreement shall be interpreted under the laws of the State or Commonwealth where the real property securing the loan is located, except its choice of laws rules.

10. EACH SIGNER LIABLE. If two or more persons, corporations or other entities sign this Agreement as the Borrowers, they are equally responsible for compliance with the Agreement and a breach or violation by any signer is a breach or violation by all of them.

11. RELATION TO OTHER AGREEMENTS. In addition to the Note and Mortgage, the terms of my construction loan are also governed by my loan application, conditional approval letter and any other related documents. If there is any inconsistency between those documents and this Agreement, this Agreement shall govern. The Note, Mortgage, this Agreement and other related documents are the entire agreement of the Borrower and the Lender regarding this construction loan.

12. ASSIGNMENT. Borrower may not assign or transfer any rights or responsibilities under this Agreement. The Lender may assign its rights hereunder to another financial institution that agrees to perform the Lender's responsibility under this Agreement.

 2/7/17
Michael C Garraway Date

Contractor

Print Name

Raymond Young

TD Bank, N.A.

Raymond Young

Print Name

By

Title

Date

By

Loan Processor

02/03/2017

Title

Date

Signature Required.

Please Return: Fax: (866) 809-0845
scan and e-mail to Raymond.Young2@td.com
or return to a Store nearest you.

YOUR MORTGAGE LOAN PROCESSOR

Name: Raymond A Young
Phone: (864) 315-4148
Fax: (866) 809-0845
Email: Raymond.Young2@td.com



CONSTRUCTION LOAN DISBURSEMENT WORKSHEET

Borrowers: Garraway, Michael
Property Address: 140 Front Street
Loan Number: 7162



Refinance	
EMD	
BUILDING COSTS	\$585,000.00
TOTAL COSTS	\$585,000.00

Refinance	\$0.00	Borrower	
Loan Funds-Construction	\$280,000.00	Contribution	\$305,000.00
Total Loan Amt	\$280,000.00		

Disbursement Req'd by Builder	Project Completion	Total Costs		Loan Funds		Borrower Funds/Equity
Refinance		\$0.00	=	\$0.00	+	
First Disbursement	15%	\$87,750.00	=	\$0.00	+	\$305,000.00
Second Disbursement	22%	\$128,700.00	=	\$0.00	+	
Third Disbursement	15%	\$87,750.00	=	\$0.00	+	
Fourth Disbursement	20%	\$117,000.00	=	\$116,200.00	+	
Fifth Disbursement	25%	\$146,250.00	=	\$146,250.00	+	
Final Disbursement	3%	\$17,550.00	=	\$17,550.00	+	
	100%	\$585,000.00	=	\$280,000.00	+	\$305,000.00

Borrower will provide Down Payment

Plumbing, heating and wiring roughed and insulation installed - ready for sheetrock.

First Disbursement	Foundation in (Certified Plot Plan received).
Second Disbursement	Sidewalls boarded, interior partitions installed, doors and windows installed and roof shingled (weather tight)(DRIED IN).
Third Disbursement	Plumbing, heating and wiring roughed and insulation installed - ready for sheetrock.
Fourth Disbursement	Exterior finished, fireplace and chimney completed.
Fifth Disbursement	Sheetrock finished, interior doors, trim, counters and cabinets installed
Final Disbursement	Building completed(Landscaping cmopleted by borrower).

**** Borrower must fund full contribution prior to first disbursement****** This schedule is used for loan disbursements, unless another schedule has been submitted by the borrower for approval prior to loan closing.******Final disbursements will not be made until receipt of occupancy permit, inspection by Appraiser & title rundown have been received by the Bank.****** NO DISBURSEMENTS UNTIL THE BANK RECEIVES AND REVIEWS APPROVED BUILDING PERMIT****I (we) acknowledge that I (we) have received a copy of this schedule.**

Borrower

Date

Borrower

Date

Contractor

Date

CONSTRUCTION LOAN DISBURSEMENT WORKSHEET

Borrowers: Garraway, Michael
Property Address: 140 Front Street
Loan Number: [REDACTED] 7162



Refinance	
EMD	
BUILDING COSTS	\$585,000.00
TOTAL COSTS	\$585,000.00

Refinance	\$0.00	Borrower
Loan Funds-Construction	\$280,000.00	Contribution
Total Loan Amt	\$280,000.00	\$305,000.00

Disbursement Req'd by Builder	Project Completion		Total Costs		Loan Funds		Borrower Funds/Equity
Refinance			\$0.00	=	\$0.00	+	
First Disbursement	15%		\$87,750.00	=	\$0.00	+	\$305,000.00
Second Disbursement	22%		\$128,700.00	=	\$0.00	+	
Third Disbursement	15%		\$87,750.00	=	\$0.00	+	
Fourth Disbursement	20%		\$117,000.00	=	\$116,200.00	+	
Fifth Disbursement	25%		\$146,250.00	=	\$146,250.00	+	
Final Disbursement	3%		\$17,550.00	=	\$17,550.00	+	
	100%	=	\$585,000.00	=	\$280,000.00	+	\$305,000.00

Borrower will provide Down Payment

Plumbing, heating and wiring roughed and insulation installed - ready for sheetrock.

First Disbursement	Foundation in (Certified Plot Plan received).
Second Disbursement	Sidewalls boarded, interior partitions installed, doors and windows installed and roof shingled (weather tight)(DRIED IN).
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**** Borrower must fund full contribution prior to first disbursement****** This schedule is used for loan disbursements, unless another schedule has been submitted by the borrower for approval prior to loan closing.******Final disbursements will not be made until receipt of occupancy permit, inspection by Appraiser & title rundown have been received by the Bank.****** NO DISBURSEMENTS UNTIL THE BANK RECEIVES AND REVIEWS APPROVED BUILDING PERMIT****I (we) acknowledge that I (we) have received a copy of this schedule.**

Borrower

Date

Borrower

Date

Contractor

Date

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

STEVENS BUILDERS, LLC,

Plaintiff,

vs.

MICHAEL C. GARRAWAY, ALICIA M.
GARRAWAY, and TD Bank, N.A.,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL CASE NO.: 2019-CP-07-1666

AFFIDAVIT OF DEFAULT

Personally appeared Benjamin T. Coppage, attorney for the Plaintiff, in the above-captioned action, who states that Defendant TD Bank, N.A. (hereinafter "TD") was served with a copy of the Summons and Complaint in this action on September 30, 2019. TD failed to answer, raise defenses, assert counterclaims, or otherwise respond to the Complaint. The Plaintiff filed an Affidavit of Default on December 2, 2019 and the Clerk of Court entered the Default on December 4, 2019. On January 21, 2020, TD was given notice by first class mail of a damages hearing on the Plaintiff's Motion for Default Judgment to be held on January 31, 2020. The damages hearing was held as scheduled and TD did not attend or otherwise participate. The court announced a judgment from the bench in favor of the Plaintiff and against TD in the amount of \$110,550.18.

TD filed a Notice of Motion and Motion to "Set Aside Entry of Default Pursuant to Rule 55(c) SCRPC" on February 7, 2020. The court heard that motion on February 26, 2020 and granted the motion in an Order Granting TD Bank's Motion to be Relieved from Entry of Default (hereinafter "Order") entered on March 9, 2020. The Order required TD to file an answer or other pleading to the Complaint within fifteen (15) days from the entry of the Order.

More than fifteen (15) days have passed from the date of the entry of the Order and TD has failed to file an answer or other pleading as required by the Order. As such, Defendant is now in default.

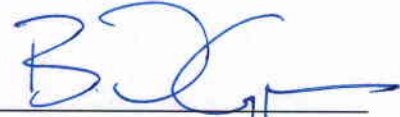
Sworn to before me this
10th day of April, 2020



Devon Smith

Notary Public of South Carolina

My Commission expires: March 9, 2027



Benjamin T. Coppage

Attorney for the Plaintiff

Post Office Box 2473

Beaufort, South Carolina 29901

Telephone: 843-379-9601

E-Mail: ben@coppagelawfirm.com

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
CIVIL CASE NO.: 2019-CP-07-1666

STEVENS BUILDERS, LLC,

Plaintiff,

vs.

MICHAEL C. GARRAWAY, ALICIA M.
GARRAWAY, and TD Bank, N.A.,

Defendants.

AFFIDAVIT OF DEFAULT

Personally appeared Benjamin T. Coppage, attorney for the Plaintiff, in the above-captioned action, who states that Defendant TD Bank, N.A. (hereinafter "TD") was served with a copy of the Summons and Complaint in this action on September 30, 2019. TD failed to answer, raise defenses, assert counterclaims, or otherwise respond to the Complaint. The Plaintiff filed an Affidavit of Default on December 2, 2019 and the Clerk of Court entered the Default on December 4, 2019. On January 21, 2020, TD was given notice by first class mail of a damages hearing on the Plaintiff's Motion for Default Judgment to be held on January 31, 2020. The damages hearing was held as scheduled and TD did not attend or otherwise participate. The court announced that it would grant judgment in favor of the Plaintiff and against TD in the amount of \$110,550.18.

TD filed a Notice of Motion and Motion to "Set Aside Entry of Default Pursuant to Rule 55(c) SCRCF" on February 7, 2020. The court heard that motion on February 26, 2020 and granted the motion in an Order Granting TD Bank's Motion to be Relieved from Entry of Default (hereinafter "Order") entered on March 9, 2020. The Order required TD to file an answer or other pleading to the Complaint within fifteen (15) days from the entry of the Order.

More than fifteen (15) days have passed from the date of the entry of the Order and TD has failed to file an answer or other pleading as required by the Order. As such, Defendant is now in default.

Sworn to before me this
2nd day of June, 2020



Devon Smith

Notary Public of South Carolina

My Commission expires: March 9, 2027



Benjamin T. Coppage

Attorney for the Plaintiff

Post Office Box 2473

Beaufort, South Carolina 29901

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E-Mail: ben@coppagelawfirm.com

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

STEVENS BUILDERS, LLC,

Plaintiff,

vs.

MICHAEL C. GARRAWAY, ALICIA M.
GARRAWAY, and TD Bank, N.A.,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL CASE NO.: 2019-CP-07-1666

**NOTICE OF MOTION AND MOTION
FOR DEFAULT JUDGMENT**

PLEASE TAKE NOTICE that the Plaintiff, Stevens Builders, LLC, moves the Court, pursuant to Rule 55(b)(1), SCRCP for an Order granting default judgment for damages and prejudgment interest in the amount of \$101,655.34 against Defendant TD Bank, N.A. and in favor of the Plaintiff. Since the court has already conducted a damages hearing in this matter and determined the amount of damages and prejudgment interest due the Plaintiff, as shown on Exhibit A, hereto, judgment pursuant to Rule 55(b)(1), SCRCP is appropriate.

Submitted June 3, 2020.

Coppage Law Firm, LLC

By: s/Benjamin T. Coppage
 Benjamin T. Coppage
 Attorney for the Plaintiff
 Post Office Box 2473
 Beaufort, South Carolina 29901
 Phone: 843-379-9601
 Email: ben@coppagelawfirm.com

Ex. A

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	
	)	
Stevens Builders, LLC,	)	CASE NO. 2019-CP-07-01666
	)	
PLAINTIFF,	)	TRANSCRIPT OF RECORD
	)	
VS.	)	ORIGINAL
	)	
Michael C. Garraway,	)	
Alicia M. Garraway, and	)	
TD Bank, N.A.,	)	
	)	
DEFENDANTS.	)	
	)	

January 31, 2020

Beaufort, South Carolina

B E F O R E:

The Honorable Carmen T. Mullen

A P P E A R A N C E S:

Benjamin T. Coppage, Esquire
For the Plaintiff

James John Wegmann, Esquire
For the Defense

Certified Transcript Provided For: Benjamin T. Coppage

I N D E X

(PW) - DENOTES PLAINTIFF'S WITNESS

(DW) - DENOTES DEFENSE WITNESS

Exhibit List	--	03
Hearing	--	04

WITNESSES(SW) Mr. Stevens:

Direct Examination by Mr. Coppage	--	11

<u>CERTIFICATION OF TRANSCRIPT</u>	--	16

If you need an additional copy of this transcript or a sealed transcript or if opposing counsel requires a copy of the transcript, you should contact the court reporter.

Certification will satisfy Rule 80, Stenographic Report of Transcript as Evidence.

1

<u>P L A I N T I F F E X H I B I T S</u>			
<u>NO.</u>	<u>DESCRIPTION</u>	<u>MARKED</u>	<u>ADMIT</u>
1	Expenses - Labor and Materials	13	13

1 THE COURT: Mr. Coppage, you represent Stevens Builders;
2 is that correct?

3 MR. COPPAGE: I do, Your Honor.

4 THE COURT: Okay.

5 Who do you represent on this one?

6 MR. WEGMANN: Ma'am, I represent the Garraway's.

7 THE COURT: Okay.

8 MR. WEGMANN: Michael and Alicia.

9 THE COURT: Okay. All right. Whenever you are ready.

10 MR. COPPAGE: Thank you, Your Honor. As I just said, I
11 represent Stevens Builders in this case. Mr. Stevens of
12 Stevens Builders and his company were hired to work on a
13 project, a house for Michael and Alicia Garraway, back in
14 2017. Work began on that house. At the same time entered
15 into a contract with TD Builders and the Garraway's. Pursuant
16 to that contract TD agreed to make payments to Stevens
17 Builders as the -- as work was done and labor provided on that
18 contract.

19 Things went along fairly well for a while, then at the
20 end of 2018, beginning of 2019, Stevens Builders had done a
21 considerable amount of work, demanded payment that was due on
22 the contract, and TD refused to make that payment.

23 Negotiations eventually failed, and that is why we are
24 here today. Some ---

25 THE COURT: So who was in default?

1 MR. COPPAGE: TD.

2 THE COURT: TD Bank is in default?

3 MR. COPPAGE: It is.

4 MR. WEGMANN: I -- yes, they didn't answer. They
5 didn't -- we have not heard from them. I don't know what they
6 are thinking.

7 MR. COPPAGE: I think ---

8 THE COURT: I mean was ---

9 MR. COPPAGE: --- it is unusual too.

10 THE COURT: Pardon?

11 MR. COPPAGE: I think it is unusual too.

12 THE COURT: I mean were they properly -- I just want to
13 make sure they were properly served. Which I am sure they
14 were. And it just is very shocking.

15 MR. WEGMANN: I don't know if they are -- and again I am
16 guessing. I have never heard one word from them.

17 THE COURT: Okay.

18 MR. WEGMANN: I know that the construction loan agreement
19 that was signed in that particular mortgage was taken out and
20 no longer exists in the county records. So I don't know if
21 they are thinking, well, we don't -- you know, that mortgage
22 doesn't exist, we don't have ---

23 THE COURT: So we don't have any ---

24 MR. WEGMANN: --- we don't have anything to worry about.
25 I don't know if their thinking is somehow if something comes

1 up that they get a judgment against TD Bank that somehow they
2 are going to press that against my people as a construction
3 draw. I just don't know.

4 THE COURT: Okay.

5 MR. WEGMANN: It is very odd. I have been in a number of
6 these cases over the years. Bank usually always acts --
7 answers, says, hey, we've got a first mortgage, we don't know
8 what you are talking about, ---

9 THE COURT: Right.

10 MR. WEGMANN: --- our mortgage takes priority.

11 THE COURT: Yeah.

12 MR. WEGMANN: You know, and they ---

13 MR. COPPAGE: That is what we expected.

14 MR. WEGMANN: We have a mortgage out there.

15 THE COURT: Okay.

16 MR. WEGMANN: But it is not the same mortgage that was
17 the construction loan agreement that they ---

18 THE COURT: Okay.

19 MR. WEGMANN: --- that they signed. That mortgage was
20 taken out three days I think prior to the mechanics lien being
21 filed and probably three months prior to ---

22 THE COURT: So a mechanics lien has been filed?

23 MR. WEGMANN: Mechanics lien was filed.

24 THE COURT: Okay.

25 MR. WEGMANN: We've got ---

1 THE COURT: Okay.

2 MR. WEGMANN: And it is not before the court.

3 THE COURT: I understand.

4 MR. WEGMANN: We have got a partial summary judgment
5 sitting out there waiting to be heard that the mechanics lien
6 is not -- wasn't filed correctly. In other words filed it on
7 the 90th day.

8 THE COURT: Okay.

9 MR. WEGMANN: Never served.

10 THE COURT: Okay.

11 MR. WEGMANN: And it requires filing and service. But
12 that really only as it relates to my client. Not necessarily
13 the bank. So it is a little confusing.

14 I have never seen a bank not at least assert that they
15 have got a mortgage, they are in first position, and, you
16 know, go away.

17 THE COURT: Right. So have your clients gone to the bank
18 to speak with them? Because I am assuming -- I mean the bank
19 has a fiduciary duty to you. But ---

20 MR. WEGMANN: The matter between the plaintiff and my
21 clients relates around draws.

22 THE COURT: Right.

23 MR. WEGMANN: You know, my client's position is pretty
24 simply in their counterclaim that he was ahead of the draw
25 schedule.

1 THE COURT: Okay.

2 MR. WEGMANN: There's lots of correspondence going back
3 between the bank, my client, and the plaintiff that he is
4 ahead of draw schedule. They are not giving out anymore
5 draws.

6 THE COURT: Okay.

7 MR. WEGMANN: He has got to do more work and all that.
8 That is the issue ---

9 THE COURT: Okay.

10 MR. WEGMANN: --- in the case.

11 THE COURT: Right.

12 MR. WEGMANN: It is just whether or not -- and I don't
13 know the answer to this. I know of no case where a lender, a
14 construction loan lender, has been held to be liable because
15 they didn't make a draw when a builder requested it.

16 THE COURT: Yeah.

17 MR. WEGMANN: And, you know, if that is the case then
18 banks aren't going to make construction loans.

19 THE COURT: Right. Yeah, the concern is that they are
20 going to come after your people.

21 MR. WEGMANN: Well, and that is my concern. And why I am
22 here today is they are somehow going to take -- if they are in
23 default and the court orders -- I would like nothing more than
24 a court order that they pay \$93,000 there ---

25 THE COURT: Yeah.

1 MR. WEGMANN: --- and dismiss the complaint; that builder
2 now has \$93,000 I can go after.

3 THE COURT: Right.

4 MR. WEGMANN: But my concern is are they going to somehow
5 consider that a draw, tack it onto something that is owed by
6 my client and move forward. I don't know how to get around
7 that. If I am a bank that is what I am going to try and do.
8 And now I am in litigation against the bank that, no, no, that
9 is your judgment, not mine, ---

10 THE COURT: Right.

11 MR. WEGMANN: --- and you can't tack that into this ---

12 THE COURT: Right.

13 MR. WEGMANN: --- construction loan that is out there
14 now.

15 THE COURT: Right.

16 MR. WEGMANN: So that is my dilemma ---

17 THE COURT: Okay.

18 MR. WEGMANN: --- as I stand here, you know, today. I
19 would like nothing more than the court order that ---

20 THE COURT: Right.

21 MR. WEGMANN: --- if it doesn't attach to me somehow ---

22 THE COURT: Right.

23 MR. WEGMANN: --- or my clients, more appropriately.

24 THE COURT: Well, they are -- the bank is going to be
25 trying to, obviously. Okay.

1 Unfortunately the bank is in default, hasn't answered.
2 And -- okay. All right.

3 Mr. Coppage, let's go ahead.

4 MR. COPPAGE: Yes, ma'am. So TD was served on September
5 30th. Failed to answer or otherwise reply. Entry of default
6 was entered on December 4th. The notice in motion, default
7 judgment which is before the court, was filed on December 4th.
8 TD was given notice of this hearing on January 21st at their
9 corporate headquarters. And ---

10 THE COURT: Where is their corporate headquarters?

11 MR. COPPAGE: In New Jersey.

12 THE COURT: Okay.

13 MR. COPPAGE: The pertinent paragraphs of the complaint
14 to which TD has admitted are that on February 6th, 2017, TD
15 entered a construction loan agreement with Stevens which
16 provided for payment to Stevens for labor and material
17 rendered on the project, that the construction loan agreement
18 was a binding contract, that Stevens Builders has provided
19 labor and material with a value of \$93,575.27 for which it has
20 not been paid, that Stevens has demanded payment from TD but
21 TD has failed to disperse the payment, and that TD breached
22 the construction loan agreement by failing to pay the
23 plaintiff for labor and materials rendered as required by the
24 construction loan agreement.

25 So basically that Stevens Builders provide the labor and

1 agreement -- or the labor and materials as it was supposed to
2 do and TD failed to make the payments as it was supposed to
3 do.

4 And I have Mr. Stevens of Stevens Builders here to
5 testify to his damages.

6 THE COURT: All right. Mr. Stevens, come on up right
7 here, sir.

8 We are going to swear you in.

9 (WHEREUPON, the witness was duly sworn.)

10 (WHEREUPON, the microphone was adjusted for the witness.)

11 THE COURT: Whenever you are ready, Mr. Coppage.

12 MR. COPPAGE: Thank you, Your Honor.

13 **DIRECT EXAMINATION BY MR. COPPAGE OF MR. STEVENS:**

14 Q. Mr. Stevens, were the allegations from the complaint that
15 I just relayed to the court accurate?

16 A. Yes, sir.

17 Q. That you entered into a contract with TD Bank for the
18 payment of funds for materials and labor provided on the
19 project for the Garraway's?

20 A. Yes, sir.

21 Q. All right. And have you provided labor and materials on
22 that project for which you have not been paid?

23 A. Yes, sir.

24 Q. Can you just break down the labor and materials that you
25 have provided and the amount that is currently owed on those

1 items?

2 A. Okay. I have a list with me here breaking -- broken down
3 from electrical, HVAC, plumbing, gas water lines, framing,
4 foundation, and roofing. And I have an itemized list for
5 each.

6 Q. Do you just want to tell us what is owed for each of
7 those items?

8 A. Okay. Electrical is \$22,640. The combined HVAC,
9 plumbing, is 14,935.44. And the framing, structural, I-beams,
10 39,329.98. For a total of 101,655.34.

11 Q. And I think you may have overlooked a couple of items.
12 So you said electrical you had \$22,640.40?

13 A. That's correct.

14 Q. And for HVAC what was -- what was the amount there?

15 A. HVAC was \$10,000.

16 Q. Okay. And how about the plumbing?

17 A. Plumbing is \$5,507.50. And then for my portion it was
18 \$9,427.94. For a total of \$14,935.43.

19 Q. Okay. So we have got \$22,640 for electrical, total,
20 correct?

21 A. Correct.

22 Q. Ten thousand total for heating and air?

23 A. Correct.

24 Q. \$14,935.44 for plumbing?

25 A. Correct.

1 Q. All right. How about gas?

2 A. The gas lines were \$2,310. Water lines were -- water
3 lines were \$492. And the framing I-beams were \$1,075. For
4 framing it was \$38,254.98. In addition to that ---

5 Q. There's -- there's basically you had some -- a sub do
6 some framing with the I-beams and then your company did the
7 rest of the framing so that is the reason for those two
8 different numbers?

9 A. Exactly.

10 Q. All right.

11 A. The additional foundation and concrete \$1,900. And the
12 roofing was \$10,047.52.

13 Q. And what was that total?

14 A. \$101,655.34.

15 Q. Go ahead and make his an exhibit.

16 (WHEREUPON, Plaintiff Exhibit Number 1, expenses for labor and
17 materials, was marked for identification.)

18 MR. WEGMANN: I am not sure I can object.

19 THE COURT: All right. Not really. I was going to
20 say ---

21 MR. COPPAGE: I offer Mr. Stevens notes as Plaintiff's 1.

22 THE COURT: Okay.

23 (WHEREUPON, Plaintiff Exhibit Number 1 was admitted into
24 evidence.)

25 MR. COPPAGE: That's all the questions I have for this

1 witness at this time.

2 THE COURT: Okay. So just so I understand, when it says
3 contractor if it has a different name other than Stevens it is
4 a subcontractor; is that correct?

5 MR. STEVENS: That is correct.

6 THE COURT: Okay. All right. And what was the
7 renovation you were doing to their home?

8 MR. STEVENS: It was new construction.

9 THE COURT: Oh, it was new construction?

10 MR. STEVENS: Yes.

11 THE COURT: I'm sorry. Okay.

12 MR. STEVENS: That's okay.

13 THE COURT: I didn't realize that.

14 Okay. All right. Anything else, Mr. Coppage?

15 MR. COPPAGE: No, ma'am.

16 THE COURT: All right. So you are asking for a judgment
17 in the amount of 101,655.34?

18 MR. COPPAGE: Plus ---

19 THE COURT: Plus?

20 MR. COPPAGE: --- prejudgment interest ---

21 THE COURT: Of course.

22 MR. COPPAGE: --- which was pled in the complaint.

23 THE COURT: Okay.

24 MR. COPPAGE: With that prejudgment interest at 8.75
25 percent per annum the total would be \$110,550.18.

1 THE COURT: Okay. Do you want to give me a proposed
2 order?

3 MR. COPPAGE: Certainly.

4 THE COURT: Okay.

5 MR. COPPAGE: I'll ---

6 THE COURT: Can you e-file it?

7 MR. COPPAGE: Yes.

8 THE COURT: Okay. Just e-file it. And if you upload it
9 as soon as you upload it I will sign it. And I think it is
10 going to probably spur a flurry of activity is my guess.
11 Probably yours too. So we will see how it goes. Okay.

12 MR. COPPAGE: Yes, ma'am.

13 THE COURT: All right.

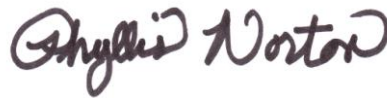
14 (WHEREUPON, the hearing concluded.)

(NOTE: Please contact the court reporter for additional copies or certified transcripts.)

CERTIFICATE

I, the undersigned Phyllis Norton, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all proceedings had and evidence introduced in the captioned case, relative to appeal, in the court for South Carolina, on January 31, 2020.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.



PHYLLIS NORTON, CVR

Date: April 23, 2020

*Certified Transcript Provided For: Benjamin T. Coppage
Certification Reference #2020-0423 Original*

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

STEVENS BUILDERS, LLC,

Plaintiff,

vs.

MICHAEL C. GARRAWAY, ALICIA
M. GARRAWAY, and TD BANK, N.A.

Defendant(s).

IN THE COURT OF COMMON PLEAS

Civil Action No. 2019-CP-07-01666

**ANSWER AND AFFIRMATIVE
DEFENSES OF TD BANK, N.A.**

Defendant TD Bank, N.A. (“***TD Bank***”) submits this answer and affirmative defenses to Stevens Builders, LLC’s (“***Plaintiff***”) Complaint as follows:

1. Each and every allegation of the Complaint not specifically admitted, explained, or qualified is denied and strict proof is demanded.

2. TD Bank lacks sufficient knowledge to admit or deny the allegations of Paragraphs 1 and 2 of the Complaint, and those allegations are therefore denied.

3. Paragraph 3 is denied, except it is admitted that TD Bank is a national association. TD Bank further admits that it recorded a mortgage on April 15, 2019, in the Office of the Register of Deeds for Beaufort County, SC in Book 3752, at Page 0369, on the property which is the subject of this action (“***Mortgage***”). TD Bank further admits that it entered into a Construction Loan Agreement on April 15, 2019, with Michael Garraway in the amount of \$467,250.00.

4. TD Bank lacks sufficient knowledge to admit or deny the allegations in Paragraphs 4 and 5, and therefore denies those allegations.

5. Paragraph 6 is denied, except it is admitted only that TD Bank holds the Mortgage on the property at issue as reflected in the records of the Register of Deeds for Beaufort County.

6. TD Bank lacks sufficient knowledge to admit or deny the allegations in Paragraphs 7, 8, and 9, and therefore denies those allegations.

7. The allegations in Paragraph 10 are denied as legal conclusions.

8. The allegations in Paragraph 11 are denied as legal conclusions.

First Cause of Action
Breach of Contract as to the Garraways

9. No response is required to the allegations in Paragraphs 12, 13, 14, and 15, as they relate to a different Defendant. If these allegations are directed at TD Bank, then TD Bank lacks sufficient knowledge to admit or deny the allegations, and those allegations are therefore denied.

Second Cause of Action
Breach of Contract as to TD Bank

10. The allegations in Paragraphs 16, 17, 18, and 19, are denied as legal conclusions.

Third Cause of Action
Quantum Meruit

11. No response is required to the allegations in Paragraphs 20, 21, 22, and 23, as they relate to a different Defendant. If these allegations are directed at TD Bank, then TD Bank lacks sufficient knowledge to admit or deny the allegations, and those allegations are therefore denied.

Fourth Cause of Action

Foreclosure of Mechanic's Lien

12. No response is required to the allegations in allegations in Paragraphs 24, 25, 26, 27, 28, 29, 30, 31, and 32, as this Court was dismissed with prejudice. Furthermore, TD Bank lacks sufficient knowledge to admit or deny the allegations, and those allegations are therefore denied.

Prayer

WHEREFORE, Defendant TD Bank demands judgment in its favor and dismissal of Plaintiff's Complaint with an award of costs, attorney's fees, and such other relief as this Honorable Court may deem appropriate

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE

13. Plaintiff has failed to state a claim against TD Bank upon which relief may be granted.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE

14. Plaintiff's claims are barred by the equitable doctrine of unclean hands.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE

15. Plaintiff's claims are barred by the equitable doctrine of waiver.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE

16. Plaintiff's claims are barred by the equitable doctrine of estoppel.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE

17. Defendant TD Bank acted appropriately, reasonably, lawfully, properly, and in good faith.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE

18. TD Bank's Mortgage has priority over any interest in the property at issue that Plaintiff may have.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE

19. TD Bank reserves the right to amend its Answer to assert such other affirmative defenses as may become available or apparent during discovery.

WHEREFORE, TD Bank respectfully requests:

1. For a dismissal of the Plaintiff's Complaint with prejudice;
2. Judgment in favor of TD Bank on all claims herein;
3. For any further relief that the Court deems just and proper.

/s/ J. Martin Page

J. Martin Page (SC Bar No.: 100200)
 Bell Carrington Price & Gregg, LLC
 339 Heyward St., 2nd Floor
 Columbia, SC 29201
 (803)509-5078
 mpage@bellcarrington.com
Attorneys for TD Bank, N.A.

Columbia, South Carolina
 June 23, 2020

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

STEVENS BUILDERS, LLC,

Plaintiff,

v.

MICHAEL C. GARRAWAY, ALICIA M.
GARRAWAY, and TD Bank, N.A.,

Defendants.

) IN THE COURT OF COMMON PLEAS

) CIVIL CASE NO.: 2019-CP-07-1666

) **TD BANK, N.A.'S RESPONSE AND**
) **MEMORANDUM OPPOSING**
) **PLAINTIFF'S THIRD MOTION FOR**
) **DEFAULT JUDGMENT**
)
)
)
)
)

TO: Benjamin T. Coppage, Esq.
Attorney for Plaintiff

COMES NOW, Defendant TD Bank, N.A. ("**TD Bank**") and files this Response and Memorandum Opposing Plaintiff Stevens Builders, LLC's ("**Stevens Builders**") Third Motion for Default Judgment ("**3d Motion for Default Judgment**").

There are **two reasons** why this Court should deny Plaintiff's 3d Motion for Default Judgment and strike from the record Plaintiff's Third Affidavit of Default ("**3d Aff. of Default**"):

First, TD Bank is not in default because it timely filed a Motion to Dismiss within 15 days of this Court's Order, and then timely filed an Answer under SCRCR Rule 12(a), after the Court's denial of its Motion to Dismiss; and

Second, TD Bank's Motion to Dismiss satisfied SCRCR Rule 55 and South Carolina policy favoring merits disposition over technicalities.

I. RELEVANT BACKGROUND

The heart of this action is a dispute between a building contractor, Plaintiff Stevens Builders, LLC ("**Stevens Builders**"), and two of its customers, Defendants Michael Garraway and Alicia Garraway (collectively, "**Garraways**"). But Stevens Builders also is searching for a deep pocket by making additional claims against TD Bank for being the Garraways' construction lender, and repeatedly asserting defaults to avoid the meritless basis for these claims. See TD Bank's Motion for Judgment on the Pleadings or in the Alternative, Motion for Summary Judgment, filed contemporaneously.

After learning that Plaintiff filed its first Motion for Default Judgment last December and that this Court ordered the Entry of Default Judgment, on February 7, 2020, TD Bank filed a Motion to Set Aside Entry of Default Judgment. This Court granted that motion and ordered (1) the Default Judgment was set aside because good cause was shown, and (2) TD Bank to "**file an answer or other pleading to the Complaint within fifteen (15) days from the entry of the Order.**"¹ Court Order, March 9, 2020 ("**March 9 Order**"). See Exhibit 1. On March 16, 2020, Plaintiff filed a motion for reconsideration of the

¹ Emphasis added throughout unless indicated to the contrary.

Court's order relieving TD Bank of the default judgment, which this Court denied without a hearing on March 18, 2020. *See* Exhibit 2.

On March 24, 2020 – 15 days after the March 9 Order - TD Bank timely filed a Motion to Dismiss. On June 8, 2020, the Court denied TD Bank's Motion to Dismiss and TD Bank timely filed its answer within 15 days, as required by Rule 12(a), on June 23, 2020.

Before the Court ruled on TD Bank's Motion to Dismiss, Plaintiff surprisingly filed a second and third motion for entry of default—even though the Court had already set aside the default and denied without a hearing Plaintiff's motion for reconsideration. On April 10, 2020, Plaintiff filed a second Affidavit of Default and a second Motion for Entry of Default Judgment. These still appear on the docket, but Plaintiff advised that these requests were withdrawn.

Without justification, on June 5, 2020, Plaintiff executed its 3d Aff. of Default and filed its 3d Motion for Default Judgment, which falsely claimed that TD Bank did not file an answer or pleading within fifteen days of the Court's March 9, 2020 Order. 3d Aff. of Default Page 2.

II. ARGUMENT

A. TD Bank is Not in Default because it Timely Responded To the Court's March 9 Order by Filing a Motion To Dismiss and then timely filed an Answer under Rule 12(a), after the Court's denial of its Motion to Dismiss

Under SCRCP Rule 12(a), a defendant is required to serve his answer within thirty days after service of the Complaint upon him. SCRCP Rule 12(a).

But this timeline is altered by service of a motion permitted under Rule 12(a), including a Motion to Dismiss. If “the Court denies the motion or postpones its disposition until the trial on the merits, ***the responsive pleading shall be served within 15 days after the notice of the Court’s action . . .***” SCRCP 12(a).

Here, TD Bank filed its Motion to Dismiss on March 24, 2020, within 15 days of mandated the March 9 Order.

On June 8, 2020, the Court denied TD Bank’s motion to Dismiss. (“**June 8 Order**”). See Exhibit 3. TD Bank then timely filed an Answer on June 23, 2020, which satisfied Rule 12(a) because it was within 15 days of the Court’s June 8 order.

Thus, TD Bank is not in default because it timely answered the complaint and Plaintiff 3d Motion for Default should be denied.

B. TD Bank’s Motion to Dismiss Satisfied SCRCP Rule 55 and South Carolina Policy Favoring Merits Disposition Over Technicalities.

A default may only be entered when a defendant “***has failed to plead or otherwise defend.***” SCRCP Rule 55. South Carolina’s black letter law is that a motion to dismiss satisfies Rule 55’s requirement to “otherwise defend”. See *Vista Investments, LLC v. Tompkins & McMaster, LLP*, No. 2013-001385, 2015 WL 5248737, at *1 (S.C. Ct. App. Sept. 9, 2015). “The words ‘otherwise defend’ refer to the interposition of various challenges to such matters as service, venue, and the sufficiency of the prior pleading, any of which might prevent a default if

pursued in the absence of a responsive pleading.” *Stark Truss Co. v. Superior Const. Corp.*, 360 S.C. 503, 509, 602 S.E.2d 99, 102 (Ct. App. 2004) (citing 10A Charles Allen Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2682, at 16–17 (3rd ed.1989)).

Moreover, South Carolina policy favors the disposition of issues on their merits rather than on technicalities. *Micronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001). The Federal Rules of Civil Procedure, which align to the South Carolina Rules of Civil Procedure, also favor deciding issues on the merits instead of in default. See *Moore v. Google, Inc.*, No. CIV.A. 2:13-3034-RMG, 2014 WL 4955264, at *3 (D.S.C. Sept. 30, 2014), *aff'd*, 599 F. App'x 108 (4th Cir. 2015) (“[D]efault judgments are devices available to the Court to manage cases where defendants refuse to participate in judicial proceedings; they are not prizes available for Plaintiffs to claim if they have the good fortune of suing a party that misses a court deadline. Here, far from being unresponsive, Defendant has argued the merits of the case[.]”). Thus, filing a motion to dismiss a complaint prevents the entry of default. See SCRCF Rule 55(a).

III. CONCLUSION

There are two reasons why this Court should deny Plaintiff’s 3d Motion for Default Judgment and strike from the record Plaintiff’s 3d Aff. of Default:

First, TD Bank is not in default because it timely filed an Answer following the Court’s denial of its Motion to Dismiss and then timely filed an Answer under SCRCF Rule 12(a), after the Court’s denial of its Motion to Dismiss; and

Second, TD Bank's Motion to Dismiss satisfied SCRCP Rule 55 and South Carolina policy favoring merits disposition over technicalities.

Respectfully Submitted,

/s/ J. Martin Page
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Bell Carrington Price & Gregg, LLC
339 Heyward Street, 2nd Floor
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Phone: 803-508-5078

Alexander D. Bono (*pro hac vice*
forthcoming)
Forrest Hansen (*pro hac vice* forthcoming)
Duane Morris LLP
30 S. 17th Street
Philadelphia, PA 19103

Dated: August 17, 2020
Columbia, South Carolina

Attorneys for Defendants, TD Bank, N.A.

State of South Carolina

County of Beaufort

Stevens Builders, LLC,

Plaintiff,

vs.

Michael C. Garraway, Alicia M. Garraway,
 and TD Bank, N.A.,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Case No.: 2019-CP-07-1666

**ORDER GRANTING TD BANK'S MOTION TO
 BE RELIEVED FROM ENTRY OF DEFAULT**

THIS MATTER is before the Court for hearing on Defendant, TD Bank, N.A.'s Motion to be Relieved from Entry of Default ("**Motion**"). A hearing on the Motion was held on February 26, 2020. Present at the hearing were Benjamin Coppage counsel for the Plaintiff, James Wegman, counsel for Michael C. Garraway and Alicia M. Garraway, and J. Martin Page, counsel for TD Bank, N.A. ("**TD Bank**"). For the reasons set forth below, the Court grants TD Bank's Motion.

FINDINGS OF FACT

1. On or around, July 18, 2019, Plaintiff, Stevens Builders, LLC, ("**Plaintiff**") filed a *Lis Pendens*, Summons and Complaint seeking, among other things, the foreclosure of a Mechanics' Lien on real property known as Lot 40 as shown on that certain plat entitled "Bermuda Bluff" St. Helena Township, Beaufort County South Carolina recorded in Plat Book 35 at Pages 164 in the Records of Charleston County (Complaint ¶ 6).
2. Thereafter, TD Bank, was served with the Complaint on or around, September 30, 2019.
3. Thereafter, Plaintiff filed a Motion for Default Judgment ("**Motion for Default Judgment**") on December 2, 2019.

4. A damages hearing on the Motion for Default Judgment was held on January 31, 2020.
5. TD Bank filed the present Motion on February 7, 2020.

DISCUSSION AND CONCLUSIONS OF LAW

TD Bank is entitled to be relieved from default. Entry of default is a ministerial act, which a clerk must perform once default is made to appear by the affidavit of the moving party. Start Truss Co., Inc. v. Superior Const. Corp., 360 S.C. 503, 602 S.E.2d 99 (S.C. App. 2004). Once an entry of default has been made, the standard for granting relief from such entry of default is mere “good cause.” Regions Bank v. Owens, 402 S.C. 642, 648 741 S.E.2d 51, 54 (S.C. App. 2013). The “good cause” standard for a party seeking relief must provide an explanation for the default and reasons why vacation of the default entry serves the interests of justice. Id. If there is a satisfactory explanation for the default, the court must also consider: (1) the timing of the motion for relief; (2) the existence of a meritorious defense; and (3) the degree of prejudice to the nonmoving party if relief is granted. Id. A motion under Rule 55(c) is addressed to the sound discretion of the court. Id., (quoting Wham v. Shearson Lehman Bros., Inc. 298 2.C. 462, 465, 381 S.E.2d 499, 501-02 (S.C. App. 1989)).

TD Bank has shown that “good cause” exists here as to why an answer to the Complaint was not filed.

TD Bank further meets the requirements of the remaining factors: (1) even though no default has been entered, upon being referred the action, TD Bank’s counsel immediately filed this Motion, (2) a meritorious defense exists and (3) there would be no prejudice to the Plaintiff in allowing TD Bank to answer or otherwise response to the Complaint.

IT IS, THEREFORE, ORDERED THAT:

1. TD Bank's Motion to be Relieved from Default is **granted**; and
2. TD Bank shall file an answer or other pleading to the Complaint within **fifteen (15) days** from entry of this Order.

AND IT IS SO ORDERED.

[ELECTRONIC SIGNATURE TO FOLLOW]



Beaufort Common Pleas

Case Caption: Stevens Builders Llc VS Michael C Garraway , defendant, et al

Case Number: 2019CP0701666

Type: Order/Other

So Ordered

s/Carmen T Mullen 2142

Electronically signed on 2020-03-06 12:00:24 page 4 of 4

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Beaufort
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP0701666

Stevens Builders Llc
PLAINTIFF(S)Michael C Garraway et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Plaintiff's Motion to Reconsider, Alter, and Amend Order is hereby respectfully denied without a hearing.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 03/18/2020 .

James John Wegmann for Michael C Garraway, Alicia M Garraway
Benjamin Terrell Coppage for Stevens Builders Llc
James Martin Page for Td Bank N A

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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ELECTRONICALLY FILED - 2020 Aug 17 4:30 PM - BEAUFORT - COMMON PLEAS - CASE#2019CP0701666



Beaufort Common Pleas

Case Caption: Stevens Builders Llc VS Michael C Garraway , defendant, et al

Case Number: 2019CP0701666

Type: Order/Electronic Form 4

So Ordered

s/Carmen T Mullen 2142

Electronically signed on 2020-03-18 15:29:25 page 3 of 3

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Beaufort
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP0701666

Stevens Builders Llc
PLAINTIFF(S)Michael C Garraway et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

This matter came before the Court on June 4, 2020 on Defendant TD Bank, N.A.'s (hereinafter "TD Bank") Motion to Dismiss, filed March 24, 2020. Representing the Plaintiff was Benjamin T. Coppage, Esq. Representing the Defendant TD Bank was J. Martin Page, Esq. Counsel advised the Court on May 28, 2020 that the case was appealed to the Court of Appeals and that the Appeal was dismissed, but that the remittitur had not yet been filed. The remittitur was subsequently filed on June 4, 2020.

Defendant's Motion is made pursuant to Rule 12(b)(6), SCRPC. A ruling on a motion to dismiss a claim pursuant to Rule 12(b)(6), SCRPC, must be based solely on the allegations set forth on the face of the complaint. United Educational Distributors, LLC, v. Educational Testing Service, 350 S.C. 7, 13, 564 S.E.2d 324, 328 (Ct. App. 2002). The motion will not be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.☒ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 06/08/2020 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

Washington v. Lexington County Jail, 337 S.C. 400, 404, 523 S.E.2d 204, 206 (Ct. App.1999) ; McCormick v. England, 328 S.C. 627, 632–33, 494 S.E.2d 431, 433 (Ct. App.1997). “[A] judgment on the pleadings is considered to be a drastic procedure by our courts.” Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). Therefore, pleadings in a case should be construed liberally and the trial court and this Court must presume all well pled facts to be true so that substantial justice is done between the parties. See Justice v. Pantry, 330 S.C. 37, 42, 496 S.E.2d 871, 874 (Ct. App.1998). “The cause of action should not be struck merely because the court doubts the plaintiff will prevail in the action.” McCormick, 328 S.C. at 633, 494 S.E.2d at 434. Further, “a novel issue should not be summarily decided on a 12 (b)(6) motion.” Keiger v. Citgo, Coastal Petroleum Inc., 326 S.C. 369, 373, 482 S.E.2d 792, 794 (Ct. App. 1997). Viewed in the light most favorable to the non-moving party, the facts alleged and inferences deducible therefrom may entitle Plaintiff to relief on a theory of the case. Accordingly, the Motion is heard and respectfully Denied.



Beaufort Common Pleas

Case Caption: Stevens Builders Llc VS Michael C Garraway , defendant, et al

Case Number: 2019CP0701666

Type: Order/Electronic Form 4

IT IS SO ORDERED>

s/D.L. Jefferson Chief Administrative Judge 2128

Electronically signed on 2020-06-08 15:14:46 page 3 of 3

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ELECTRONICALLY FILED - 2020 Aug 17 4:30 PM - BEAUFORT - COMMON PLEAS - CASE#2019CP0701666

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

STEVENS BUILDERS, LLC,

Plaintiff,

vs.

MICHAEL C. GARRAWAY, ALICIA M.
GARRAWAY, and TD Bank, N.A.,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL CASE NO.: 2019-CP-07-1666

**MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR
DEFAULT JUDGMENT**

COMES NOW the Plaintiff, Stevens Builders, LLC, by and through its undersigned attorney of record and files this Memorandum in Support of its Motion for Default Judgment in this matter, showing the Court as follows:

FACTS AND PROCEDURAL HISTORY

The Plaintiff filed a Summons and Complaint on July 18, 2019 alleging that Defendant TD Bank, N.A., (hereinafter "TD") breached its contract by failing to pay the Plaintiff for services rendered. TD was served by personal service on September 30, 2019.¹ TD failed to answer, raise defenses, assert counterclaims, or otherwise respond to the Complaint. The Plaintiff filed an Affidavit of Default on December 2, 2019 and the Clerk of Court entered the Default on December 4, 2019.² On January 21, 2020, TD was given notice of the damages hearing on the Motion for Default Judgment by first class mail at its last known address.³

¹ See Affidavit of Service filed October 14, 2019

² See Affidavit of Default filed December 2, 2019 and Entry of Default filed December 4, 2019

³ See Notice of Hearing filed January 21, 2020

The damages hearing was held as scheduled and TD did not attend or otherwise participate.⁴ The Plaintiff offered evidence of its damages, totaling \$110,550.18.⁵ The court instructed counsel for the Plaintiff to give the court a proposed order which she would sign “as soon as you upload it.”⁶

On February 7, 2020, before the proposed order was uploaded and the court’s judgment entered, TD filed a Motion to Set Aside Entry of Default Pursuant to Rule 55(c) SCRCP. That motion was heard on February 26, 2020. On February 28, 2020, the court sent an email requesting that counsel for TD submit a proposed order. Counsel for TD submitted a proposed order which was used as the Court’s Order Granting TD Bank’s Motion to be Relieved from Entry of Default, filed on March 9, 2020. That Order relieved TD from the Entry of Default on December 4, 2019 and required TD to “file an answer or other pleading to the Complaint within **fifteen (15) days** from entry of this Order.”⁷

On March 24, 2020, fifteen days after the filing of the Order Granting TD Bank’s Motion to be Relieved from Entry of Default, TD filed a Motion to Dismiss the claims against it. However, it did not file an answer or other pleading. On April 10, 2020, TD had still not filed an answer or other pleading to the Complaint, so the Plaintiff filed an Affidavit of Default and Motion for Default Judgment. However, that default was forgiven by Supreme Court Order 2020-04-03-01 (regarding operation of the trial courts during the coronavirus emergency) and, as such, the Affidavit of Default and Motion for Default were withdrawn by the Plaintiff.

Supreme Court Order 2020-04-14-01, issued on April 14, 2020, stated that, “[i]n the event a party to a case or other matter pending before a trial court was required to take certain action on

⁴ Ex. A., Transcript of January 31, 2020 Hearing

⁵ *Id.* at pp. 11 – 15.

⁶ *Id.* at p. 15, ll. 8-9

⁷ See Order Granting TD Bank’s Motion to be Relieved from Entry of Default, p. 3

or after March 13, 2020, but failed to do so, that procedural default is hereby forgiven, and the required action shall be taken within thirty (30) days of the date of this order.” TD did not take the required action within thirty days of April 14, 2020, again failing to file an answer or other pleading. The Plaintiff filed an Affidavit of Default and a Motion for Default Judgment reflecting this failure on June 5, 2020, which is now before the court.

TD finally filed its Answer on June 23, 2020 – nearly nine months after the date on which it was served and nearly three months after the court ordered it to file an answer or other pleading.

LAW AND ANALYSIS

I. TD’s Default

When the South Carolina Rules of Civil Procedure require an act to be done within a specified time and a party fails to do the required act within that time, the party may move the court for an order permitting the act to be done despite the expiration of the specified period.⁸ Upon a showing of good cause, the court may grant such motion and permit the act to be done.⁹ This is the standard applied by courts in practice and is found in Rule 55(c) for relief from entry of default.¹⁰

TD Bank’s Motion to be Relieved from Entry of Default was such a motion as contemplated by Rule 6.¹¹ It sought enlargement of the time to answer and claimed that there was good cause for such relief.¹² Despite that motion’s being based wholly on facts not appearing in the record, the court granted the motion and allowed TD an additional fifteen days to “file an answer or other pleading to the Complaint.”¹³

⁸ Rule 6(b), SCRCPP

⁹ *Id.*

¹⁰ Rule 6, SCRCPP, Note to 1986 Amendment

¹¹ See TD Bank’s Motion to be Relieved from Entry of Default

¹² *Id.*

¹³ See Order Granting TD Bank’s Motion to be Relieved from Entry of Default, p. 3

Rule 12(a) allows a defendant to answer *or* file a motion permitted by Rule 12 within thirty days of service.¹⁴ In its Order Granting TD Bank’s Motion to be Relieved from Entry of Default, the court gave TD additional time to file an answer or otherwise plead, but did not allow for the same extension for the filing of a Rule 12 motion.¹⁵ The court avoided using the “plead or otherwise defend” language of Rule 55(a), instead choosing to specifically limit the required response to a pleading.¹⁶

Rule 7, SCRP provides a very clear dichotomy between pleadings and motions. Pleadings include complaints, answers, replies to counterclaims, answers to cross-claims, third-party complaints, third-party answers, and court-ordered replies to answers.¹⁷ Outside of those, “[n]o other pleadings shall be allowed.”¹⁸ On the other hand, a motion is not a pleading but simply is an application made for the purpose of obtaining an order from the court.¹⁹

For a Rule 12 motion filed by TD to have altered the time for the answer, it would have had to have been filed by October 30, 2019 – thirty days after TD was served. The court showed extraordinary clemency to TD by allowing it to be relieved from default and file an answer. Despite this leniency, TD chose to ignore the clear language of the Order, which required it to file a pleading, and instead filed a motion.

As such, TD has failed to plead or otherwise defend as provided in the South Carolina Rules of Civil Procedure and is therefore in default.²⁰

¹⁴ Rule 12(a), SCRPC

¹⁵ See Order Granting TD Bank’s Motion to be Relieved from Entry of Default, p. 3

¹⁶ *Id.*

¹⁷ Rule 7(a), SCRPC

¹⁸ *Id.*

¹⁹ Rule 7(b)(1), SCRPC; *United Machine Works, Inc. v. Williams*, 268 S.C. 600, 235 S.E.2d 711 (1977).

²⁰ Rule 55(a), SCRPC

II. Default Judgment

By virtue of TD's default, all of the allegations of the Complaint are deemed admitted.²¹ Pertinently, TD has admitted that (1) the Plaintiff and TD entered into a Construction Loan Agreement (hereinafter "Agreement") which provided for the payment to the Plaintiff for labor and materials rendered for a construction project,²² the Agreement was a binding contract,²³ TD failed to remunerate the Plaintiff as required by the Agreement for labor and materials provided by the Plaintiff,²⁴ the Plaintiff demanded payment from TD as required by the Agreement but TD refused to make the same,²⁵ and the Plaintiff suffered damages as a direct and proximate result of TD's breach of the Agreement.²⁶

Rule 55(b)(2) authorizes the court to conduct a hearing prior to entering default judgment if ". . . it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter . . .".²⁷ Here, there is no such necessity. The court conducted such a hearing on January 31, 2020 and found that the total amount of damages was \$110,550.18: \$101,655.34 in actual damages plus prejudgment interest in the amount of \$8,894.84.²⁸ TD was given notice of this hearing and chose not to participate.²⁹ As such, the court may rely on the sworn testimony presented by the Plaintiff to determine the amount of damages without the necessity of a hearing.

²¹ Rule 8(d), SCRCP

²² See Complaint, ¶ 10

²³ *Id.* at ¶ 17

²⁴ *Id.* at ¶ 18

²⁵ *Id.* at ¶ 11

²⁶ *Id.* at ¶ 19

²⁷ Rule 55(b)(2)

²⁸ Ex. A, p. 15

²⁹ See Notice of Hearing filed January 21, 2020

CONCLUSION

Since TD failed to answer or otherwise respond as required by Rule 12(a), SCRCF it cannot avail itself of that rule's protections. It's only opportunity for response was as stated in the Order Granting TD Bank's Motion to be Relieved from Entry of Default, which required it to file a pleading in response to the Complaint within fifteen days of that Order. It filed no such pleading. As such, it is likewise unable to avail itself of the relief afforded it by the court's Order. As such, TD remains in default and the Plaintiff is entitled to those damages which have already been shown to the court.

Respectfully submitted,

Coppage Law Firm, LLC

By: s/Benjamin T. Coppage
Benjamin T. Coppage
SC Bar No. 100055
Attorney for Robert J. O'Neill and
O'Neill Enterprises, LLC
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September 17, 2020
Beaufort, South Carolina.

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

STEVENS BUILDERS, LLC,

Plaintiff,

vs.

MICHAEL C. GARRAWAY, ALICIA M.
GARRAWAY, and TD Bank, N.A.,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL CASE NO.: 2019-CP-07-1666

**NOTICE OF MOTION, MOTION FOR
RECONSIDERATION, AND
MEMORANDUM IN SUPPORT**

PLEASE TAKE NOTICE that the Plaintiff, Stevens Builders, LLC, shall move the Court to alter or amend its order filed October 22, 2020 (hereinafter the “Order”) at such time and place as directed by the Court, upon the following grounds:

FACTS AND PROCEDURAL HISTORY

The Plaintiff filed a Summons and Complaint on July 18, 2019 alleging that Defendant TD Bank, N.A., (hereinafter “TD”) breached its contract by failing to pay the Plaintiff for services rendered. TD was served by personal service on September 30, 2019.¹ TD failed to answer, raise defenses, assert counterclaims, or otherwise respond to the Complaint. The Plaintiff filed an Affidavit of Default on December 2, 2019 and the Clerk of Court entered the Default on December 4, 2019.² On January 21, 2020, TD was given notice of the damages hearing on the Motion for Default Judgment by first class mail at its last known address.³

¹ See Affidavit of Service filed October 14, 2019

² See Affidavit of Default filed December 2, 2019 and Entry of Default filed December 4, 2019

³ See Notice of Hearing filed January 21, 2020

The damages hearing was held as scheduled and TD did not attend or otherwise participate.⁴ The Plaintiff offered evidence of its damages, totaling \$110,550.18.⁵ The court instructed counsel for the Plaintiff to give the court a proposed order which she would sign “as soon as you upload it.”⁶

On February 7, 2020, before the proposed order was uploaded and the court’s judgment entered, TD filed a Motion to Set Aside Entry of Default Pursuant to Rule 55(c) SCRCp. That motion was heard on February 26, 2020. On February 28, 2020, the court sent an email requesting that counsel for TD submit a proposed order. Counsel for TD submitted a proposed order which was used as the Court’s Order Granting TD Bank’s Motion to be Relieved from Entry of Default, filed on March 9, 2020. That Order relieved TD from the Entry of Default on December 4, 2019 and required TD to “file an answer or other pleading to the Complaint within **fifteen (15) days** from entry of this Order.”⁷

On March 24, 2020, fifteen days after the filing of the Order Granting TD Bank’s Motion to be Relieved from Entry of Default, TD filed a Motion to Dismiss the claims against it. However, it did not file an answer or other pleading. On April 10, 2020, TD had still not filed an answer or other pleading to the Complaint, so the Plaintiff filed an Affidavit of Default and Motion for Default Judgment. However, that default was forgiven by Supreme Court Order 2020-04-03-01 (regarding operation of the trial courts during the coronavirus emergency) and, as such, the Affidavit of Default and Motion for Default were withdrawn by the Plaintiff.

Supreme Court Order 2020-04-14-01, issued on April 14, 2020, stated that, “[i]n the event a party to a case or other matter pending before a trial court was required to take certain action on

⁴ See Ex. A. to Memorandum in Support of Plaintiff’s Motion for Default Judgment, Transcript of January 31, 2020 Hearing

⁵ *Id.* at pp. 11 – 15.

⁶ *Id.* at p. 15, ll. 8-9

⁷ See Order Granting TD Bank’s Motion to be Relieved from Entry of Default, p. 3

or after March 13, 2020, but failed to do so, that procedural default is hereby forgiven, and the required action shall be taken within thirty (30) days of the date of this order.” TD did not take the required action within thirty days of April 14, 2020, again failing to file an answer or other pleading. The Plaintiff filed an Affidavit of Default and a Motion for Default Judgment reflecting this failure on June 5, 2020, which is now before the court.

TD finally filed its Answer on June 23, 2020 – nearly nine months after the date on which it was served and nearly three months after the court ordered it to file an answer or other pleading after it was granted relief from the initial default.

TD responded to the Plaintiff’s Motion for Default Judgment by filing a memorandum in opposition on August 17, 2020.⁸ In that memorandum, TD did not claim that it filed an answer or pleading as required by Judge Mullen’s order and it did not seek relief from an entry of default. Instead, it claimed that it was not in default because it filed a motion to dismiss.⁹ Its arguments were (1) that it was not in default because it filed a motion to dismiss within 15 days of Judge Mullen’s order and then filed an answer after the court ruled on its motion to dismiss, (2) that by filing a motion to dismiss it had not failed to plead or otherwise defend as required by Rule 55, SCRCF, and (3) that South Carolina favors disposition on the merits over technicalities.¹⁰

On September 17, 2020, the Plaintiff filed a Memorandum in Support of its Motion for Default Judgment. It argued that TD was in default because it was subject to the provisions of the Court’s Order Granting TD Bank’s Motion to be Relieved from Entry of Default, filed on March 9, 2020, which were narrower than the provisions governing responses under the South Carolina Rules of Civil Procedure.

⁸ See TD Bank, N.A.’s Response and Memorandum Opposing Plaintiff’s Third Motion for Default Judgment

⁹ *Id.*

¹⁰ *Id.*

When the South Carolina Rules of Civil Procedure require an act to be done within a specified time and a party fails to do the required act within that time, the party may move the court for an order permitting the act to be done despite the expiration of the specified period.¹¹ Upon a showing of good cause, the court may grant such motion and permit the act to be done.¹² This is the standard applied by courts in practice and is found in Rule 55(c) for relief from entry of default.¹³

TD Bank's Motion to be Relieved from Entry of Default was such a motion as contemplated by Rule 6.¹⁴ It sought enlargement of the time to answer and claimed that there was good cause for such relief.¹⁵ Despite that motion's being based wholly on facts not appearing in the record, the court granted the motion and allowed TD an additional fifteen days to "file an answer or other pleading to the Complaint."¹⁶

Rule 12(a) allows a defendant to answer *or* file a motion permitted by Rule 12 within thirty days of service.¹⁷ In its Order Granting TD Bank's Motion to be Relieved from Entry of Default, the court gave TD additional time to file an answer or otherwise plead, but did not allow for the same extension for the filing of a Rule 12 motion.¹⁸ The court avoided using the "plead or otherwise defend" language of Rule 55(a), instead choosing to specifically limit the required response to a pleading.¹⁹

Rule 7, SCRP provides a very clear dichotomy between pleadings and motions. Pleadings include complaints, answers, replies to counterclaims, answers to cross-claims, third-party

¹¹ Rule 6(b), SCRPC

¹² *Id.*

¹³ Rule 6, SCRPC, Note to 1986 Amendment

¹⁴ *See* TD Bank's Motion to be Relieved from Entry of Default

¹⁵ *Id.*

¹⁶ *See* Order Granting TD Bank's Motion to be Relieved from Entry of Default, p. 3

¹⁷ Rule 12(a), SCRPC

¹⁸ *See* Order Granting TD Bank's Motion to be Relieved from Entry of Default, p. 3

¹⁹ *Id.*

complaints, third-party answers, and court-ordered replies to answers.²⁰ Outside of those, “[n]o other pleadings shall be allowed.”²¹ On the other hand, a motion is not a pleading but simply is an application made for the purpose of obtaining an order from the court.²²

For a Rule 12 motion filed by TD to have altered the time for the answer, it would have had to have been filed by October 30, 2019 – thirty days after TD was served. The court showed extraordinary clemency to TD by allowing it to be relieved from default and file an answer. Despite this leniency, TD chose to ignore the clear language of the Order, which required it to file a pleading, and instead filed a motion. As such, the Plaintiff argued, TD had failed to plead or otherwise defend as provided in the South Carolina Rules of Civil Procedure and is therefore in default.²³

The Court heard the Plaintiff’s Motion for Default Judgment on September 21, 2020. Counsel for the Plaintiff reiterated the above-stated facts, procedural history, and argument. The Plaintiff also responded to TD’s claim that the Motion for Default Judgment should be denied because of South Carolina’s policy favoring the disposition of issues on their merits rather than on technicalities. The Plaintiff pointed out that the one case that TD had cited in support of its position,²⁴ was one in which a *pro se* party fully participated in a case but missed a hearing before an administrative law judge because of a misunderstanding about scheduling.²⁵ In *Micronics*, because the *pro se* party missed the hearing, its case was dismissed by the judge.²⁶ When the party found that it had missed its hearing, it immediately apologized but was not granted relief.²⁷ On

²⁰ Rule 7(a), SCRCF

²¹ *Id.*

²² Rule 7(b)(1), SCRCF; *United Machine Works, Inc. v. Williams*, 268 S.C. 600, 235 S.E.2d 711 (1977).

²³ Rule 55(a), SCRCF

²⁴ *Micronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001)

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

appeal, the Court of Appeals found that, in a case like that, it was good policy to favor disposition on the merits.²⁸

The Plaintiff argued that the facts in this case are very different from those in *Mictronics*. Here, the defaulting Defendant is a very sophisticated party which failed to participate in any way in the litigation until four months after it was served. It was the beneficiary of great leniency when it was relieved from its initial default by Judge Mullen. However, despite that leniency, TD chose to ignore the requirement of the Court's order requiring it to file a pleading. This case does not involve a default resulting from a mere technicality, but rather with a sophisticated party which simply refuses to follow the rules of procedure and the Court's orders.

On October 22, 2020, the Court filed a Form 4 Order denying the Plaintiff's Motion for Default Judgment. The one-sentence order stated that the motion was denied because "the Court favors disposition on the merits and the Plaintiff's aren't prejudiced."

LAW AND ANALYSIS

A party may move the court to alter or amend its order when the court has misunderstood or failed to fully consider an argument or issue and the party wishes for the court to reconsider it.²⁹ It is inherently unfair to disallow a party an opportunity to call the court's attention to a possible misapprehension of an earlier argument and also revisit a previously raised argument, even if it means rehashing all or part of those arguments.³⁰

Here, reconsideration and rehearing are necessary. The court has denied the Plaintiff's motion for two reasons. First, because it "favors disposition on the merits" and second, because "the Plaintiff's aren't prejudiced." It is South Carolina's policy to favor disposition of the issues

²⁸ *Id.*

²⁹ *Elam v. S.C. DOT*, 361 S.C. 9, 602 S.E.2d 772 (2004).

³⁰ *Id.*

on their merits rather than on technicalities.³¹ The Court has applied the first portion of this policy here and ignored the second portion. If it were simply our courts' policy to dispose of cases on the merits, there would be no need to have Rule 12(a), SCRCP and Rule 55, SCRCP. If all that mattered were the merits of the case, there would be no need for a Defendant to file an answer and no need for rules about the procedure following a Defendant's failure to participate in litigation.

As such, the policy is to avoid disposition on mere technicalities. Here, TD's default is not the result of a technicality or good faith error. TD is a sophisticated party which has refused to participate in litigation and then failed to comply with the Court's Orders. It is necessary that the court address the fact that this case can be clearly distinguished from *Mictronics* and that the ruling there was not meant to apply to these facts.

The Court's finding that the "Plaintiff's aren't prejudiced" appears to be misplaced. There was no argument from TD that there would be no prejudice to the Plaintiff if the Motion for Default Judgment were denied. Likewise, there was no argument from the Plaintiff that it would be prejudiced if its motion were denied. This language may be in reference to the third "good cause" consideration set out in *Wham v. Shearson Lehman Bros., Inc.*, 298 2.C. 462, 465, 381 S.E.2d 499, 501-02 (S.C. App. 1989), which addresses the factors a court should consider in determining whether it should grant a party relief from default. Here, TD does not seek relief from default. Instead, it claims that it is not in default despite failing to comply with Judge Mullen's Order requiring it to file a pleading. As such, the application of a *Wham* analysis is misplaced.

Finally, the Court's ruling wholly ignores the Plaintiff's arguments made in its Memorandum in Support of its Motion for Default Judgment and during the hearing. It is necessary that the court consider and rule on the Plaintiff's argument that TD is in default because it did not

³¹ *Mictronics*, *supra*.

timely file a pleading despite being bound to “file an answer or other pleading to the Complaint within fifteen (15) days from entry of this Order.”³² As was clearly stated in the Plaintiff’s Memorandum and during the hearing, a motion to dismiss is not a pleading.³³ As such, TD failed to comply with Judge Mullen’s Order and remains in default.

Since TD remains in default, it is necessary that the court proceed to enter default judgment against TD. As stated in its Memorandum in Support of its Motion for Default Judgment and during the hearing, a damages hearing has already been conducted and the court has found that the Plaintiff is entitled to judgment against TD in the amount of \$110,550.18.

CONCLUSION

For the foregoing reasons, it is necessary that the court reconsider its Order dated October 21, 2020 and filed October 22, 2020 and amend that Order such that it finds that TD is in default and the Plaintiff is entitled to judgment against TD in the amount of \$110,550.18.

Submitted November 2, 2020.

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³² See Order Granting TD Bank’s Motion to be Relieved from Entry of Default, p. 3

³³ Rule 7(a), SCRC

STEVENS BUILDERS, LLC,

Plaintiff,

V.

MICHAEL C. GARRAWAY, ALICIA M.
GARRAWAY, and TD Bank, N.A.,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL CASE NO.: 2019-CP-07-1666

**TD BANK, N.A.'S RESPONSE
AND MEMORANDUM OPPOSING
PLAINTIFF'S MOTION FOR
RECONSIDERATION**

TO: Benjamin T. Coppage, Esq.
Attorney for Plaintiff

Defendant TD Bank, N.A. (“**TD Bank**”) respectfully submits this Response and Memorandum Opposing Plaintiff Steven Builders (“**Steven Builders**”)’s Motion for Reconsideration (“**Motion**”) of the Court’s October 22, 2020 Order that dismissed Stevens Builders’s third motion for default judgment. Steven Builders’s Motion merely reargues issues that were fully briefed, considered and resolved by the Court. There are **three reasons** why the Motion should be denied:

First, Steven Builders's Motion fails to meet any of the grounds for reconsideration;

Second, this Court appropriately considered and denied Stevens's Builders's third motion for default judgment because Rule 55 was not met and well established policy favors disposition on the merits; and

Third, Stevens Builders admits that it is not prejudiced by the Court's denial of the motion for default judgment.

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I. INTRODUCTION

Defendant TD Bank, N.A. (“**TD Bank**”) respectfully submits this Opposition to Plaintiff Steven Builders (“**Steven Builders**”)’s Motion for Reconsideration (“**Motion**”) of the Court’s October 22, 2020 Order that dismissed Stevens Builders’s third motion for default judgment. Steven Builders’s Motion merely reargues issues that were fully briefed, considered and resolved by the Court. There are **three reasons** why Motion should be **denied**:

First, Steven Builders’s Motion fails to meet any of the grounds for reconsideration;

Second, this Court appropriately considered and denied Stevens’s Builders’s third motion for default judgment because Rule 55 was not met and well established policy favors disposition on the merits; and

Third, Stevens Builders admits that it is not prejudiced by the Court’s denial of the motion for default judgment.

II. RELEVANT BACKGROUND

The heart of this action is a dispute between a building contractor, Stevens Builders, and two of its customers, Defendants Michael Garraway and Alicia Garraway (collectively, “**Garraways**”). But, Stevens Builders also is searching for a deep pocket by making an additional claim against TD Bank for being the Garraways’ construction lender, and repeatedly asserting defaults to avoid having to prove its meritless claim against TD Bank.

On February 7, 2020, after learning that Stevens Builders filed its first motion for default judgment in December 2019, and that the Clerk had ordered entry of default, TD Bank filed a Motion to Set Aside Entry of Default Pursuant to Rule 55(c). The Court granted that motion and ordered that (1) the default be set aside because good cause was shown, and (2) TD Bank “***file an answer or other pleading to the Complaint within fifteen (15) days from the entry of the Order.***”¹ Court Order, March 9, 2020 (“***March 9 Order***

On March 24, 2020 – within 15 days of the March 9 Order – TD Bank timely filed a Motion to Dismiss. On June 8, 2020, the Court denied TD Bank’s Motion to Dismiss and on June 23, 2020, TD Bank timely filed its answer within 15 days, as required by Rule 12(a).

Before the Court ruled on TD Bank’s Motion to Dismiss, Stevens Builders surprisingly filed a second and third motion for entry of default judgment—even though the Court had already set aside the default and denied without a hearing Stevens Builders’s motion for reconsideration. On April 10, 2020, Stevens Builders filed its second motion for entry of default judgment, but subsequently withdrew it. On June 5, 2020, without justification, Stevens Builders filed its third motion for default judgment and an affidavit that falsely claimed that TD Bank did not file an answer or pleading within fifteen days of

¹ Emphasis added throughout unless indicated to the contrary.

the Court's March 9, 2020 Order. See Exhibit 3. TD Bank responded to the third motion for default judgment on August 17, 2020, and Stevens Builders filed a memorandum supporting its third motion for default judgment on September 17, 2020. See Exhibit 4. Stevens Builders's argued, as it does again in the present Motion, that, by filing a Motion to Dismiss by the deadline in the March 9 Order, TD Bank did not file an "answer or other pleading."

On October 22, 2020, after a hearing on Stevens Builders's third motion for default judgment, the Court entered an order denying Stevens Builders's third motion for default judgment ("**October 22 Order**"). See Exhibit 5. On November 2, 2020, Stevens Builders filed the present Motion, asking the Court to expend additional judicial resources to once again consider Stevens Builders's same failed argument that it presented in its third motion for default judgment.

III. ARGUMENT

A. Steven Builders's Motion Should Be Denied Because It Fails To Meet Any Of The Grounds for Reconsideration.

A motion for reconsideration is appropriate when "***the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue***, and the party wishes for the court to reconsider or rule on it," or when "an issue or argument has been raised, but not ruled on[.]" *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 778 (2004).²

² Rule 59(e) is the procedural vehicle for a motion for reconsideration. See *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004) ("A motion under Rule 59(e) long has been viewed as a 'motion for reconsideration' despite the absence of those words from the rule.").

Thus, where a court has already considered and rejected an argument raised by a party for reconsideration, the motion for reconsideration should be denied. *See, e.g., Saj v. Adams*, No. 2015CP4601222, 2016 WL 9053015, at *1 (S.C.Com.Pl. Aug. 02, 2016) (***denying reconsideration*** of motion for summary judgment order ***because there was “no matter presented*** [in the reconsideration briefing] ***that was not addressed expressly or by clear implication in the prior order.***). Further, motions for reconsideration are granted sparingly. *See, e.g., Bray v. Marathon Corp.*, No. 97-CP-21-292, 1999 WL 35115057 (S.C.Com.Pl. Dec. 02, 1999) (explaining that “[t]he official notes to [South Carolina] Rule 59 state ‘[t]his Rule 59 is substantially the federal rule[,]’” and recognizing that federal courts have held “Rule 59(e) motions should be granted sparingly.”) (citing *Rouse v. Nielson*, 851 F. Supp. 717, 734 (D.S.C. 1994) (citations omitted)).

Here, Stevens Builders’s Motion should be denied because it fails to meet any of the grounds necessary to justify reconsideration of the Court’s October 22 Order. To the contrary, the Motion fails to identify any issue that the Court misunderstood or failed to fully consider. Indeed, and as Stevens Builders admits, its current Motion merely rehashes the same failed theory that it previously briefed and argued, and that the Court previously considered and rejected—*i.e.*, that TD Bank was in default by timely filing a Motion to Dismiss instead of an Answer. *See, e.g., Motion*, at 8 (“***As was clearly stated in the Plaintiff’s Memorandum and during the hearing***, a motion to dismiss is not a pleading. As such, TD failed to comply with Judge Mullen’s Order and

remains in default.”). As the only case Stevens Builders’s cites underscores, a motion to dismiss is a pleading. *United Mach. Works, Inc. v. Williams*, 268 S.C. 600, 604 (1977) (“There are only two pleadings permitted to a complaint and these are a demurrer [*i.e.*, a motion to dismiss] or an answer, as indicated in s 10-641, quoted above.”).³

Stevens Builders never argues any issue the Court has not already heard, several times now, from Stevens Builders. Instead, because Stevens Builders dislikes the Court’s ruling allowing this case to proceed on the merits, Stevens Builders is using its Motion merely to reargue issues that were fully briefed, considered and rejected by this Court, to get another bite at the apple. This is an improper use of the motion for reconsideration procedure, and Stevens Builders’s Motion should be denied.

³ The Court there concluded that a motion for a more definite statement or to strike from complaint is not a pleading, but, as noted above, expressly recognized that **a demurrer** (*i.e.*, motion to dismiss) **is** a pleading. *Id.* at 604-05. There, the Court held that the defendants lost their right to move to make more definite and certain and/or to strike from the complaint after they had demurred, reasoning that “[i]f one desires to ‘straighten out’ a complaint, he must do so before demurring or answering, which goes to the merits of the entire cause of action.” *Id.* at 605-06. This case also relies on South Carolina Code of Laws Section 10-641, which has been repealed. Responses to complaints are now governed by South Carolina Rule of Civil Procedure 12, which similarly allows for answers or motions, including to dismiss, in response to a complaint. See also Notes to SCRCP 7(c) (“[T]his last step abolishes the outmoded demurrer. **The defenses now raised by demurrer are raised by motion under Rule 12.**”); *Gaskins v. S. Farm Bureau Cas. Ins. Co.*, 343 S.C. 666, 670–71, 541 S.E.2d 269, 271 (Ct. App. 2000), *aff’d as modified*, 354 S.C. 416, 581 S.E.2d 169 (2003) (“**The rule governing a motion to dismiss for failure to state a cause of action, Rule 12(b)(6), SCRCP, replaces the Code Pleading rules regarding demurrers.**”).

B. This Court Correctly Denied Stevens Builders’s Motion for Default Judgment Because Rule 55 Was Not Met and Well Settled Policy Favors Disposition on the Merits.

Stevens Builders’s Motion also should also be denied because the Court’s decision was correct. There are two reasons why.

First, the Court was correct in denying Stevens Builders’s third motion for default judgment because entry of default judgment would have been expressly contrary to Rule 55.

As explained in TD Bank’s opposition to Stevens Builders’s third motion for default judgment, a **default judgement may only be entered when a defendant “has failed to plead or otherwise defend.”** SCRCP Rule 55. South Carolina’s black letter law is that a motion to dismiss satisfies Rule 55’s requirement to “otherwise defend”. *See Vista Investments, LLC v. Tompkins & McMaster, LLP*, No. 2013-001385, 2015 WL 5248737, at *1 (S.C. Ct. App. Sept. 9, 2015). **“The words ‘otherwise defend’ refer to the interposition of various challenges to** such matters as service, venue, and **the sufficiency of the prior pleading, any of which might prevent a default if pursued in the absence of a responsive pleading.”** *Stark Truss Co. v. Superior Const. Corp.*, 360 S.C. 503, 509, 602 S.E.2d 99, 102 (Ct. App. 2004) (citing 10A Charles Allen Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2682, at 16–17 (3rd ed.1989)). The Motion fails to cite a single case supporting Stevens Builders’s theory that default judgment should be entered when a party moves to dismiss, instead of answers, in response to a complaint.

Here, once relieved from an initial default, TD Bank timely filed a Motion to Dismiss. Thus, entry of default judgment would have been improper and expressly contrary to Rule 55 because TD Bank, by filing its Motion to Dismiss, “otherwise defend[ed]” against the Complaint. Further, when TD Bank’s Motion to Dismiss was denied, TD Bank timely filed an Answer to the Complaint, and has since filed a Motion for Judgment on the Pleadings and in the alternative for Summary Judgment and responded to Stevens Builders’s motion for default judgment and now this motion for reconsideration. In short, TD Bank has been an active participant and defended the claim against it zealously.

SCRCP 55 is clear—default judgment is only ever appropriate against a party that has “failed to plead **or otherwise defend**”. Thus, this Court’s October 22 Order was correct and Stevens Builders’s Motion should be denied.

Second, even if somehow TD Bank could have been found to have “failed to plead or otherwise defend,” which it cannot, the Court appropriately considered and applied South Carolina’s well settled policy of favoring disposition on the merits in denying Stevens Builders’s third motion for default judgment. *See* Exhibit 5.

South Carolina policy favors disposition of issues on their merits rather than on technicalities. *Columbia Pools, Inc. v. Galvin*, 288 S.C. 59, 61, 339 S.E.2d 524, 525 (Ct. App. 1986) (“**We favor trial of issues on merit over securing judgment by slight technicalities.**”); *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 154, 399 S.E.2d 439, 440 (Ct. App. 1990) (“the Court should not go beyond the necessities of the situation to foreclose a

decision on the merits of a case.”) (citing *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958)).

Applying this policy, courts consistently reject attempts to obtain a default judgment against another based on a purported technicality. See, e.g., *Micronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001) (“**This [ruling opening default judgment] is consistent with South Carolina's policy favoring the disposition of issues on their merits rather than on technicalities[.]**”); *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997) (citing *Ricks v. Weinrauch*, 293 S.C. 372, 360 S.E.2d 535 (Ct.App.1987) (“The discretionary element makes it clear that **the party requesting a judgment by default is not entitled to one as of right, even when the defendant is technically in default.**”). “Rule 55(c) should be liberally construed so as to promote justice and dispose of cases on the merits.” *In re Estate of Weeks*, 329 S.C. at 259 (citing *Dixon v. Besco Eng'g*, 320 S.C. 174, 463 S.E.2d 636 (Ct.App.1995)).⁴

Here, TD Bank timely filed a Motion to Dismiss in accord with the Court’s March 9 Order to file an “answer or other pleading.” But, even if

⁴ The Federal Rules of Civil Procedure, which align to the South Carolina Rules of Civil Procedure, also favor deciding issues on the merits instead of entering defaults. See *Moore v. Google, Inc.*, No. CIV.A. 2:13-3034-RMG, 2014 WL 4955264, at *3 (D.S.C. Sept. 30, 2014), *aff'd*, 599 F. App'x 108 (4th Cir. 2015) (“**[D]efault judgments are devices available to the Court to manage cases where defendants refuse to participate in judicial proceedings; they are not prizes available for Plaintiffs to claim if they have the good fortune of suing a party that misses a court deadline.** Here, far from being unresponsive, Defendant has argued the merits of the case[.]”).

Stevens Builders's theory were correct that the March 9 Order required TD Bank to Answer, which it is not, default judgment is wholly inappropriate because TD Bank has meritorious defenses and has not refused to participate in judicial proceedings. To the contrary, TD Bank has vigorously defended against Stevens Builders's claim and repetitive motions, filing a Motion to Dismiss, Answer, Motion for Judgment on the Pleadings and in the alternative for Summary Judgment, and responding to Stevens Builders's motion for default judgment and now motion for reconsideration. As this Court correctly concluded, default judgment is inappropriate here because the Court, in accord with well settled South Carolina policy, "favors disposition on the merits[,] and TD Bank has and will continue to argue the merits of the case.

C. The Motion Admits That Stevens Builders Is Not Prejudiced By The Denial of Default Judgment.

In a final attempt to force reconsideration, the Motion raises a red herring that the form October 22 Order states "Plaintiff[s] aren't prejudiced." The Motion argues that the Court erred in considering whether Stevens Builders would be prejudiced by denial of the motion for default judgment, because prejudice is not a factor considered in determining whether a party is in default, but rather, only in determining whether to grant a party relief from default. *See* Motion, at 7.⁵

⁵ It is correct that, in assessing a motion to be relieved from default, a court may consider the degree of prejudice to the nonmoving party if the motion is granted. *Regions Bank v. Owens*, 402 S.C. 642, 648 741 S.E.2d 51, 54 (S.C. App. 2013).

Regardless, the Motion admits that Stevens Builders is **not** prejudiced by the Court's denial of Stevens Builders's third motion for default judgment. Motion, at 7 ("Likewise, there was no argument from the Plaintiff that it would be prejudiced if its [third] motion [for default judgment] were denied.").

Even if the Court was not required to consider prejudice to Stevens Builders at this stage, the Court's denial of Stevens Builders's third motion for default judgment was correct for the reasons stated above—that Stevens Builders attempts to reargue its failed theory that a Motion to Dismiss is not a pleading, and that default judgment, when TD Bank filed a Motion to Dismiss and zealously defended, would have been expressly contrary to Rule 55 and well settled South Carolina policy favoring disposition on the merits.

IV. CONCLUSION

TD Bank respectfully submits that Steven Builders's Motion for Reconsideration should be denied, and the Court's October 22, 2020 Opinion and Order affirmed, for the reasons in TD Bank's Response And Memorandum Opposing Plaintiff's Third Motion For Default Judgment and the following three reasons:

First, Steven Builders's Motion fails to meet any of the grounds for reconsideration;

Second, this Court appropriately considered and denied Stevens's Builders's third motion for default judgment because Rule 55 was not met and well established policy favors disposition on the merits; and

Third, Stevens Builders admits that it is not prejudiced by the Court's denial of the motion for default judgment.

Respectfully Submitted,

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Dated: January 20, 2021
Columbia, South Carolina

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EXHIBIT 1

State of South Carolina

County of Beaufort

Stevens Builders, LLC,

Plaintiff,

vs.

Michael C. Garraway, Alicia M. Garraway,
and TD Bank, N.A.,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Case No.: 2019-CP-07-1666

**ORDER GRANTING TD BANK'S MOTION TO
BE RELIEVED FROM ENTRY OF DEFAULT**

THIS MATTER is before the Court for hearing on Defendant, TD Bank, N.A.'s Motion to be Relieved from Entry of Default ("***Motion***"). A hearing on the Motion was held on February 26, 2020. Present at the hearing were Benjamin Coppage counsel for the Plaintiff, James Wegman, counsel for Michael C. Garraway and Alicia M. Garraway, and J. Martin Page, counsel for TD Bank, N.A. ("***TD Bank***"). For the reasons set forth below, the Court grants TD Bank's Motion.

FINDINGS OF FACT

1. On or around, July 18, 2019, Plaintiff, Stevens Builders, LLC, ("***Plaintiff***") filed a *Lis Pendens*, Summons and Complaint seeking, among other things, the foreclosure of a Mechanics' Lien on real property known as Lot 40 as shown on that certain plat entitled "Bermuda Bluff" St. Helena Township, Beaufort County South Carolina recorded in Plat Book 35 at Pages 164 in the Records of Charleston County (Complaint ¶ 6).
2. Thereafter, TD Bank, was served with the Complaint on or around, September 30, 2019.
3. Thereafter, Plaintiff filed a Motion for Default Judgment ("***Motion for Default Judgment***") on December 2, 2019.

4. A damages hearing on the Motion for Default Judgment was held on January 31, 2020.
5. TD Bank filed the present Motion on February 7, 2020.

DISCUSSION AND CONCLUSIONS OF LAW

TD Bank is entitled to be relieved from default. Entry of default is a ministerial act, which a clerk must perform once default is made to appear by the affidavit of the moving party. Start Truss Co., Inc. v. Superior Const. Corp., 360 S.C. 503, 602 S.E.2d 99 (S.C. App. 2004). Once an entry of default has been made, the standard for granting relief from such entry of default is mere “good cause.” Regions Bank v. Owens, 402 S.C. 642, 648 741 S.E.2d 51, 54 (S.C. App. 2013). The “good cause” standard for a party seeking relief must provide an explanation for the default and reasons why vacation of the default entry serves the interests of justice. Id. If there is a satisfactory explanation for the default, the court must also consider: (1) the timing of the motion for relief; (2) the existence of a meritorious defense; and (3) the degree of prejudice to the nonmoving party if relief is granted. Id. A motion under Rule 55(c) is addressed to the sound discretion of the court. Id., (quoting Wham v. Shearson Lehman Bros., Inc. 298 2.C. 462, 465, 381 S.E.2d 499, 501-02 (S.C. App. 1989)).

TD Bank has shown that “good cause” exists here as to why an answer to the Complaint was not filed.

TD Bank further meets the requirements of the remaining factors: (1) even though no default has been entered, upon being referred the action, TD Bank’s counsel immediately filed this Motion, (2) a meritorious defense exists and (3) there would be no prejudice to the Plaintiff in allowing TD Bank to answer or otherwise response to the Complaint.

IT IS, THEREFORE, ORDERED THAT:

1. TD Bank's Motion to be Relieved from Default is **granted**; and
2. TD Bank shall file an answer or other pleading to the Complaint within **fifteen (15) days** from entry of this Order.

AND IT IS SO ORDERED.

[ELECTRONIC SIGNATURE TO FOLLOW]



Beaufort Common Pleas

Case Caption: Stevens Builders Llc VS Michael C Garraway , defendant, et al

Case Number: 2019CP0701666

Type: Order/Other

So Ordered

s/Carmen T Mullen 2142

Electronically signed on 2020-03-06 12:00:24 page 4 of 4

EXHIBIT 2

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Beaufort
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP0701666

Stevens Builders Llc
PLAINTIFF(S)

Michael C Garraway et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Plaintiff's Motion to Reconsider, Alter, and Amend Order is hereby respectfully denied without a hearing.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 03/18/2020 .

James John Wegmann for Michael C Garraway, Alicia M Garraway
Benjamin Terrell Coppage for Stevens Builders Llc
James Martin Page for Td Bank N A

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Beaufort Common Pleas

Case Caption: Stevens Builders Llc VS Michael C Garraway , defendant, et al

Case Number: 2019CP0701666

Type: Order/Electronic Form 4

So Ordered

s/Carmen T Mullen 2142

Electronically signed on 2020-03-18 15:29:25 page 3 of 3

EXHIBIT 3

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

STEVENS BUILDERS, LLC,

Plaintiff,

vs.

MICHAEL C. GARRAWAY, ALICIA M.
GARRAWAY, and TD Bank, N.A.,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL CASE NO.: 2019-CP-07-1666

**NOTICE OF MOTION AND MOTION
FOR DEFAULT JUDGMENT**

PLEASE TAKE NOTICE that the Plaintiff, Stevens Builders, LLC, moves the Court, pursuant to Rule 55(b)(1), SCRCP for an Order granting default judgment for damages and prejudgment interest in the amount of \$101,655.34 against Defendant TD Bank, N.A. and in favor of the Plaintiff. Since the court has already conducted a damages hearing in this matter and determined the amount of damages and prejudgment interest due the Plaintiff, as shown on Exhibit A, hereto, judgment pursuant to Rule 55(b)(1), SCRCP is appropriate.

Submitted June 3, 2020.

Coppage Law Firm, LLC

By: s/Benjamin T. Coppage
Benjamin T. Coppage
Attorney for the Plaintiff
Post Office Box 2473
Beaufort, South Carolina 29901
Phone: 843-379-9601
Email: ben@coppagelawfirm.com

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
CIVIL CASE NO.: 2019-CP-07-1666

STEVENS BUILDERS, LLC,
Plaintiff,

AFFIDAVIT OF DEFAULT

vs.

MICHAEL C. GARRAWAY, ALICIA M.
GARRAWAY, and TD Bank, N.A.,
Defendants.

Personally appeared Benjamin T. Coppage, attorney for the Plaintiff, in the above-captioned action, who states that Defendant TD Bank, N.A. (hereinafter “TD”) was served with a copy of the Summons and Complaint in this action on September 30, 2019. TD failed to answer, raise defenses, assert counterclaims, or otherwise respond to the Complaint. The Plaintiff filed an Affidavit of Default on December 2, 2019 and the Clerk of Court entered the Default on December 4, 2019. On January 21, 2020, TD was given notice by first class mail of a damages hearing on the Plaintiff’s Motion for Default Judgment to be held on January 31, 2020. The damages hearing was held as scheduled and TD did not attend or otherwise participate. The court announced that it would grant judgment in favor of the Plaintiff and against TD in the amount of \$110,550.18.

TD filed a Notice of Motion and Motion to “Set Aside Entry of Default Pursuant to Rule 55(c) SCRCF” on February 7, 2020. The court heard that motion on February 26, 2020 and granted the motion in an Order Granting TD Bank’s Motion to be Relieved from Entry of Default (hereinafter “Order”) entered on March 9, 2020. The Order required TD to file an answer or other pleading to the Complaint within fifteen (15) days from the entry of the Order.

More than fifteen (15) days have passed from the date of the entry of the Order and TD has failed to file an answer or other pleading as required by the Order. As such, Defendant is now in default.

Sworn to before me this
2nd day of June, 2020



Devon Smith

Notary Public of South Carolina

My Commission expires: March 9, 2027



Benjamin T. Coppage

Attorney for the Plaintiff

Post Office Box 2473

Beaufort, South Carolina 29901

Telephone: 843-379-9601

E-Mail: ben@coppagelawfirm.com

Ex. A

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	
	)	
Stevens Builders, LLC,	)	CASE NO. 2019-CP-07-01666
	)	
PLAINTIFF,	)	TRANSCRIPT OF RECORD
	)	
VS.	)	ORIGINAL
	)	
Michael C. Garraway,	)	
Alicia M. Garraway, and	)	
TD Bank, N.A.,	)	
	)	
DEFENDANTS.	)	
	)	

January 31, 2020

Beaufort, South Carolina

B E F O R E:

The Honorable Carmen T. Mullen

A P P E A R A N C E S:

Benjamin T. Coppage, Esquire
For the Plaintiff

James John Wegmann, Esquire
For the Defense

Certified Transcript Provided For: Benjamin T. Coppage

I N D E X

(PW) - DENOTES PLAINTIFF'S WITNESS

(DW) - DENOTES DEFENSE WITNESS

Exhibit List	--	03
Hearing	--	04

WITNESSES(SW) Mr. Stevens:

Direct Examination by Mr. Coppage	--	11

<u>CERTIFICATION OF TRANSCRIPT</u>	--	16

If you need an additional copy of this transcript or a sealed transcript or if opposing counsel requires a copy of the transcript, you should contact the court reporter.

Certification will satisfy Rule 80, Stenographic Report of Transcript as Evidence.

1

<u>P L A I N T I F F E X H I B I T S</u>			
<u>NO.</u>	<u>DESCRIPTION</u>	<u>MARKED</u>	<u>ADMIT</u>
1	Expenses - Labor and Materials	13	13

1 THE COURT: Mr. Coppage, you represent Stevens Builders;
2 is that correct?

3 MR. COPPAGE: I do, Your Honor.

4 THE COURT: Okay.

5 Who do you represent on this one?

6 MR. WEGMANN: Ma'am, I represent the Garraway's.

7 THE COURT: Okay.

8 MR. WEGMANN: Michael and Alicia.

9 THE COURT: Okay. All right. Whenever you are ready.

10 MR. COPPAGE: Thank you, Your Honor. As I just said, I
11 represent Stevens Builders in this case. Mr. Stevens of
12 Stevens Builders and his company were hired to work on a
13 project, a house for Michael and Alicia Garraway, back in
14 2017. Work began on that house. At the same time entered
15 into a contract with TD Builders and the Garraway's. Pursuant
16 to that contract TD agreed to make payments to Stevens
17 Builders as the -- as work was done and labor provided on that
18 contract.

19 Things went along fairly well for a while, then at the
20 end of 2018, beginning of 2019, Stevens Builders had done a
21 considerable amount of work, demanded payment that was due on
22 the contract, and TD refused to make that payment.

23 Negotiations eventually failed, and that is why we are
24 here today. Some ---

25 THE COURT: So who was in default?

1 MR. COPPAGE: TD.

2 THE COURT: TD Bank is in default?

3 MR. COPPAGE: It is.

4 MR. WEGMANN: I -- yes, they didn't answer. They
5 didn't -- we have not heard from them. I don't know what they
6 are thinking.

7 MR. COPPAGE: I think ---

8 THE COURT: I mean was ---

9 MR. COPPAGE: --- it is unusual too.

10 THE COURT: Pardon?

11 MR. COPPAGE: I think it is unusual too.

12 THE COURT: I mean were they properly -- I just want to
13 make sure they were properly served. Which I am sure they
14 were. And it just is very shocking.

15 MR. WEGMANN: I don't know if they are -- and again I am
16 guessing. I have never heard one word from them.

17 THE COURT: Okay.

18 MR. WEGMANN: I know that the construction loan agreement
19 that was signed in that particular mortgage was taken out and
20 no longer exists in the county records. So I don't know if
21 they are thinking, well, we don't -- you know, that mortgage
22 doesn't exist, we don't have ---

23 THE COURT: So we don't have any ---

24 MR. WEGMANN: --- we don't have anything to worry about.
25 I don't know if their thinking is somehow if something comes

1 up that they get a judgment against TD Bank that somehow they
2 are going to press that against my people as a construction
3 draw. I just don't know.

4 THE COURT: Okay.

5 MR. WEGMANN: It is very odd. I have been in a number of
6 these cases over the years. Bank usually always acts --
7 answers, says, hey, we've got a first mortgage, we don't know
8 what you are talking about, ---

9 THE COURT: Right.

10 MR. WEGMANN: --- our mortgage takes priority.

11 THE COURT: Yeah.

12 MR. WEGMANN: You know, and they ---

13 MR. COPPAGE: That is what we expected.

14 MR. WEGMANN: We have a mortgage out there.

15 THE COURT: Okay.

16 MR. WEGMANN: But it is not the same mortgage that was
17 the construction loan agreement that they ---

18 THE COURT: Okay.

19 MR. WEGMANN: --- that they signed. That mortgage was
20 taken out three days I think prior to the mechanics lien being
21 filed and probably three months prior to ---

22 THE COURT: So a mechanics lien has been filed?

23 MR. WEGMANN: Mechanics lien was filed.

24 THE COURT: Okay.

25 MR. WEGMANN: We've got ---

1 THE COURT: Okay.

2 MR. WEGMANN: And it is not before the court.

3 THE COURT: I understand.

4 MR. WEGMANN: We have got a partial summary judgment
5 sitting out there waiting to be heard that the mechanics lien
6 is not -- wasn't filed correctly. In other words filed it on
7 the 90th day.

8 THE COURT: Okay.

9 MR. WEGMANN: Never served.

10 THE COURT: Okay.

11 MR. WEGMANN: And it requires filing and service. But
12 that really only as it relates to my client. Not necessarily
13 the bank. So it is a little confusing.

14 I have never seen a bank not at least assert that they
15 have got a mortgage, they are in first position, and, you
16 know, go away.

17 THE COURT: Right. So have your clients gone to the bank
18 to speak with them? Because I am assuming -- I mean the bank
19 has a fiduciary duty to you. But ---

20 MR. WEGMANN: The matter between the plaintiff and my
21 clients relates around draws.

22 THE COURT: Right.

23 MR. WEGMANN: You know, my client's position is pretty
24 simply in their counterclaim that he was ahead of the draw
25 schedule.

1 THE COURT: Okay.

2 MR. WEGMANN: There's lots of correspondence going back
3 between the bank, my client, and the plaintiff that he is
4 ahead of draw schedule. They are not giving out anymore
5 draws.

6 THE COURT: Okay.

7 MR. WEGMANN: He has got to do more work and all that.
8 That is the issue ---

9 THE COURT: Okay.

10 MR. WEGMANN: --- in the case.

11 THE COURT: Right.

12 MR. WEGMANN: It is just whether or not -- and I don't
13 know the answer to this. I know of no case where a lender, a
14 construction loan lender, has been held to be liable because
15 they didn't make a draw when a builder requested it.

16 THE COURT: Yeah.

17 MR. WEGMANN: And, you know, if that is the case then
18 banks aren't going to make construction loans.

19 THE COURT: Right. Yeah, the concern is that they are
20 going to come after your people.

21 MR. WEGMANN: Well, and that is my concern. And why I am
22 here today is they are somehow going to take -- if they are in
23 default and the court orders -- I would like nothing more than
24 a court order that they pay \$93,000 there ---

25 THE COURT: Yeah.

1 MR. WEGMANN: --- and dismiss the complaint; that builder
2 now has \$93,000 I can go after.

3 THE COURT: Right.

4 MR. WEGMANN: But my concern is are they going to somehow
5 consider that a draw, tack it onto something that is owed by
6 my client and move forward. I don't know how to get around
7 that. If I am a bank that is what I am going to try and do.
8 And now I am in litigation against the bank that, no, no, that
9 is your judgment, not mine, ---

10 THE COURT: Right.

11 MR. WEGMANN: --- and you can't tack that into this ---

12 THE COURT: Right.

13 MR. WEGMANN: --- construction loan that is out there
14 now.

15 THE COURT: Right.

16 MR. WEGMANN: So that is my dilemma ---

17 THE COURT: Okay.

18 MR. WEGMANN: --- as I stand here, you know, today. I
19 would like nothing more than the court order that ---

20 THE COURT: Right.

21 MR. WEGMANN: --- if it doesn't attach to me somehow ---

22 THE COURT: Right.

23 MR. WEGMANN: --- or my clients, more appropriately.

24 THE COURT: Well, they are -- the bank is going to be
25 trying to, obviously. Okay.

1 Unfortunately the bank is in default, hasn't answered.
2 And -- okay. All right.

3 Mr. Coppage, let's go ahead.

4 MR. COPPAGE: Yes, ma'am. So TD was served on September
5 30th. Failed to answer or otherwise reply. Entry of default
6 was entered on December 4th. The notice in motion, default
7 judgment which is before the court, was filed on December 4th.
8 TD was given notice of this hearing on January 21st at their
9 corporate headquarters. And ---

10 THE COURT: Where is their corporate headquarters?

11 MR. COPPAGE: In New Jersey.

12 THE COURT: Okay.

13 MR. COPPAGE: The pertinent paragraphs of the complaint
14 to which TD has admitted are that on February 6th, 2017, TD
15 entered a construction loan agreement with Stevens which
16 provided for payment to Stevens for labor and material
17 rendered on the project, that the construction loan agreement
18 was a binding contract, that Stevens Builders has provided
19 labor and material with a value of \$93,575.27 for which it has
20 not been paid, that Stevens has demanded payment from TD but
21 TD has failed to disperse the payment, and that TD breached
22 the construction loan agreement by failing to pay the
23 plaintiff for labor and materials rendered as required by the
24 construction loan agreement.

25 So basically that Stevens Builders provide the labor and

1 agreement -- or the labor and materials as it was supposed to
2 do and TD failed to make the payments as it was supposed to
3 do.

4 And I have Mr. Stevens of Stevens Builders here to
5 testify to his damages.

6 THE COURT: All right. Mr. Stevens, come on up right
7 here, sir.

8 We are going to swear you in.

9 (WHEREUPON, the witness was duly sworn.)

10 (WHEREUPON, the microphone was adjusted for the witness.)

11 THE COURT: Whenever you are ready, Mr. Coppage.

12 MR. COPPAGE: Thank you, Your Honor.

13 **DIRECT EXAMINATION BY MR. COPPAGE OF MR. STEVENS:**

14 Q. Mr. Stevens, were the allegations from the complaint that
15 I just relayed to the court accurate?

16 A. Yes, sir.

17 Q. That you entered into a contract with TD Bank for the
18 payment of funds for materials and labor provided on the
19 project for the Garraway's?

20 A. Yes, sir.

21 Q. All right. And have you provided labor and materials on
22 that project for which you have not been paid?

23 A. Yes, sir.

24 Q. Can you just break down the labor and materials that you
25 have provided and the amount that is currently owed on those

1 items?

2 A. Okay. I have a list with me here breaking -- broken down
3 from electrical, HVAC, plumbing, gas water lines, framing,
4 foundation, and roofing. And I have an itemized list for
5 each.

6 Q. Do you just want to tell us what is owed for each of
7 those items?

8 A. Okay. Electrical is \$22,640. The combined HVAC,
9 plumbing, is 14,935.44. And the framing, structural, I-beams,
10 39,329.98. For a total of 101,655.34.

11 Q. And I think you may have overlooked a couple of items.
12 So you said electrical you had \$22,640.40?

13 A. That's correct.

14 Q. And for HVAC what was -- what was the amount there?

15 A. HVAC was \$10,000.

16 Q. Okay. And how about the plumbing?

17 A. Plumbing is \$5,507.50. And then for my portion it was
18 \$9,427.94. For a total of \$14,935.43.

19 Q. Okay. So we have got \$22,640 for electrical, total,
20 correct?

21 A. Correct.

22 Q. Ten thousand total for heating and air?

23 A. Correct.

24 Q. \$14,935.44 for plumbing?

25 A. Correct.

1 Q. All right. How about gas?

2 A. The gas lines were \$2,310. Water lines were -- water
3 lines were \$492. And the framing I-beams were \$1,075. For
4 framing it was \$38,254.98. In addition to that ---

5 Q. There's -- there's basically you had some -- a sub do
6 some framing with the I-beams and then your company did the
7 rest of the framing so that is the reason for those two
8 different numbers?

9 A. Exactly.

10 Q. All right.

11 A. The additional foundation and concrete \$1,900. And the
12 roofing was \$10,047.52.

13 Q. And what was that total?

14 A. \$101,655.34.

15 Q. Go ahead and make his an exhibit.

16 (WHEREUPON, Plaintiff Exhibit Number 1, expenses for labor and
17 materials, was marked for identification.)

18 MR. WEGMANN: I am not sure I can object.

19 THE COURT: All right. Not really. I was going to
20 say ---

21 MR. COPPAGE: I offer Mr. Stevens notes as Plaintiff's 1.

22 THE COURT: Okay.

23 (WHEREUPON, Plaintiff Exhibit Number 1 was admitted into
24 evidence.)

25 MR. COPPAGE: That's all the questions I have for this

1 witness at this time.

2 THE COURT: Okay. So just so I understand, when it says
3 contractor if it has a different name other than Stevens it is
4 a subcontractor; is that correct?

5 MR. STEVENS: That is correct.

6 THE COURT: Okay. All right. And what was the
7 renovation you were doing to their home?

8 MR. STEVENS: It was new construction.

9 THE COURT: Oh, it was new construction?

10 MR. STEVENS: Yes.

11 THE COURT: I'm sorry. Okay.

12 MR. STEVENS: That's okay.

13 THE COURT: I didn't realize that.

14 Okay. All right. Anything else, Mr. Coppage?

15 MR. COPPAGE: No, ma'am.

16 THE COURT: All right. So you are asking for a judgment
17 in the amount of 101,655.34?

18 MR. COPPAGE: Plus ---

19 THE COURT: Plus?

20 MR. COPPAGE: --- prejudgment interest ---

21 THE COURT: Of course.

22 MR. COPPAGE: --- which was pled in the complaint.

23 THE COURT: Okay.

24 MR. COPPAGE: With that prejudgment interest at 8.75
25 percent per annum the total would be \$110,550.18.

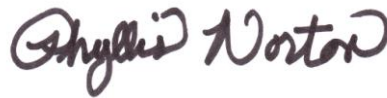
1 THE COURT: Okay. Do you want to give me a proposed
2 order?
3 MR. COPPAGE: Certainly.
4 THE COURT: Okay.
5 MR. COPPAGE: I'll ---
6 THE COURT: Can you e-file it?
7 MR. COPPAGE: Yes.
8 THE COURT: Okay. Just e-file it. And if you upload it
9 as soon as you upload it I will sign it. And I think it is
10 going to probably spur a flurry of activity is my guess.
11 Probably yours too. So we will see how it goes. Okay.
12 MR. COPPAGE: Yes, ma'am.
13 THE COURT: All right.
14 (WHEREUPON, the hearing concluded.)

(NOTE: Please contact the court reporter for additional copies or certified transcripts.)

CERTIFICATE

I, the undersigned Phyllis Norton, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all proceedings had and evidence introduced in the captioned case, relative to appeal, in the court for South Carolina, on January 31, 2020.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.



PHYLLIS NORTON, CVR

Date: April 23, 2020

*Certified Transcript Provided For: Benjamin T. Coppage
Certification Reference #2020-0423 Original*

Certificate of Electronic Notification

Recipients

James Wegmann - Notification transmitted on 06-05-2020 09:16:12 AM.

James Page - Notification transmitted on 06-05-2020 09:16:12 AM.

Benjamin Coppage - Notification transmitted on 06-05-2020 09:16:12 AM.

***** IMPORTANT NOTICE - READ THIS INFORMATION *****
NOTICE OF ELECTRONIC FILING [NEF]

-

A filing has been submitted to the court RE: 2019CP0701666

Official File Stamp: 06-05-2020 09:15:47 AM

Court: CIRCUIT COURT

Common Pleas

Beaufort

Case Caption: Stevens Builders Llc VS Michael C Garraway ,
defendant, et al

Document(s) Submitted: Affidavit/Default

Proposed Order/Entry of Default

Motion/Default Judgment

- Exhibit/Filing of Exhibits

Filed by or on behalf of: Benjamin Terrell Coppage

This notice was automatically generated by the Court's auto-notification system.

-

The following people were served electronically:

James John Wegmann for Michael C Garraway,
Alicia M Garraway

Benjamin Terrell Coppage for Stevens Builders
Llc

James Martin Page for Td Bank N A

The following people have not been served electronically by the Court. Therefore, they must
be served by traditional means:

EXHIBIT 4

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
CIVIL CASE NO.: 2019-CP-07-1666

STEVENS BUILDERS, LLC,

Plaintiff,

vs.

MICHAEL C. GARRAWAY, ALICIA M.
GARRAWAY, and TD Bank, N.A.,

Defendants.

**MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR
DEFAULT JUDGMENT**

COMES NOW the Plaintiff, Stevens Builders, LLC, by and through its undersigned attorney of record and files this Memorandum in Support of its Motion for Default Judgment in this matter, showing the Court as follows:

FACTS AND PROCEDURAL HISTORY

The Plaintiff filed a Summons and Complaint on July 18, 2019 alleging that Defendant TD Bank, N.A., (hereinafter "TD") breached its contract by failing to pay the Plaintiff for services rendered. TD was served by personal service on September 30, 2019.¹ TD failed to answer, raise defenses, assert counterclaims, or otherwise respond to the Complaint. The Plaintiff filed an Affidavit of Default on December 2, 2019 and the Clerk of Court entered the Default on December 4, 2019.² On January 21, 2020, TD was given notice of the damages hearing on the Motion for Default Judgment by first class mail at its last known address.³

¹ See Affidavit of Service filed October 14, 2019

² See Affidavit of Default filed December 2, 2019 and Entry of Default filed December 4, 2019

³ See Notice of Hearing filed January 21, 2020

The damages hearing was held as scheduled and TD did not attend or otherwise participate.⁴ The Plaintiff offered evidence of its damages, totaling \$110,550.18.⁵ The court instructed counsel for the Plaintiff to give the court a proposed order which she would sign “as soon as you upload it.”⁶

On February 7, 2020, before the proposed order was uploaded and the court’s judgment entered, TD filed a Motion to Set Aside Entry of Default Pursuant to Rule 55(c) SCRCP. That motion was heard on February 26, 2020. On February 28, 2020, the court sent an email requesting that counsel for TD submit a proposed order. Counsel for TD submitted a proposed order which was used as the Court’s Order Granting TD Bank’s Motion to be Relieved from Entry of Default, filed on March 9, 2020. That Order relieved TD from the Entry of Default on December 4, 2019 and required TD to “file an answer or other pleading to the Complaint within **fifteen (15) days** from entry of this Order.”⁷

On March 24, 2020, fifteen days after the filing of the Order Granting TD Bank’s Motion to be Relieved from Entry of Default, TD filed a Motion to Dismiss the claims against it. However, it did not file an answer or other pleading. On April 10, 2020, TD had still not filed an answer or other pleading to the Complaint, so the Plaintiff filed an Affidavit of Default and Motion for Default Judgment. However, that default was forgiven by Supreme Court Order 2020-04-03-01 (regarding operation of the trial courts during the coronavirus emergency) and, as such, the Affidavit of Default and Motion for Default were withdrawn by the Plaintiff.

Supreme Court Order 2020-04-14-01, issued on April 14, 2020, stated that, “[i]n the event a party to a case or other matter pending before a trial court was required to take certain action on

⁴ Ex. A., Transcript of January 31, 2020 Hearing

⁵ *Id.* at pp. 11 – 15.

⁶ *Id.* at p. 15, ll. 8-9

⁷ See Order Granting TD Bank’s Motion to be Relieved from Entry of Default, p. 3

or after March 13, 2020, but failed to do so, that procedural default is hereby forgiven, and the required action shall be taken within thirty (30) days of the date of this order.” TD did not take the required action within thirty days of April 14, 2020, again failing to file an answer or other pleading. The Plaintiff filed an Affidavit of Default and a Motion for Default Judgment reflecting this failure on June 5, 2020, which is now before the court.

TD finally filed its Answer on June 23, 2020 – nearly nine months after the date on which it was served and nearly three months after the court ordered it to file an answer or other pleading.

LAW AND ANALYSIS

I. TD’s Default

When the South Carolina Rules of Civil Procedure require an act to be done within a specified time and a party fails to do the required act within that time, the party may move the court for an order permitting the act to be done despite the expiration of the specified period.⁸ Upon a showing of good cause, the court may grant such motion and permit the act to be done.⁹ This is the standard applied by courts in practice and is found in Rule 55(c) for relief from entry of default.¹⁰

TD Bank’s Motion to be Relieved from Entry of Default was such a motion as contemplated by Rule 6.¹¹ It sought enlargement of the time to answer and claimed that there was good cause for such relief.¹² Despite that motion’s being based wholly on facts not appearing in the record, the court granted the motion and allowed TD an additional fifteen days to “file an answer or other pleading to the Complaint.”¹³

⁸ Rule 6(b), SCRCF

⁹ *Id.*

¹⁰ Rule 6, SCRCF, Note to 1986 Amendment

¹¹ See TD Bank’s Motion to be Relieved from Entry of Default

¹² *Id.*

¹³ See Order Granting TD Bank’s Motion to be Relieved from Entry of Default, p. 3

Rule 12(a) allows a defendant to answer *or* file a motion permitted by Rule 12 within thirty days of service.¹⁴ In its Order Granting TD Bank’s Motion to be Relieved from Entry of Default, the court gave TD additional time to file an answer or otherwise plead, but did not allow for the same extension for the filing of a Rule 12 motion.¹⁵ The court avoided using the “plead or otherwise defend” language of Rule 55(a), instead choosing to specifically limit the required response to a pleading.¹⁶

Rule 7, SCRP provides a very clear dichotomy between pleadings and motions. Pleadings include complaints, answers, replies to counterclaims, answers to cross-claims, third-party complaints, third-party answers, and court-ordered replies to answers.¹⁷ Outside of those, “[n]o other pleadings shall be allowed.”¹⁸ On the other hand, a motion is not a pleading but simply is an application made for the purpose of obtaining an order from the court.¹⁹

For a Rule 12 motion filed by TD to have altered the time for the answer, it would have had to have been filed by October 30, 2019 – thirty days after TD was served. The court showed extraordinary clemency to TD by allowing it to be relieved from default and file an answer. Despite this leniency, TD chose to ignore the clear language of the Order, which required it to file a pleading, and instead filed a motion.

As such, TD has failed to plead or otherwise defend as provided in the South Carolina Rules of Civil Procedure and is therefore in default.²⁰

¹⁴ Rule 12(a), SCRPC

¹⁵ See Order Granting TD Bank’s Motion to be Relieved from Entry of Default, p. 3

¹⁶ *Id.*

¹⁷ Rule 7(a), SCRPC

¹⁸ *Id.*

¹⁹ Rule 7(b)(1), SCRPC; *United Machine Works, Inc. v. Williams*, 268 S.C. 600, 235 S.E.2d 711 (1977).

²⁰ Rule 55(a), SCRPC

II. Default Judgment

By virtue of TD's default, all of the allegations of the Complaint are deemed admitted.²¹ Pertinently, TD has admitted that (1) the Plaintiff and TD entered into a Construction Loan Agreement (hereinafter "Agreement") which provided for the payment to the Plaintiff for labor and materials rendered for a construction project,²² the Agreement was a binding contract,²³ TD failed to remunerate the Plaintiff as required by the Agreement for labor and materials provided by the Plaintiff,²⁴ the Plaintiff demanded payment from TD as required by the Agreement but TD refused to make the same,²⁵ and the Plaintiff suffered damages as a direct and proximate result of TD's breach of the Agreement.²⁶

Rule 55(b)(2) authorizes the court to conduct a hearing prior to entering default judgment if ". . . it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter . . .".²⁷ Here, there is no such necessity. The court conducted such a hearing on January 31, 2020 and found that the total amount of damages was \$110,550.18: \$101,655.34 in actual damages plus prejudgment interest in the amount of \$8,894.84.²⁸ TD was given notice of this hearing and chose not to participate.²⁹ As such, the court may rely on the sworn testimony presented by the Plaintiff to determine the amount of damages without the necessity of a hearing.

²¹ Rule 8(d), SCRC

²² See Complaint, ¶ 10

²³ *Id.* at ¶ 17

²⁴ *Id.* at ¶ 18

²⁵ *Id.* at ¶ 11

²⁶ *Id.* at ¶ 19

²⁷ Rule 55(b)(2)

²⁸ Ex. A, p. 15

²⁹ See Notice of Hearing filed January 21, 2020

CONCLUSION

Since TD failed to answer or otherwise respond as required by Rule 12(a), SCRCP it cannot avail itself of that rule's protections. It's only opportunity for response was as stated in the Order Granting TD Bank's Motion to be Relieved from Entry of Default, which required it to file a pleading in response to the Complaint within fifteen days of that Order. It filed no such pleading. As such, it is likewise unable to avail itself of the relief afforded it by the court's Order. As such, TD remains in default and the Plaintiff is entitled to those damages which have already been shown to the court.

Respectfully submitted,

Coppage Law Firm, LLC

By: s/Benjamin T. Coppage
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Attorney for Robert J. O'Neill and
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September 17, 2020
Beaufort, South Carolina.

EXHIBIT 5

STATE OF SOUTH CAROLINA
COUNTY OF Beaufort
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP0701666

Stevens Builders Llc
PLAINTIFF(S)

Michael C Garraway et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

After careful consideration, the Plaintiff's Motion for Default Judgment, heard on September 22, 2020, is respectfully denied, as the Court favors disposition on the merits and the Plaintiff's aren't prejudiced.

Furthermore, the Defendant-TD Bank NA's Motion for Judgment on the Pleadings, or in the Alternative, Motion for Summary Judgment, heard September 22, 2020, is respectfully denied, as there are issues of material fact.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 10/21/2020 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

FILED ELECTRONICALLY FILED -- 2022 OCT 20 13:56 AM -- EFILED -- COURT -- COMMUNICATIONS -- CASE# 201903707/016665



Beaufort Common Pleas

Case Caption: Stevens Builders Llc VS Michael C Garraway , defendant, et al

Case Number: 2019CP0701666

Type: Order/Electronic Form 4

So Ordered

s/ Maite Murphy 2166

Electronically signed on 2020-10-21 16:39:40 page 3 of 3

EEHFCIRRONICALLY FILED -- 2020.10.21 16:39:40 -- BEAUFORT -- COMMON PLEAS -- CASE#2019CP0701666

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

STEVENS BUILDERS, LLC,

Plaintiff,

V.

MICHAEL C. GARRAWAY, ALICIA M. GARRAWAY, and TD Bank, N.A.,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL CASE NO.: 2019-CP-07-1666

**TD BANK, N.A.'S NOTICE OF MOTION
FOR SUMMARY JUDGMENT**

TO: Benjamin T. Coppage, Esq.
Attorney for Plaintiff

COMES NOW, Defendant TD Bank, N.A. (“***TD Bank***”) and files this Motion for Summary Judgment pursuant to South Carolina Rule of Civil Procedure (“***SCRPC***”) 56 against the claim asserted by Plaintiff Stevens Builders, LLC (“***Stevens Builders***”) because there is no dispute as to the material facts and under the facts, TD Bank is not liable for a breach of contract claim.

There are *three reasons* why this Court should grant summary judgment in favor of TD Bank on Stevens Builders's single breach of contract claim pursuant to SCRPC 56:

First, the breach of contract claim fails to satisfy the standard under SCRPC 56 because there are no record facts showing that TD Bank failed to perform any contractual obligation under the construction loan agreement dated February 6, 2017 (“**Construction Loan Agreement**”);

Second, Stevens Builders's claim that TD Bank breached the Construction Loan Agreement by not paying Stevens Builders when "Plaintiff has demanded payment" fails under SCRCP 56 because it is inconsistent with, and contradicted by, the unambiguous provisions of the Construction Loan Agreement; and

Third, Stevens Builders fails to meet the requirements of SCRCP 56 because there are no record facts showing that Stevens Builders satisfied conditions precedent to payment under the Construction Loan Agreement.

Respectfully Submitted,

/s/ J. Martin Page
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Phone: 215-979-1102

Attorneys for Defendant, TD Bank, N.A.

Dated: December 1, 2021
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

STEVENS BUILDERS, LLC,

Plaintiffs,

v.

MICHAEL C. GARRAWAY, ALICIA M. GARRAWAY, and TD Bank, N.A.,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL CASE NO.: 2019-CP-07-1666

**MEMORANDUM OF LAW SUPPORTING TD BANK, N.A.'S
MOTION FOR SUMMARY JUDGMENT**

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 Phone: 215-979-1102

Dated: December 1, 2021
Columbia, South Carolina

Attorneys for Defendants, TD Bank, N.A.

I. INTRODUCTION

The heart of this action is a dispute between a building contractor, Plaintiff Stevens Builders, LLC (“*Stevens Builders*”) and two of its customers, Defendants Michael and Alicia Garraway (collectively, “*Garraways*”), concerning amounts Stevens Builders and the Garraways respectively claim the other owes them for work Stevens Builders did or did not complete on the Garraways’ home.

TD Bank, N.A. (“*TD Bank*”) was only involved as the Garraways’ lender under a construction loan agreement. But, looking for a deep pocket, Stevens Builders manufactured a breach of contract claim, attempting to argue that TD Bank was obligated to release construction loan funds to Stevens Builders based on a single allegation – *that Stevens Builders “demanded payment.”* Compl. ¶ 11.¹

There are three reasons why this Court should grant summary judgment in favor of TD Bank pursuant to South Carolina Rule of Civil Procedure (“*SCRCP*”) 56:

First, the breach of contract claim fails to satisfy the standard under SCRCP 56 because there are no record facts showing that TD Bank failed to perform any contractual obligation under the construction loan agreement dated February 6, 2017 (“*Construction Loan Agreement*”)²;

Second, Stevens Builders’s claim that TD Bank breached the Construction Loan Agreement by not paying Stevens Builders when “Plaintiff has demanded payment” fails under SCRCP 56 because it is inconsistent with, and contradicted by, the unambiguous provisions of the Construction Loan Agreement; and

Third, Stevens Builders fails to meet the requirements of SCRCP 56 because there are no record facts showing that Stevens Builders satisfied conditions precedent to payment under the Construction Loan Agreement.

¹ Emphasis added throughout unless indicated to the contrary.

² A Copy of the Construction Loan Agreement is attached and incorporated as Exhibit A.

II. BACKGROUND

A. The Garraways Hired Stevens Builders, and Then Made the Construction Loan Agreement with TD Bank.

In 2016, the Garraways entered into a contract with Stevens Builders for the construction of a new home in South Carolina (“*Construction Contract*”). Compl. ¶ 7. After the Garraways and Stevens Builders entered their Construction Contract, they both made an agreement with TD Bank. Specifically, on February 6, 2017, the Garraways made a loan agreement with TD Bank for a construction loan of \$280,000. *See* Exhibit A, Construction Loan Agreement.³ Stevens Builders became a party and executed the Construction Loan Agreement as the “Contractor.” *Id.* at p. 7.

B. The Garraways and Stevens Builders Agreed to the Unambiguous Terms of the Construction Loan Agreement with TD Bank.

The Construction Loan Agreement contains several clear and unambiguous terms about TD Bank’s rights and obligations concerning construction loan disbursements.

Importantly, the Construction Loan Agreement states that *TD Bank would make construction loan disbursements only if certain conditions were met*. Stevens Builders simply making a demand was not a condition. Specifically, construction loan disbursements:

- Were not to be made “unless and until. . . the Borrower presents proper written demand from the Contractor”;
- Were to be made “based upon the percentage of work completed”;
- Were to be made “only for work already completed and deposits for supplies as approved by Lender on a case by case basis, and only for work contemplated in the original Construction Contract and contract price”; and
- Were to be made “only as long as construction progresses in accordance with the specifications, drawings and plans (as determined by the Lender in its sole discretion, and

³ *See also* Exhibit C, Plaintiff’s Responses to TD Bank’s First Set of Requests for Admission, No. 1 (admitting Construction Loan Agreement is a true and correct copy of the Construction Loan Agreement among TD Bank, the Garraways and Stevens Builders); Exhibit B, Garraways’ Answers to TD Bank’s Requests to Admit, No. 1 (same).

for the Lender's benefit only), and only provided that there are no violations of any terms of this documents of any other documents signed in connection with this loan".

Exhibit A, Construction Loan Agreement, Sect. III, ¶ 1.

Moreover, as to the timing and amount of disbursements, TD Bank "~~retain[ed]~~ the option, in its sole discretion, to change the timing and amounts of disbursements provided in any schedule established by or in connection with this loan . . . [t]he method by which it disburses the money *shall be at the discretion* of [TD Bank], based upon the percentage of work completed." Exhibit A, Construction Loan Agreement, Sect. III, ¶ 1.

Stevens Builders further agreed to *defend, indemnify and holds harmless TD Bank* for any and all claims arising out of the construction project. Exhibit A, Construction Loan Agreement, Sect. II, ¶ 6(d) ("*The Contractor shall hold harmless, indemnify and defend* [TD Bank] against any and all claims, liability, losses, damages, costs or expenses, including but not limited to attorney's fees, which [TD Bank] may incur which *arise from any action or failure to act the Contractor* and/or any failure to conform with the Construction Contract or this Agreement, except where such claims, liabilities, losses, damages, costs, or expenses result from [TD Bank's] willful malfeasance or gross negligence.").

C. TD Bank Performed Its Obligations Under the Construction Loan Agreement.

TD Bank properly disbursed funds to Stevens Builders in compliance with the Construction Loan Agreement.

It is undisputed that TD Bank was never presented with a written demand or draw request from the Garraways to pay Stevens Builders the amount Stevens Builders seeks to recover in this action. See Exhibit B, Garraway Admissions, ¶¶ 2, 3. See also Exhibit C, Stevens Builders Admissions, ¶ 3. Per the Construction Loan Agreement, TD Bank was unable to disburse funds until this prerequisite was met. Exhibit A, Construction Loan Agreement, Sect. III, ¶ 1 ("The advances

will not be made unless and until, in addition to meeting the other requirements of this Agreement, the Borrower presents proper written demand from the Contractor.”).

Further, the Construction Loan Agreement provided that an inspector, of TD Bank’s choosing, would periodically inspect the property to determine the progress of the work. *See* Exhibit A, Construction Loan Agreement, Sect. III, ¶ 1:

The advances will be paid out only for work already completed and deposits for supplies as approved by Lender on a case by case basis, and only for work contemplated in the original Construction Contract and contract price. ***The advances will be paid out only as long as construction progresses in accordance with the specifications, drawings and plans (as determined by the Lender in its sole discretion, and for the Lender’s benefit only)*** The Lender retains the option, in its sole discretion, to change the timing and amounts of disbursements provided in any schedule established by or in connection with this loan. ***In order to determine whether adequate progress has been made, an individual selected by the Lender will visit the site to determine that the project is being completed according to plans and specifications (as determined by the Lender in its sole discretion, and for the Lender’s benefit only).***

The agreement does not specify any particular worksheet to be used in determining or tracking the progress made. *See generally id.* To the contrary, the Construction Loan Agreement clearly and unambiguously states that TD Bank retains the option, in its sole discretion, to change the timing and amounts of disbursements provided in any schedule. *See* Exhibit A, Construction Loan Agreement, Sect. III, ¶ 1.

TD Bank had several inspections completed throughout the project. *See* Exhibit D, Construction Progress Inspection Report, Stevens Builders 020. The inspection dated January 3, 2019, showed construction as 54.5% complete. *Id.* Through that date, Stevens Builders had received payments from the Garraways, totaling \$261,818.99, in addition to a \$72,000 disbursement from TD Bank, for total payments to Stevens Builders of \$333,818.99. *See* Exhibit E, Stevens Builders 058-059, Jan. 11, 2019 Email from Michael Garraway to Donna Courchesne at TD Bank, copying Stevens

Builders. On January 8, 2019, TD Bank sent Stevens Builders the inspection report showing the work 54.5% complete, and explained that, based on the percentage complete and total amount of money Stevens had received so far, TD Bank was not able to release funds until more work was completed. Exhibit E, Stevens Builders 070-071, Jan. 8, 2019 Email from Donna Courchesne, TD Bank, to Stevens Builders.⁴

D. Stevens Builders Sued Garraways and TD Bank.

Stevens Builders sued Garraways, alleging that they failed and refused to pay Stevens Builders \$93,575.27 for labor and materials supplied, asserting claims for breach of the Construction Contract, quantum meruit, and foreclosure of a mechanic's lien. Compl. at ¶¶ 9, 12-15, 20-23, 24-32. The foreclosure claim was dismissed on March 2, 2020. *See* Release of Lis Pendens filed on March 2, 2020; Consent Order/Dismissal of 4th Cause of Action with Prejudice on March 2, 2020.

As to TD Bank, Stevens Builders asserted that it “demanded payment from TD as required by the Construction Loan Agreement, but TD has failed and refused to disburse the same.” Compl. ¶ 11. Importantly, on that basis alone and without reference to any provision of the Construction Loan Agreement, Stevens Builders asserted a single claim against TD Bank for alleged breach of the Construction Loan Agreement. *Id.* at ¶¶ 16-19. Stevens Builders appears to have manufactured this claim to keep TD Bank in this case, including serially filing motions for default against TD Bank. *See* TD Bank's Opposition to Plaintiff's Third Motion for Default, filed August 17, 2020.

⁴ The cost to construct was \$540,000, 54.5% of which would be \$294,300 that could be disbursed to Stevens Builders based on the inspection report. *Id.* *See also* Exhibit C, Stevens Builders Response to Interrogatories at ¶ 16 (cost to construct was \$540,000). But Stevens Builders had already received more than that (\$333,819.09). *See* Exhibit E, Stevens Builders 070-071, Jan. 8, 2019 Email from Donna Courchesne, TD Bank, to Stevens Builders.

On June 23, 2020, TD Bank filed its Answer and Affirmative Defenses. *See* Exhibit F, TD Bank Answer. TD Bank expressly denied that it breached the Construction Loan Agreement. *See id.* at ¶ 10.

III. ARGUMENT

A. The Governing Standard Under SCRCP 56 Compels Summary Judgment in Favor of TD Bank.

“Summary judgment shall be granted ‘if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law.’” *Loflin v. BMP Development, LP*, 2016 WL 11597897 *Mullen, J. (citing SCRCP 56(c)); *see also ARB, Inc. v. Integrated Recycling Group of SC, LLC*, 432 S.C. 545, 551, 854 S.E.2d 171, 174 (Ct. App. 2021), *reh’g denied* (Feb. 12, 2021).

When the moving party demonstrates no evidentiary basis for nonmoving party’s claims, the nonmoving party must “come forward with specific facts showing there is a genuine issue for trial.” *Id.* (citing *Singleton v. Sherer*, 377 S.C. 185, 197-98, 659 S.E.2d 196, 203 (Ct. Appl. 2008)). “It is not sufficient for one to create an inference that is not reasonable or an issue of fact that is not genuine.” *Id.* (citing *Evans. v Stewart*, 370 S.C. 522, 526, 636 S.E.2d 632, 635 (Ct. App. 2006)) (internal quotations omitted).

B. Stevens Builders’s Breach of Contract Claim Fails Because There Are No Facts Showing That TD Bank Failed to Perform Any Contractual Obligations Under the Construction Loan Agreement.

Under South Carolina law, the elements of a breach of contract claim are: (1) a contract existed; (2) a breach of that contract; and (3) that breach caused plaintiff damages. *Maro v. Lewis*, 389 S.C. 216, 222, 697 S.E.2d 684, 688 (S.C. Ct. App. 2010). Under South Carolina law, it is the plaintiff’s burden to establish “defendant’s breach of one or more of the contractual terms.” *Stanley*

v. Computer Scis. Corp., No. 3:12-CV-00280-MGL, 2014 WL 6473703, at *11 (D.S.C. Nov. 18, 2014) (granting defendants' motion for summary judgment where plaintiff failed to show a breach of contract).

It is common sense that a party cannot breach a contract where the alleged obligation under the contract does not exist. *See Allegro, Inc. v. Scully*, 791 S.E.2d 140, 145 (S.C. 2016). This is equally true with respect to construction loan agreements – where construction loan distribution provisions are for the benefit of the lender, a claim against the lender for breaching such provisions fails as a matter of law. *See Carew v. RBC Centura Bank*, No. 2010CP3200442, 2012 WL 10861828, at *5 (S.C.Com.Pl. May 17, 2012) (granting lender's motion for summary judgment and dismissing borrower's breach of contract claim because the construction loan contract provision that served as the basis for the complaint did not “place any obligations on [the lender to plaintiffs regarding the distribution of loan proceeds], and, therefore, cannot support a claim for breach of contract.”).

Here, Stevens Builders fails to show that a single term of the Construction Loan Agreement concerning distributions are for its benefit. Further, Stevens Builders has failed to show which term, if any, supports Stevens Builders's claim that TD Bank must make a distribution simply because Stevens Builders “demanded payment.” In its untimely answers to interrogatories, Stevens Builders's claimed that TD Bank breached the Construction Loan Agreement by using more than one worksheet to track the progress of work. *See* Exhibit C, Stevens Builders Response to Interrogatories at ¶ 5. However, there is no contract term included in the Construction Loan Agreement that requires a particular worksheet be followed. *See* Exhibit A, Construction Loan Agreement, Sect. III, ¶ 1. To the contrary, the Construction Loan Agreement states that ***TD Bank “retain[ed] the option, in its sole discretion to change the timing and amounts of disbursements provided in any schedule*** established by or in connection with this loan.” *Id.* Further, the

Construction Loan Agreement clearly states “advances will be paid. . . as determined by the Lender at its sole discretion and for the Lender’s benefit only” based on the progress made as determined by an inspector selected by the Lender. *Id.* This is precisely what TD Bank did. Utilizing the Construction Progress Inspection Reports, TD Bank assessed whether additional funds could be distributed, and informed Stevens Builders that more progress was needed for further disbursements. *See* Exhibit E, Stevens Builders 058-059, Jan. 11, 2019 Email from Michael Garraway to Donna Courchesne at TD Bank, copying Stevens Builders.

Accordingly, because Stevens Builders has failed to identify a single contract term for which TD Bank was in breach, Stevens Builders’s breach of contract claim must be dismissed under SCRCP 56. *See Scully*, 791 S.E.2d at 145 (affirming dismissal of breach of contract claims because, in part, no material terms were alleged).

C. Stevens Builders’s Contract Claim Is Inconsistent With, and Contradicted By, the Unambiguous Provisions of the Construction Loan Agreement.

It is black letter contract law in South Carolina that, if the language of a contract is unambiguous, then the contract’s language determines the force and effect. *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004). *Courts “are without authority to alter an unambiguous contract by construction or to make new contracts for the parties. A court must enforce an unambiguous contract according to its terms . . .”* *S.C. Dep’t of Transp. v. M & T Enters. Of Mt. Pleasant*, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008). *See Captain's Harbour & Racquet Club Homeowners' Ass'n, Inc., Respondent, v. Jerald W. Jones, Appellant.*, No. 2018-001724, 2021 WL 1906294, at *1 (S.C. Ct. App. May 12, 2021) (affirming grant of summary judgment where the court found no ambiguity in the contract terms that defined who were to be deemed parties to the agreement).

Here, Stevens Builders's unsupported claim that it was entitled to a construction loan disbursement simply because it "demanded payment" is inconsistent with, and contradicted by, the unambiguous provisions of the Construction Loan Agreement. Instead of stating that TD Bank must pay the Contractor whenever the Contractor makes a demand, the Construction Loan Agreement expressly states that TD Bank would only make construction loan disbursements if specified conditions were met. Specifically, construction loan disbursements:

- Were not to be made "unless and until . . . the Borrower presents proper written demand from the Contractor";
- Were to be made "based upon the percentage of work completed";
- Were to be made "only for work already completed and deposits for supplies as approved by Lender on a case by case basis, and only for work contemplated in the original Construction Contract and contract price"; and
- Were to be made "only as long as construction progresses in accordance with the specifications, drawings and plans (as determined by the Lender in its sole discretion, and for the Lender's benefit only), and only provided that there were no violations of any terms of this document or any other documents signed in connection with this loan".

Exhibit A, Construction Loan Agreement, Sect. III, ¶ 1.

Not only is Stevens Builders's contract claim contrary to the express and unambiguous terms of the Construction Loan Agreement, which make clear that payment may only be made if certain conditions are met, but *Stevens Builders has failed to produce any evidence that any of these conditions of payment were in fact met*. Stevens Builders does not allege that the Garraways presented TD Bank with a written demand for payment. To the contrary, *the Complaint admits that the Garraways "failed and refused to pay" Stevens Builders*, despite Stevens Builders's demand. Compl. ¶ 9. Additionally, the Garraways agree that they made no such demand to authorize payment. See Exhibit B, Garraway Admissions at ¶¶ 3, 4. See also Exhibit C, Stevens Builders Response to Interrogatories at ¶ 14 (failing to explain how Stevens Builders met these conditions

precedent in the Construction Loan Agreement). Stevens Builders has also produced no evidence showing that Stevens Builders's demand was based on "the percentage of work completed", "work already completed and deposits for supplies" as approved by TD Bank, "work contemplated in the original Construction Contract and contract price", or that construction had progressed "in accordance with the specifications, drawings and plans (as determined by the Lender in its sole discretion)." These terms, and not Stevens Builders's mere "demand for payment", are clear and unambiguous controlling contract terms.

For these reasons, Stevens Builders has failed to show a breach of contract claim and thus summary judgment should be granted on the contract claim. *See Greene v. Cherokee Cty. Sch. Dist.*, No. 2011-UP-391, 2011 WL 11735046, at *1 (S.C. Ct. App. Aug. 16, 2011) (summary judgment is appropriate when there is no ambiguity in the contract).

D. There Are No Record Facts Showing That Stevens Builders Satisfied Conditions Precedent to Payment Under the Construction Loan Agreement.

"*A condition precedent* to a contract is 'any fact other than the lapse of time, which, unless excused, *must exist or occur before a duty of immediate performance arises.*' *Brewer v. Stokes Kia, Isuzu, Subaru, Inc.*, 364 S.C. 444, 449, 613 S.E.2d 802, 805 (Ct.App.2005) (citing *Worley v. Yarborough Ford, Inc.*, 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct.App.1994)). "The question of whether a provision in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ." *Id* (internal quotations and citations omitted). "*If a contract contains a condition precedent, that condition must either occur or it must be excused before a party's duty to perform arises.*" *McGill v. Moore*, 381 S.C. 179, 187, 672 S.E.2d 571, 575 (2009).

Here, Stevens Builders fails to show that it satisfied the conditions precedent to payment. The clear and unambiguous Construction Loan Agreement terms explicitly state that Stevens Builders

was only to receive payment when certain conditions were met – including that the Garraways presented TD Bank with a written demand for disbursement, such demand was based on the percentage of work completed, only for work already completed and only as long as construction progressed in accordance with the specifications, drawings and plans, as determined by TD Bank. Such a demand was never made. *See* Exhibit B, Garraway Admissions at ¶¶ 3, 4. The amount requested exceeded the percentage of work completed. *See* Exhibit D, Construction Progress Inspection Report. *See also* Exhibit E, Stevens Builders 058-059, Jan. 11, 2019 Email from Michael Garraway to Donna Courchesne at TD Bank, copying Stevens Builders. Stevens Builders failed to produce any evidence showing that Stevens Builders satisfies any of the other conditions precedent to TD Bank making an additional disbursement of construction loan funds. *See* Section III(C), *supra*. In short, TD Bank had no obligation to disburse any funds to Stevens Builders because Stevens Builders did not meet the conditions precedent for payment.

IV. CONCLUSION

There are *three reasons* why this Court should grant summary judgment in favor of TD Bank on Stevens Builders's single breach of contract pursuant to SCRCP 56:

First, the breach of contract claim fails to satisfy the standard under SCRCP 56 because there are no record facts showing that TD Bank failed to perform any contractual obligation under the parties' Construction Loan Agreement;

Second, Stevens Builders's claim that TD Bank breached the Construction Loan Agreement by not paying Stevens Builders when "Plaintiff has demanded payment" fails under SCRCP 56 because it is inconsistent with, and contradicted by, the unambiguous provisions of the Construction Loan Agreement; and

Third, Stevens Builders fails to meet the requirements of SCRCP 56 because there are no record facts showing that Stevens Builders satisfied conditions precedent to payment under the Construction Loan Agreement.

Respectfully Submitted,

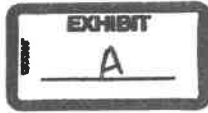
/s/ J. Martin Page

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Attorneys for Defendants, TD Bank, N.A.

Dated: December 1, 2021
Columbia, South Carolina



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CONSTRUCTION LOAN AGREEMENT

Loan # [REDACTED] 7162

In this Agreement the words "I", "me", "my", "mine" and "Borrower" mean each person who signs as a Borrower below. The word "Contractor" means each person or entity that signs as Contractor below. The words "you", "your" or "Lender" mean TD Bank, N.A. I will give the Lender a Note for Two Hundred Eighty Thousand and 00/100 Dollars (\$280,000.00) which will be secured by a mortgage on real estate with all the buildings and improvements thereon. The real estate is located at 140 Front St., St. Helena Island, County of Beaufort, State of Commonwealth of South Carolina. The real estate is described more precisely in the mortgage.

I. MY RESPONSIBILITIES AS A BORROWER

The Lender has agreed to make periodic advances of money to me under the Note I will sign. In exchange for this loan, I agree to do the following:

- 1. TIMELY COMPLETION.** The Borrower agrees to complete the construction as soon as possible under the terms of the Construction Contract, and that in any event the construction and improvements will be complete by 02/28/2018 (Completion Date). The Construction term is set for 12 months and the Bank will not extend the period of construction beyond that time. If construction is not complete by the Rider Completion Date or by the 12th payment whichever comes first, Principal and Interest payment will begin on the 13th payment and the Lender may take action as described under Section III.2.
- 2. NO LIENS OR CLAIMS.** I will keep the property and any buildings on the property free from any mechanic's liens or other liens or claims. If the Lender asks me to, I will get waivers of liens from any person who may have a potential lien or claim on the property or buildings.
- 3. REPAIR AND MAINTENANCE.** I will keep the property and any buildings on the property in good repair.
- 4. INSURANCE.** I promise to keep all buildings on the property insured against loss by fire or other casualty. The insurance will be in an amount satisfactory to the Lender and with an insurance company acceptable to the Lender. I will make all payments necessary to maintain the insurance. The insurance policy will contain a standard mortgagee clause and builder's risk coverage to protect the Lender. If the property is damaged by fire or other cause and insurance proceeds are paid to the Lender, the Lender, at its option, may use the insurance proceeds to pay off or reduce the debt or it may use the proceeds to rebuild or repair the property.

If there is no person or entity signing as Contractor below, I promise to provide the Lender evidence of the Sub-Contractor's Insurance described in Section II.7. Sub-Contractor's Insurance must be in force until the construction and improvements are complete to the Lender's satisfaction. Sub-Contractor's Insurance will be with an insurance company acceptable to the Lender. The sub-contractor or I will make all payments necessary to maintain the Sub-Contractor's Insurance. Each policy of Sub-Contractor's Insurance will contain a provision for the Lender to be notified upon the cancellation or expiration of the insurance. I agree to provide the Lender with evidence of the required Sub-Contractor's Insurance upon request, but in no event later than the loan closing.
- 5. PROTECTION OF LENDER'S INTEREST.** If the Lender asks me for any reason, I will furnish any documents which will establish and protect the Lender's interest including surveys of the property, assurances that Contractors have performed and have been paid and a financial bond or other document which makes the Lender financially more secure. The Lender has the right to make periodic inspections of the construction project. If, because of an inspection, the Lender decides that the construction may not be proceeding in accordance with the plans and specifications, good building practices or commonly accepted safety standards, I agree to pay for additional costs, if any, such as engineering or architectural studies.

NMLS#:

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6. PROMISE TO PAY AND COMPLY WITH CONTRACTS. I agree to pay all money that I owe to the Lender under other related contract documents. I also agree to comply with all promises which are included in this Agreement and other contract documents. Other related contract documents include, but are not limited to the Note, Mortgage, security agreement, conditional approval letter, loan application or other agreement that I may sign in connection with this loan and construction project.

7. BORROWER'S FUNDS. ☐ **Deposit of Borrower's Funds.** If the box at the beginning of this paragraph is checked, I agree to deposit \$ _____ of my own money in a non-interest bearing escrow account with the Lender. I also agree to sign any Escrow Agreement or similar document required by the Lender. I must deposit this money before the Lender is required to begin advances of the construction loan proceeds. This money which I have deposited in the non-interest bearing escrow account will be the first money disbursed by the Lender for the construction project. It will be disbursed in accordance with Section III.1 of this Agreement. I also agree to put more of my own money into a non-interest bearing escrow account within a reasonable time after the Lender asks me to, if the Lender decides that there may be construction or other costs which exceed the original estimates and that those costs must be paid to complete the construction project. I agree to put enough money in the non-interest bearing escrow account to cover these costs. So long as the Lender holds any money in this non-interest bearing escrow account, the money will also be security for my obligations to the Lender under this Agreement and the Note. If I am in default, the Lender may apply these monies to the debt I owe under the Note or to complete the construction project without my prior approval.

If the box at the beginning of the preceding paragraph is not checked, I understand and agree that the Lender will not disburse the proceeds of the Note until I have provided evidence to the Lender that I have contributed \$ 305,000.00 of my own money to the construction project (for example, a paid receipt from the Contractor and a copy of my canceled check made payable to the Contractor and/or fully executed waivers of rights to a lien or claim on the property). I also agree to put more of my own money into the construction project within a reasonable time after the Lender asks me to, if the Lender decides that there may be construction or other costs which exceed the original estimates and that those costs must be paid to complete the construction project. I will provide the Lender with evidence of such additional payments upon request.

8. COPIES OF DOCUMENTS FOR LENDER. I agree to give the Lender signed copies of all Construction Contracts, sub-contracts, change orders, invoices and estimates. I will also give the Lender statements, which give the names of any Contractors or sub-contractors or any other persons who furnish labor, materials or services to the construction. This statement will include any amount due to those persons, any amount paid to those persons and the total price of any contract with those persons.

9. COMPLIANCE WITH LAWS. I agree to comply with all federal, state and local laws, regulations and codes regarding the property.

10. NO CHANGES WITHOUT NOTICE. The Construction Contract may be amended provided that the changes, in the aggregate, do not result in an increase in the contract price of more than one percent (1%). Otherwise, amendments to the Construction Contract require prior written notice to the Lender. I am responsible for any payments for changes prior to the Lender's next disbursement. The Lender is under no obligation to make advances of loan funds to pay for increases to the contract price related to changes, regardless of the amount of these increases.

11. INSPECTION. I agree to allow the Lender, or any person the Lender designates, to inspect the construction project at any time that is reasonable. I agree that each request for an advance of the kind described at Section III.1 of this Agreement will require that such an inspection be made. The Lender agrees to pay the cost of each such inspection. THESE INSPECTIONS ARE FOR THE BENEFIT OF THE LENDER TO PROTECT ITS INTEREST AND I CANNOT RELY ON THE INSPECTIONS FOR MY PROTECTION.

II. THE CONTRACTOR'S RESPONSIBILITIES

1. CONSTRUCTION IN COMPLIANCE WITH PLANS AND LAWS. The construction and improvements will be made





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according to the specifications, drawings and plans agreed upon between Borrower and Contractor ("Construction Contract"). The Contractor warrants and represents that the construction and improvements will be made to comply with all applicable federal, state and local laws, regulations and codes. The Contractor agrees to complete the construction as soon as possible under the terms of the Construction Contract, and that Contractor shall not substantially stop construction for fourteen (14) calendar days without cause, and that in any event the Contractor will complete the construction and improvements by the Completion Date established in Section 1.1.

2. NO LIENS OR CLAIMS. The Contractor agrees to keep the property and any buildings or improvements on the property free from any mechanic's liens or claims, and in good repair.

3. WAIVER OF LIENS. If required by Lender, the Contractor must provide the Lender with waivers, on forms to be provided by the Lender or its agent, from anyone who may have rights to a lien or claim on the property. These waivers must be provided to the Lender or its agent when demand is made for payment and must cover all work done up to the date of the previous demand for payment.

4. COPIES OF DOCUMENTS FOR LENDER. The Contractor agrees to provide the Lender with copies of all Construction Contracts, change orders, invoices and Contractor estimates. The Contractor also promises to give statements which include the names of all Contractors, sub contractors and any other persons who provide labor, materials and services for the construction who may have rights to a lien or claim on the property. The Contractor shall not allow any sub-contractors or material suppliers to work on or supply materials to the construction project without prior notice to Lender or its agent in order for Lender to track those persons or entities who may have rights to a lien or claim on the property. The Lender is under no obligation to make advances of loan funds to pay for increases to the contract price related to changes, regardless of the amount of these increases.

5. INSPECTION. The Contractor agrees to allow the Lender or anyone designated by the Lender to inspect the construction project at any reasonable time. THESE INSPECTIONS ARE SOLELY FOR THE BENEFIT OF THE LENDER TO PROTECT ITS INTEREST.

6. COMPLETION, TERMINATION, AMENDMENT, INDEMNIFICATION. Each Contractor who signs this Agreement also agrees to the following:

- a.) If the Borrower defaults and if the Lender asks the Contractor to complete construction under the terms of its Construction Contract with the Borrower, the Contractor shall complete the construction and shall comply with other terms of the Construction Contract and shall recognize the Lender's right under its Note, Mortgage and this Agreement, subject to any lien rights of the Contractor. The Contractor's agreement to complete the Construction Contract is dependent on the Lender's written agreement to perform all obligations that the Borrower has under the Construction Contract and Lender shall have no liability to the Contractor under the Construction Contract until such written agreement is made. Lender may terminate the Construction Contract by giving Contractor a written notice of termination.
- b.) The Contractor agrees to provide Lender with fifteen (15) business days advance written notice prior to terminating the Construction Contract. The Lender, in its sole discretion, may cure any breach of contract by the Borrower within the fifteen (15) business days advance notice period.
- c.) The Construction Contract may be amended provided that the changes, in the aggregate, do not result in an increase in the contract price of more than one percent (1%). Otherwise, amendments to the Construction Contract require prior written notice to the Lender.
- d.) The Contractor shall hold harmless, indemnify and defend the Lender against any and all claims, liability, losses, damages, costs or expenses, including but not limited to attorneys' fees, which Lender may incur and which arise from any action or failure to act by Contractor and/or any failure to conform with the Construction Contract or this Agreement, except where such claims, liabilities, losses, damages, costs, or expenses result from the Lender's willful malfeasance or gross negligence.





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7. INSURANCE. The Contractor agrees to obtain and keep in force the following insurance coverage (the "Contractor's Insurance"): a) public liability insurance with limits of liability equal to at least \$500,000 per occurrence; and b) if the Contractor has employees, worker's compensation insurance as required by applicable state law.

The Contractor also agrees to ensure that sub-contractors working on the project are covered by the following insurance coverage (the "Sub-Contractor's Insurance"), through an insurance policy maintained by either the Contractor or the Sub-Contractor: a) public liability insurance with limits of liability equal to at least \$500,000 per occurrence; and b) if the Sub-Contractor has employees, worker's compensation insurance as required by applicable state law.

Contractor's and Sub-Contractor's Insurance must be in force until the construction and improvements are complete to the Lender's satisfaction. Both Contractor's Insurance and Sub-Contractor's Insurance will be with an insurance company acceptable to the Lender. The Contractor or sub-contractor will make all payments necessary to maintain the Contractor's Insurance and the Sub-Contractor's Insurance. Each policy of Contractor's Insurance will contain a provision for the Lender to be notified upon the cancellation or expiration of the insurance.

The Contractor agrees to provide the Lender with evidence of the required Contractor's Insurance upon request, but in no event later than the loan closing. The Contractor agrees to provide evidence of required Sub-Contractor's Insurance upon the Lender's request.

III. LENDER'S, BORROWER'S AND CONTRACTOR'S JOINT RESPONSIBILITIES

1. ADVANCES, DISBURSEMENTS AND BASIS FOR PAYMENT. The Lender agrees with the Borrower to lend and make periodic advances of the principal sum of the Note, and interest will accrue on these advances at the rate provided in the Note. The Lender's Agreement to lend and advance money is subject to the terms and conditions of this Agreement. The advances will not be made unless and until, in addition to meeting the other requirements of this Agreement, the Borrower presents proper written demand from the Contractor. The advances will be paid out only for work already completed and deposits for supplies as approved by Lender on a case by case basis, and only for work contemplated in the original Construction Contract and contract price. The advances will be paid out only as long as construction progresses in accordance with the specifications, drawings and plans (as determined by the Lender in its sole discretion, and for the Lender's benefit only), and only provided that there are no violations of any terms of this document or any other documents signed in connection with this loan. The payment method described in this Agreement replaces any payment method in the Construction Contract that is contrary. Contractor agrees to the payment method contained in this Agreement. The Lender retains the option, in its sole discretion, to change the timing and amounts of disbursements provided in any schedule established by or in connection with this loan. In order to determine whether adequate progress has been made, an individual selected by the Lender will visit the site to determine that the project is being completed according to plans and specifications (as determined by the Lender in its sole discretion, and for the Lender's benefit only). Borrower agrees to pay any inspection fees. Within five (5) business days after the Lender has received this information and approved it, the Lender will make advances. The method by which it disburses the money shall be at the discretion of the Lender, based upon the percentage of work completed. The Lender may retain from any advance a percentage of the cost of construction from the date of the prior advance (if any).

In the Lender's sole discretion, the advances of the loan may be made directly to one or more of the following: the Borrower, the Contractor or any sub-contractor, or any other person who provided labor, services or material to the construction project. However, advances may only be paid directly to sub-contractors if (i) the Borrower or the Lender has received legal notice of a lien claim from such sub-contractor; or (ii) the Contractor is no longer working on the project.

2. MONEY RETAINED AND COMPLETION OF PROJECT. If the Lender still holds money, including undisbursed loan proceeds or borrower funds beyond the Completion Date as defined in this Agreement, the Lender may, at its option (without notice to Borrower or prior approval from Borrower), (a) apply the money to the principal of the debt and convert the loan from interest only payments to principal and interest payments; or (b) pay the money to Contractors, subcontractors or others if it decides that this is necessary to complete the work in order to protect its interest; or (c) put the undisbursed loan funds into a non-interest bearing escrow account and convert the entire loan from interest only payments to principal and interest payments. If the Lender does apply the money to the principal of the debt, the Lender does not waive its right of foreclosure.





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Lender may, at its option, retain a percentage of the final advance (final disbursement) until, in the Lender's sole discretion, construction is confirmed complete and all terms and conditions of this Agreement and related documents are satisfied. Any such amounts to be retained are to be determined in the Lender's sole discretion, and for the Lender's benefit only. Any retention of the final advance may be withheld until the Lender has conducted a final inspection satisfactory to it showing the project 100% completed, and receives (i) an affidavit from the Borrower and the Contractor sufficient for the Lender's title insurer to remove any exceptions for mechanic's liens, (ii) a final title insurance policy acceptable to the Lender; (iii) a hazard insurance and, if applicable, flood insurance, binder upon the completed construction in an amount, and from an insurance company, acceptable to the Lender, (iv) a copy of the certificate of occupancy if the municipality where the construction occurred issues such certificates, (v) evidence of satisfactory water test and septic certification (if applicable), (vi) final mortgage loan inspection plan satisfactory to Lender, (vii) a final certification of value from an appraiser acceptable to the Lender, (viii) evidence satisfactory to the Lender that all other conditions contained in the Borrower's conditional approval letter which were to be satisfied prior to final disbursement have been met, (ix) evidence that no default exists under any of the other loan documents, and (x) satisfaction of all other requirements contained in this Agreement. If the final advance is approved by the Lender, it will include all unadvanced proceeds of the Note. If that amount exceeds the last disbursement request, the excess amount will be applied to the principal of the debt.

IV. ADDITIONAL AGREEMENTS OF THE BORROWER AND THE LENDER

1. EVENTS OF DEFAULT, CONSEQUENCES. The Lender shall not be required to advance any undisbursed principal of the Note or release from any escrow account created pursuant to this Agreement, if any of the following things happen before the entire loan has been advanced and construction is confirmed complete by the Lender in its sole discretion:

- a.) The property is no longer owned by Borrower because of a sale, a death or for any other reason.
- b.) Borrower is determined to be bankrupt or insolvent.
- c.) A court action is begun which affects any part of the loan proceeds that have not yet been advanced.
- d.) The property or building is substantially damaged.
- e.) Borrower "defaults"; "default" means Borrower has broken any of the promises under this Agreement, or any Note, mortgage, security agreement or other agreement that Borrower may sign in conjunction with this loan and/or construction project.

If any of these events occurs, the Lender may also choose to demand immediate payment in full of all advances made under the Note, obtain the appointment of a receiver, take possession of the property for purposes of completion of construction, or foreclose the Mortgage on the property. The Lender may exercise any or all of these remedies together or separately, and may also exercise any other remedy available to a creditor under applicable law.

2. UNADVANCED REMAINDER. If any of the loan has not been advanced, no creditor of mine or any other person, entity or court shall have any claim upon the unadvanced remainder of the loan, and the Lender will not hold the unadvanced remainder for the benefit of any creditor or any other person.

3. WAIVER. The Lender, may, at any time, waive any condition, agreement or requirement of this Agreement. However, the Lender's waiver on one occasion shall not be considered as a waiver of its rights in the case of future defaults.





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4. THE LENDER MAY COMPLETE CONSTRUCTION. If Borrower has defaulted or broken any promises under this Agreement or other documents, or if the construction is not completed by the date established at Section I.1 of this Agreement, or if any of the Contractor's responsibilities listed in this Agreement are not met, the Lender may refuse to make further advances and/or may take control of the property and complete the construction of the building and improvements to an extent satisfactory to the Lender. Any construction materials which belong to me and which are on or near the property when the Lender takes control of the property under this section shall become the property of the Lender without payment for the materials, and the materials may be used to complete the construction. The Lender has the power to enter into contracts as necessary to accomplish the complete construction. Any money spent by the Lender to complete construction (including the amount, if any, to cure my default which the Lender may make under Section II.6 (b) of this Agreement) shall be added to the principal amount of the loan and secured by the Mortgage and shall be payable by me at a rate of interest per year equal to the interest rate set forth in the Note.

5. BORROWER'S AUTHORIZATION AND ASSIGNMENT TO LENDER REGARDING CONSTRUCTION CONTRACTS. Borrower gives, assigns and transfers all his/her rights in any existing or future construction contracts to the Lender for the Lender's use in the event that the Lender takes control of the property for the purpose of completing the construction. Even though I have given the Lender these rights, the Lender is not bound by these construction contracts and is not bound by any other obligation to fulfill my commitment unless and until the Lender decides to be bound by notifying the various Contractors, materialmen or other parties to the construction contracts in writing. If the Lender decides to complete any construction on the property, Borrower appoints the Lender as his/her agent with full authorization to bind Borrower to any contracts that would be reasonably necessary to complete the construction in accordance with the plans and specifications. Further, Borrower agrees and acknowledges that the plans and specifications may be changed by the Lender.

6. LENDER IS NOT RESPONSIBLE FOR SELECTION OF ARCHITECT AND OTHER PROCEDURES, OR FOR QUALITY OF MATERIALS OR WORKMANSHIP. I have selected all architects, engineers, Contractors, sub-contractors, materialmen and other persons furnishing services or materials to the construction project. The Lender has no responsibility for the selection of these persons or for the quality of their materials or workmanship or the timeliness of the completion of work. This is because the Lender's only function is that of a Lender and the Lender's only involvement in the construction project is to advance loan proceeds subject to the terms of this Agreement. I HAVE NO RIGHT TO RELY ON ANY INSPECTIONS OR OTHER PROCEDURES REQUIRED BY THE LENDER BECAUSE SUCH PROCEDURES ARE FOR THE PROTECTION OF THE LENDER AND NO ONE ELSE.

7. BORROWER'S LIABILITY TO THE LENDER FOR CLAIMS AGAINST THE LENDER. I agree to be responsible for any claims, injuries or judgments against the Lender arising out of the construction, use, occupancy or possession of the property. My agreement to assume this responsibility extends to any claim of any person arising out of the project, including the following persons: myself and employees of mine, the Contractor and Contractor's employees, any tenant or subtenant of mine, and any person invited on the property by any of these persons. I agree to hold harmless, indemnify and defend the Lender against all claims, liability, losses, damages, cost or expenses, including but not limited to attorneys fees, which Lender may incur in connection with this loan and construction project, except as arise from Lender's willful malfeasance or gross negligence. I understand that attorney's fees may be awarded to me in the event that I prevail in any legal action brought against me by the Lender in connection with this loan and construction project.

8. SECURITY INTEREST. I will give to the Lender a security interest in the personal property described below. The security interest includes any additions to this property, any substitutions for this property, any replacements for this property and any proceeds of this property: All construction materials, machinery and equipment which is or will be located on the real estate owned by me at the property location described in the first paragraph of this Agreement, all funds in any escrow account existing in connection with this Agreement, and the Construction Contract described in Section II of this Agreement. The real estate is described more precisely in the real estate Mortgage, which will be recorded as described in the first paragraph, including all other tangible personal property that becomes affixed to the real estate. This security interest shall secure payment and performance of all my obligations as set forth in the Note, the Mortgage and this Agreement. Default in payment or performance of any obligation entitles the Lender to all default remedies allowed by the applicable state laws as well as all pertinent federal laws and regulations.



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9. SEVERABILITY/APPLICABLE LAW. If any part of this Agreement is held to be unenforceable or void, the remaining part of the Agreement remains enforceable and valid. Except where expressly stated otherwise, this Agreement shall be interpreted under the laws of the State or Commonwealth where the real property securing the loan is located, except its choice of laws rules.

10. EACH SIGNER LIABLE. If two or more persons, corporations or other entities sign this Agreement as the Borrowers, they are equally responsible for compliance with the Agreement and a breach or violation by any signer is a breach or violation by all of them.

11. RELATION TO OTHER AGREEMENTS. In addition to the Note and Mortgage, the terms of my construction loan are also governed by my loan application, conditional approval letter and any other related documents. If there is any inconsistency between those documents and this Agreement, this Agreement shall govern. The Note, Mortgage, this Agreement and other related documents are the entire agreement of the Borrower and the Lender regarding this construction loan.

12. ASSIGNMENT. Borrower may not assign or transfer any rights or responsibilities under this Agreement. The Lender may assign its rights hereunder to another financial institution that agrees to perform the Lender's responsibility under this Agreement.

Michael C Garraway

Date

Contractor

H.L. Stevens (STEVENS Builders, LLC)

Print Name

TD Bank, N.A.

Raymond Young

Print Name

By

Sub owner 2/6/2017

Title

Date

By

Loan Processor 02/03/2017

Title

Date

Signature Required.

Please Return: Fax: (866) 809-0845

scan and e-mail to Raymond.Young2@td.com

or return to a Store nearest you.

YOUR MORTGAGE LOAN PROCESSOR**Name:** Raymond A Young**Phone:** (864) 315-4148**Fax:** (866) 809-0845**Email:** Raymond.Young2@td.com

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9. SEVERABILITY/APPLICABLE LAW. If any part of this Agreement is held to be unenforceable or void, the remaining part of the Agreement remains enforceable and valid. Except where expressly stated otherwise, this Agreement shall be interpreted under the laws of the State or Commonwealth where the real property securing the loan is located, except its choice of laws rules.

10. EACH SIGNER LIABLE. If two or more persons, corporations or other entities sign this Agreement as the Borrowers, they are equally responsible for compliance with the Agreement and a breach or violation by any signer is a breach or violation by all of them.

11. RELATION TO OTHER AGREEMENTS. In addition to the Note and Mortgage, the terms of my construction loan are also governed by my loan application, conditional approval letter and any other related documents. If there is any inconsistency between those documents and this Agreement, this Agreement shall govern. The Note, Mortgage, this Agreement and other related documents are the entire agreement of the Borrower and the Lender regarding this construction loan.

12. ASSIGNMENT. Borrower may not assign or transfer any rights or responsibilities under this Agreement. The Lender may assign its rights hereunder to another financial institution that agrees to perform the Lender's responsibility under this Agreement.

Michael C Garraway 2/7/17
Michael C Garraway Date

Contractor

By

Print Name

Title

Date

TD Bank, N.A.

By

Raymond YoungLoan Processor02/03/2017

Print Name

Title

Date

Signature Required

Please Return: Fax: (866) 809-0845
scan and e-mail to Raymond.Young2@td.com
or return to a Store nearest you.

YOUR MORTGAGE LOAN PROCESSOR

Name: Raymond A Young
Phone: (864) 315-4148
Fax: (866) 809-0845
Email: Raymond.Young2@td.com

PAGE 7 OF 7



CONSTRUCTION LOAN DISBURSEMENT WORKSHEET

Borrowers: Garraway, Michael
Property Address: 140 Front Street
Loan Number: [REDACTED] 7162



Refinance	
EMD	
BUILDING COSTS	\$585,000.00
TOTAL COSTS	\$585,000.00

Refinance	\$0.00	Borrower	
Loan Funds-Construction	\$280,000.00	Contribution	\$305,000.00
Total Loan Amt	\$280,000.00		

Disbursement Req'd by Builder	Project Completion		Total Costs		Loan Funds		Borrower Funds/Equity
Refinance			\$0.00	=	\$0.00	+	
First Disbursement	15%		\$87,750.00	=	\$0.00	+	\$305,000.00
Second Disbursement	22%		\$128,700.00	=	\$0.00	+	
Third Disbursement	15%		\$87,750.00	=	\$0.00	+	
Fourth Disbursement	20%		\$117,000.00	=	\$116,200.00	+	
Fifth Disbursement	25%		\$146,250.00	=	\$146,250.00	+	
Final Disbursement	3%		\$17,550.00	=	\$17,550.00	+	
	100%	=	\$585,000.00	=	\$280,000.00	+	\$305,000.00

Borrower will provide Down Payment

Plumbing, heating and wiring roughed and insulation installed - ready for sheetrock.

First Disbursement	Foundation in (Certified Plot Plan received).
Second Disbursement	Sidewalls boarded, interior partitions installed, doors and windows installed and roof shingled (weather tight)(DRIED IN).
Third Disbursement	Plumbing, heating and wiring roughed and insulation installed - ready for sheetrock.
Fourth Disbursement	Exterior finished, fireplace and chimney completed.
Fifth Disbursement	Sheetrock finished, interior doors, trim, counters and cabinets installed
Final Disbursement	Building completed(Landscaping cmopleted by borrower).

**** Borrower must fund full contribution prior to first disbursement****** This schedule is used for loan disbursements, unless another schedule has been submitted by the borrower for approval prior to loan closing.******Final disbursements will not be made until receipt of occupancy permit, inspection by Appraiser & title rundown have been received by the Bank.****** NO DISBURSEMENTS UNTIL THE BANK RECEIVES AND REVIEWS APPROVED BUILDING PERMIT****I (we) acknowledge that I (we) have received a copy of this schedule.**

Borrower

Date

Borrower

Date

Contractor

Date

CONSTRUCTION LOAN DISBURSEMENT WORKSHEET

Borrowers: Garraway, Michael
Property Address: 140 Front Street
Loan Number: [REDACTED] 7162



Refinance	
EMD	
BUILDING COSTS	\$585,000.00
TOTAL COSTS	\$585,000.00

Refinance	\$0.00	Borrower	
Loan Funds-Construction	\$280,000.00	Contribution	\$305,000.00
Total Loan Amt	\$280,000.00		

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	100%	\$585,000.00	=	\$280,000.00	+	\$305,000.00

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**** Borrower must fund full contribution prior to first disbursement****** This schedule is used for loan disbursements, unless another schedule has been submitted by the borrower for approval prior to loan closing.******Final disbursements will not be made until receipt of occupancy permit, inspection by Appraiser & title rundown have been received by the Bank.****** NO DISBURSEMENTS UNTIL THE BANK RECEIVES AND REVIEWS APPROVED BUILDING PERMIT****I (we) acknowledge that I (we) have received a copy of this schedule.**

Michael Garraway 2/7/17
 Borrower Date

Borrower Date Contractor Date



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CIVIL CASE NO: 2019-CP-07-01666
	)	
STEVENS BUILDERS, LLC,	)	
	)	
Plaintiff,	)	
	)	DEFENDANTS MICHAEL C. GARRAWAY
v.	)	AND ALICIA M. GARRAWAY'S ANSWERS
	)	TO DEFENDANT'S TD BANK, N.A. REQUESTS
MICHAEL C. GARRAWAY,	)	TO ADMIT
ALICIA M. GARRAWAY, and	)	
TD BANK, N.A.,	)	
	)	
Defendants.	)	
_____	)	

TO: LYNNE E. EVANS AND J. MARTIN PAGE, ATTORNEYS FOR THE DEFENDANT T.D. BANK, N.A.

In response to Defendant T.D. Bank's Request to Admit, the following answers are submitted:

1. Admit that the CLA, attached to the Requests for Admissions as Exhibit 1, is a true and correct copy of the CLA among TD Bank, you and Stevens Builders.

ANSWER: Admitted.

2. Admit that you never presented TD Bank with a written demand for Stevens Builders to be paid the amount Stevens Builders seeks to recover in this Litigation.

ANSWER: Admitted.

3. Admit that you never signed a draw request for the amount Stevens Builders seeks to recover in this Litigation.

ANSWER: Admitted.

4. Admit that the Construction Contract, attached to these Requests for Admission as Exhibit 2, is a true and correct copy of the Construction Contract between you and Stevens Builders.

ANSWER: Admitted.

5. Admit that Stevens Builders did not complete all of the work to which Stevens Builders and you agreed in the Construction Contract.

ANSWER: Admitted.

6. Admit that Stevens Builders did not complete all of the work to which Stevens Builders and you agreed in the Construction Contract by the date of February 28th, 2018.

ANSWER: Admitted.

7. Admit that Stevens Builders had a duty to construct your residence in accord with the Construction Contract, applicable building codes and the South Carolina Residential Construction Standards ("SCRCS").

ANSWER: Admitted.

8. Admit that Stevens Builders received \$72,000.00, pursuant to the CLA.

ANSWER: Admitted.

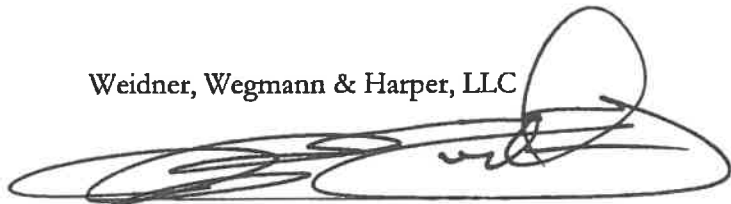
9. Admit that Stevens Builders demand for payment, as described in Complaint paragraph 11, was for a disbursement of funds in excess of the percentage of work completed.

ANSWER: Admitted.

10. Admit that Stevens Builders had not completed insulation and sheet rock work at the time it demanded payment as described in Complaint paragraph 11.

ANSWER: Admitted.

Weidner, Wegmann & Harper, LLC



JAMES J. WEGMANN, ESQUIRE
Attorney for the Defendants Garraway
6 Professional Village Circle
Beaufort, South Carolina 29907
Telephone (843) 521 0004
Facsimile (843) 524-1959
wegmanni@beaufortlaw.com
SC Bar No.: 13788

July 12th, 2021



STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL CASE NO.: 2019-CP-07-01666

STEVENS BUILDERS, LLC,

Plaintiff,

vs.

MICHAEL C. GARRAWAY, ALICIA M.
GARRAWAY, and
TD BANK, N.A.,

Defendants.

**PLAINTIFF'S REPOSSES TO TD
BANK N.A.'S FIRST SET OF
INTERROGATORIES TO
PLAINTIFF**

TO: J. MARTIN PAGE AND LYNNE EVANS, ATTORNEYS FOR THE DEFENDANT:

COMES NOW the Plaintiff, Stevens Builders, LLC (hereinafter the "Plaintiff"), and responds by and through his undersigned attorney of record to Defendant TD Bank, N.A.'s (hereinafter "Defendant" or "TD Bank") First Set of Interrogatories to Plaintiff as follows:

PRELIMINARY STATEMENT

1. The following responses are based on information presently available to the Plaintiff, which the Plaintiff believes to be correct. Said responses are made without prejudice to the Plaintiff's right to utilize subsequently discovered facts. The Plaintiff reserves the right to supplement his responses to these Interrogatories insofar as supplementation is allowed or required under applicable law.

2. No incidental or implied admissions of fact by the Plaintiff are made by the responses below. The only admissions are express admissions. The fact that the Plaintiff has answered any Interrogatory herein may not properly be taken as an admission that he accepts the existence of any facts set forth or assumed by such Interrogatory or that any information or documents produced in response constitute admissible evidence. The fact that the Plaintiff has

answered part or all of any Interrogatory is not intended, and shall not be construed to be a waiver of all or part of any objection to any Interrogatory made by the Plaintiff.

3. The objections asserted by the Plaintiff below are asserted in good faith, based upon counsel's evaluation of the Plaintiff's discovery obligations under applicable law. Nevertheless, the Plaintiff offers and stands ready to confer with the Defendant in an effort to resolve or narrow to the greatest extent possible any dispute between the parties concerning the Plaintiff's objections.

GENERAL OBJECTIONS

The Plaintiff adopts and incorporates by reference the following General Objections in each of its specific responses to the Defendant's Interrogatories.

1. The Plaintiff objects to the Defendant's Interrogatories to the extent that they request information or documents that (a) were prepared for or in anticipation of litigation; (b) constitute attorney work product; (c) constitute privileged attorney-client communications; or that (d) are otherwise privileged; and the Plaintiff will withhold all such information or documents in responding to these Interrogatories. In its efforts to produce requested information expeditiously, however, the Plaintiff may inadvertently produce information which is, or arguably is, privileged or otherwise immune from discovery. The disclosure of any such information is not intended to and shall not constitute a waiver or any rights, privileges or immunities the Plaintiff may have with respect thereto, and the Plaintiff reserves the right to request or require the return of any documents or information disclosed as to which a privilege or immunity may apply.

2. The Plaintiff reserves all objections to the admissibility, at any hearing or proceeding, of any produced information or documents, including without limitation all objections on the grounds that such information or documents are irrelevant or immaterial.

SPECIFIC OBJECTIONS AND RESPONSES

The Plaintiff's discovery, investigation, and research regarding this matter are ongoing and have not been completed. Since all the information and documents that are possibly within the scope of Defendant's Interrogatories may not have been fully located and identified, the Plaintiff reserves the right to amend and supplement these objections and responses as further information and documents are gathered pursuant to applicable law. The Plaintiff makes these objections and responses without prejudice to such future amendment or supplementation.

RESPONSE TO INTERROGATORIES

1. State the name, current title, occupation, address, and telephone number for each person from whom you have obtained information concerning your responses to these Interrogatories, and state which person or persons have responded to which Interrogatory or Interrogatories.

RESPONSE: Herschel Stevens, Plaintiff

2. List by name and address each person with knowledge, or whom you believe has knowledge, of any facts relevant to any of the issues, claims, or defenses in this Litigation, state in detail all facts known or believed to be known by each such person, and list by bates number all Documents that support each fact.

RESPONSE: Subject to additional information which may become available during further investigation and discovery, the Plaintiff identifies the following individuals:

- a. **Herschel Stevens**
345 Park Ave. SW, Apt. 302
Aiken, South Carolina 29801
The facts known or believed to be known by Mr. Stevens are all of the facts related to the claims and defenses alleged by the Plaintiff in this action.
- b. **Michael Garraway**
140 Front Street

Saint Helena Island, SC 29920

The facts known or believed to be known by Mr. Garraway are those facts related to the claims and defenses alleged by him in this action.

- c. Alicia Garraway
140 Front Street**

Saint Helena Island, SC 29920

The facts known or believed to be known by Ms. Garraway are those facts related to the claims and defenses alleged by her in this action.

- d. Joe Pizzo
45 Shorts Landing Road
Beaufort, SC 29907**

The facts known or believed to be known by Mr. Pizzo are those related to the completion of the construction project which is the subject of this action following the time at which the Defendants prevented the Plaintiff from proceeding with the project.

- e. William R. Cobia
P.O. Box 7523
Hilton Head Island, SC 29938**

The facts known or believed to be known by Mr. Cobia are those related to his preparation of a Construction Progress Inspection Report concerning the construction project that is the subject of this action.

- f. Donna Courchesne
140 Mill Street
Lewiston, ME 04240**

The facts known or believed to be known by Ms. Courchesne are those of which she became aware while working with the parties to this action in her capacity as a Loan Operations Manager for TD Bank.

- g. Raymond Young
200 Carolina Pointe Parkway
Greenville, SC 29607**

The facts known or believed to be known by Ms. Courchesne are those of which she became aware while working with the parties to this action in her capacity as a Loan Processor for TD Bank.

3. List by name and address all expert witnesses you may call at the trial, and state the subject matter of each expert witness's opinion.

RESPONSE: The Plaintiff has not yet designated any expert witness but will supplement this response when and if such expert is designated.

4. State the specific term(s) of the CLA that you claim TD Bank breached, as alleged in Paragraphs 16-19 of your Complaint.

RESPONSE: TD Bank breached Section III.1. of the CLA. To the extent the terms of the CLA are ambiguous and/or inexplicit as to TD Bank's obligations to the Plaintiff, TD Bank is in breach of those terms evinced through its course of performance of the CLA and/or such terms as would properly reflect the intention of the parties.

5. State with specificity the facts that show TD Bank failed to perform any contractual obligation under the CLA.

RESPONSE: Subject to additional information which may become available during further investigation and discovery, TD Bank breached its contract with the Plaintiff as follows. When the parties executed the CLA, they also signed a Construction Loan Disbursement Worksheet (Worksheet 1) provided by TD Bank. Worksheet 1 required disbursement to be made upon the completion of certain tasks, which tasks, cumulatively, amounted to a certain percentage of project completion. Percentages of project completion for individual tasks were not designated on Worksheet 1. On or about April 6, 2018, TD Bank began using a different Construction Loan Disbursement Worksheet (Worksheet 2) to determine the timing and amount of disbursements. Worksheet 2 recognized that \$540,000.00, not \$585,000.00, was to be distributed over the course of the project. It also amended the tasks to be completed prior to disbursements. It appears that the parties loosely followed the guidelines of Worksheet 2 through the Third Disbursement.

On or about June 11, 2018, TD Bank sent the Plaintiff a Construction Progress Report to use as guidance for the timing of disbursements. It assigned percentages of project completion to specific tasks, but those percentages did not directly reflect the percentages on Worksheet 2 and the tasks necessary for disbursements did not directly reflect those shown on Worksheet 2.

Later, TD Bank generated a spreadsheet entitled Field Inspection Report. It listed tasks and assigned monetary values, but not percentages of project completion, to those tasks. In late December 2018, the Field Inspection Report showed that 53% of the project had been paid for.

On January 3, 2019, William R. Cobia, SRA, upon the request of TD Bank, conducted an inspection of the project and provided TD Bank with a Construction Progress Inspection Report. This was not in the same form as the Construction Progress Report referenced above and Mr. Cobia has stated that the form he used was his own, i.e., it was not Provided by TD Bank and had no relation to either of the Worksheets, the Construction Progress Report, or the Field Inspection Report. Indeed the percentages of project completion on Mr. Cobia's report were different from those on any of the forms previously provided by TD Bank. Mr. Cobia's report showed the

project as being 54.5 % complete. However, when applying the percentages of project completion as shown on Worksheet 2 and the Construction Progress Report, as well as the percentages of project completion as derived from monetary values assigned to tasks on the Field Inspection Report, to Mr. Cobia's findings, it is clear that a much higher percentage of the project was complete.

TD Bank recognized this fact in Donna Courchesne's January 11, 2019 email to the Plaintiff and the Michael Garraway. In that email, she stated "It appears to me we are in line with the budget. Items in pink I show could be paid based off the budget, and the inspection showing the work completed." Her reference is to a copy of the Field Inspection Report which showed 57% of the project as being complete, but acknowledged that Carpentry Labor, Roofing, Siding, and Windows had also been completed, which accounted for another approximately 15% of project completion and \$71,400.00 of project costs.

As of January 11, 2019, \$301,705.40 had been disbursed to the Plaintiff (\$229,705.40 from the Borrower and \$72,000.00 from TD Bank), representing 56% of the total to be paid to the Plaintiff. The payment of the \$71,400.00 which Ms. Courchesne acknowledged as being due, would have brought the payments in line with the work completed. Had that payment been made, the project could have moved on to completion without further incident.

6. Itemize all damages that Stevens Builders is seeking in this Litigation, and list by bates number all Documents that you claim support your answer.

RESPONSE: Subject to additional information which may become available during further investigation and discovery, the Plaintiff has experienced damages totalling \$101,655.34 associated with nonpayment for labor and materials associated with the following project components:

- a. Electrical, \$22,640.00;
- b. HVAC, \$10,000.00;
- c. Plumbing, \$14,935.43;
- d. Gas lines, \$ 2,310.00;
- e. Water lines, \$492.00;
- f. Framing, \$39,329.98;
- g. Foundation and Concrete, \$ 1,900.00; and
- h. Roofing, \$10,047.52

7. State with specificity all facts that show that TD Bank's actions directly and proximately caused Stevens Builders's alleged damages.

RESPONSE: Please refer to the Plaintiff's response to Interrogatory 5, above.

8. State with specificity all actions You have taken to mitigate Your alleged damages.

RESPONSE: The Plaintiff undertook extensive efforts to mitigate its damages by working diligently to comply with ambiguous, arbitrary, and ever-changing requirements set forth by TD Bank during the course of the construction project, including without limitation extensive communication with the Defendants in attempts to ensure the project could move forward as efficiently as possible.

9. State with specificity the dates of all inspections concerning the work Stevens Builders completed at the Garraways' property, and the corresponding percentage of completion at the time of each inspection.

RESPONSE: Subject to additional information which may become available during further investigation and discovery, please see the Plaintiff's response to Interrogatory 5, above.

10. State whether the construction progressed in accord with the specifications, drawings and plans of the Construction Contract.

RESPONSE: Construction progressed as nearly in accord with the specifications, drawings and plans of the Construction Contract given the Defendants' interference with the progress of the same, including without limitation the ambiguous, arbitrary, and ever-changing requirements set forth by TD Bank.

11. List by bates number each written demand for payment for the Garraways presented to TD Bank for payment to You.

RESPONSE: The Plaintiff does not possess this information and will supplement its response hereto as such information becomes available during further investigation and discovery.

12. State what work you completed at the Garraways' property, including (a) what construction work you completed, (b) what amounts You paid for supplies, materials or labor, (c)

how much You received from the Garraways or TD Bank for any work, materials or supplies related to the project at the Garraways' property, (d) any amounts You believe You owe the Garraways related to the project, and (e) what amount You contend You are still owed for any work, material or supplies.

RESPONSE: Subject to additional information which may become available during further investigation and discovery, please see the Plaintiff's response to Interrogatory 6, above, and the Field Inspection Report provided by TD Bank to the Plaintiff in January 2019, a copy of which is produced in response to TD Bank's First Set of Requests for Production to the Plaintiff.

13. State with specificity all facts concerning the demand for payment described in Complaint ¶ 11, including (a) on what date You made the demand, (b) to whom You made the demand (c) the specific amount of Your demand, (d) what labor or materials were the basis for Your demand, (e) what percentage of work was completed at the time of Your demand, (f) any correspondence You had with the Garraways or TD Bank concerning Your demand, (g) whether the Garraways requested TD Bank make a disbursement to You based on Your demand.

RESPONSE: The Plaintiff made demands for payment to TD Bank's representative Donna Courchesne in a series of emails in December and January 2019, copies of which are produced in response to TD Bank's First Set of Requests for Production to the Plaintiff.

14. State with specificity how Steven Builders met the conditions precedent in the CLA for payment when it made the payment demand described in Complaint ¶ 11.

RESPONSE: The Plaintiff met the conditions precedent for payment as required by CLA and the subsequent requirements set forth by TD Bank by completing all labor and providing all material necessary to receive the requested draw.

15. State in detail why the construction on the Garraways' property was not completed by Stevens Builders.

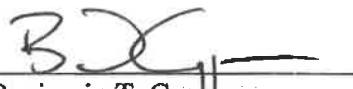
RESPONSE: Subject to additional information which may become available during further investigation and discovery, the construction on the Garraways' property was not completed by Stevens Builders due the Defendants' failure to abide by the

Construction Contract, the CLA, and subsequent agreements entered into among the parties.

16. State in detail why the Construction Contract showed a cost to build of \$540,000.00 but the budget that was provided to TD Bank prior to closing showed a cost to build of \$585,000.00.

RESPONSE: The Plaintiff agreed with the Garraways to provide construction services valued at \$540,000.00. The Garraways were undertaking additional costs associated with the construction project in the amount of \$45,000.00 for which the Plaintiff was not responsible and was not to be paid.

COPPAGE LAW FIRM, LLC

By: 
Benjamin T. Coppage
Attorney for the Plaintiff
Post Office Box 2473
Beaufort, South Carolina 29901
843-379-9601
ben@coppagelawfirm.com

Beaufort, South Carolina
July 12, 2021

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL CASE NO.: 2019-CP-07-01666

STEVENS BUILDERS, LLC,

Plaintiff,

vs.

MICHAEL C. GARRAWAY, ALICIA M.
GARRAWAY, and
TD BANK, N.A.,

Defendants.

**PLAINTIFF'S REPONSES TO TD
BANK N.A.'S FIRST REQUEST
FOR PRODUCTION OF
DOCUMENTS TO PLAINTIFF**

TO: J. MARTIN PAGE AND LYNNE EVANS, ATTORNEYS FOR THE DEFENDANT:

COMES NOW the Plaintiff, Stevens Builders, LLC (hereinafter the "Plaintiff"), and responds by and through his undersigned attorney of record to the Defendant TD Bank, N.A.'s (hereinafter "Defendant" of "TD Bank") First Set of Requests for Production to Plaintiff as follows:

GENERAL OBJECTIONS

The Plaintiff adopts and incorporates by reference the following General Objections in each of the specific responses to the Defendant's requests:

1. The Plaintiff objects to the Requests to the extent that they seek to impose upon the Plaintiff any obligations or responsibilities different from or in excess of those required by applicable law.
2. The Plaintiff reserves all objections to the admissibility, at any hearing or proceeding, of any produced documents, including without limitation all objections on the grounds that such documents are irrelevant or immaterial.

SPECIFIC OBJECTIONS AND RESPONSES

The Plaintiff's discovery, investigation, and research are ongoing and have not been completed. Because all the documents that are possibly within the scope of the Defendant's requests may not have been fully located and identified, the Plaintiff reserves the right to amend and supplement these objections and responses as further information and documents are gathered pursuant to applicable law. The Plaintiff makes these objections and responses without prejudice to such future amendment or supplementation.

RESPONSE TO REQUEST FOR PRODUCTION

1. All Documents referenced by You in Your answers to TD Bank's Interrogatories, supporting your answers, or otherwise relied on, or referenced to by You in answering the Interrogatories.

RESPONSE: Please see the documents produced herewith.

2. All Documents concerning the CLA or Construction Contract.

RESPONSE: Please see the documents produced herewith.

3. All Documents concerning written demands for payment Stevens Builders presented to the Garraways.

RESPONSE: Please see the documents produced herewith.

4. All Documents concerning written demands for payment the Garraways presented to TD Bank.

RESPONSE: Please see the documents produced herewith.

5. All Documents concerning written demands for payment, signed by the Garraways, the Garraways presented to TD Bank.

RESPONSE: Please see the documents produced herewith.

6. All Documents concerning work completed or amounts You spent for supplies approved by TD Bank for the construction project at the Garraways' property.

RESPONSE: Please see the documents produced herewith.

7. All Documents concerning any inspections at the Garraways' property or the percentage of work completed by Stevens Builders at the Garraways' property.

RESPONSE: Please see the documents produced herewith.

8. All Documents concerning the work contemplated in the original Construction Contract and contract price, and any change orders or allowances.

RESPONSE: Please see the documents produced herewith.

9. All Documents concerning credit to the Garraways for contract items removed from the Construction Contract.

RESPONSE: Please see the documents produced herewith.

10. All Documents concerning why You did not complete the work identified in the Construction Contract.

RESPONSE: Please see the documents produced herewith.

11. All Documents concerning your claim of damages.

RESPONSE: Please see the documents produced herewith.

12. All Documents you intend to rely on as exhibits at a hearing or trial in the Litigation and/or all Documents provided to or reviewed by any expert expected to testify in this matter for purposes of formulating any opinion or preparing to testify.

RESPONSE: Please see the documents produced herewith.

13. All expert reports provided by any expert who is expected to testify at the time of trial of this matter together with any and all drafts thereof.

RESPONSE: No such reports are currently in the Plaintiff's possession, but the Plaintiff will supplement its response hereto upon receipt of the same.

14. All Documents concerning the credentials of any expert you expect to have testify at the trial of this matter together with any documents stating the educational background, work history, professional experience, professional associates or memberships and published writings of said expert together with any and all other documents you intend to rely upon to qualify said expert in the field in which he/she is expected to testify.

RESPONSE: No such reports are currently in the Plaintiff's possession, but the Plaintiff will supplement its response hereto upon receipt of the same.

COPPAGE LAW FIRM, LLC

By: _____
Benjamin T. Coppage
Attorney for the Plaintiff
Post Office Box 2473
Beaufort, South Carolina 29901
843-379-9601
ben@coppagelawfirm.com

Beaufort, South Carolina
July 12, 2021

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL CASE NO.: 2019-CP-07-1666

STEVENS BUILDERS, LLC,

Plaintiff,

vs.

MICHAEL C. GARRAWAY, ALICIA M.
GARRAWAY, and
TD BANK, N.A.,

Defendants.

**PLAINTIFF'S REPOSSES TO TD
BANK N.A.'S FIRST SET OF
REQUESTS FOR ADMISSION
DIRECTED TO PLAINTIFF**

TO: J. MARTIN PAGE AND LYNNE EVANS, ATTORNEYS FOR THE DEFENDANT:

COMES NOW the Plaintiff, Stevens Builders, LLC (hereinafter the "Plaintiff"), and responds by and through his undersigned attorney of record to Defendant TD Bank, N.A.'s (hereinafter "Defendant" of "TD Bank") First Set OF Requests for Admission Directed to Plaintiff as follows:

1. Admit that the CLA, attached to these Requests for Admissions as **Exhibit 1**, is a true and correct copy of the CLA among TD Bank, the Garraways and Stevens Builders.

RESPONSE: Admitted.

2. Admit that Stevens Builders agreed to and was bound by the CLA's terms.

RESPONSE: Denied.

3. Admit that the Garraways never presented TD Bank with a written demand for Stevens Builders to be paid the amount Stevens Builders seeks to recover in this Litigation.

RESPONSE: The Plaintiff has made reasonable inquiry and the known or readily obtainable by the Plaintiff is insufficient to enable him to admit or deny. Notwithstanding the foregoing, the Plaintiff will supplement its response hereto as further investigation and discovery is undertaken.

4. Admit that Stevens Builders never presented TD Bank with a draw request, signed by the Garraways, for the amount Stevens Builders seeks to recover in this Litigation.

RESPONSE: Denied.

5. Admit that the Construction Contract, attached to these Requests for Admissions as Exhibit 2, is a true and correct copy of the Construction Contract between the Garraways and Stevens Builders.

RESPONSE: Admitted.

6. Admit that Stevens Builders did not complete the work to which Stevens Builders and Garraways agreed in the Construction Contract.

RESPONSE: Admitted.

7. Admit that Stevens Builders did not complete the work to which Stevens Builders and Garraways agreed in the Construction Contract by February 28, 2018.

RESPONSE: Admitted.

8. Admit that Stevens Builders had a duty to construct Garraways' residence in accord with the Construction Contract, applicable building codes and the South Carolina Residential Construction Standards ("SCRCS").

RESPONSE: Admitted.

9. Admit that Stevens Builders received \$72,000, pursuant to the CLA.

RESPONSE: Denied.

10. Admit that Stevens Builders's demand for payment, as described in Complaint, ¶ 11, was for a disbursement of funds in excess of the percentage of work completed.

RESPONSE: Denied.

11. List by bates number each written demand for payment for the Garraways presented

to TD Bank for payment to You.

RESPONSE: Denied.

COPPAGE LAW FIRM, LLC

By:


Benjamin T. Coppage
Attorney for the Plaintiff
Post Office Box 2473
Beaufort, South Carolina 29901
843-379-9601
ben@coppagelawfirm.com

Beaufort, South Carolina
July 12, 2021



INVOICE	
FROM: Coastal Property Appraisals Coastal Property Appraisals PO Box 7523 Hilton Head, SC 29938-7523 Telephone Number: (843) 298-9764 Fax Number: (843) 341-9365	
TO: TD Bank 12000 Horizon Way Mount Laurel, NJ 08054 E-Mail: Telephone Number: Fax Number: Alternate Number:	
INVOICE NUMBER 140 Front 01/03/2019	
DATES Invoice Date: 01/03/2019 Due Date:	
REFERENCE Internal Order #: Lender Case #: Client File #: FHA/VA Case #: Main File # on form: 140 Front 01/03/2019 Other File # on form: 140 Front 01/03/2019 Federal Tax ID: Employer ID:	
DESCRIPTION	
Lender: TD Bank Client: TD Bank Purchaser/Borrower: Michael C. Garraway Property Address: 140 Front St City: Saint Helena Island State: SC Zip: 29920 County: Beaufort Legal Description: LOT 40 BERMUDA BLUFF S/D PH I PB54 P106	
FEES	
Due Upon Receipt 150.00	
SUBTOTAL 150.00	
PAYMENTS	
Check #: Date: Description: Check #: Date: Description: Check #: Date: Description: SUBTOTAL	
TOTAL DUE \$ 150.00	

APPRAISAL OF REAL PROPERTY



LOCATED AT

140 Front St
Saint Helena Island, SC 29920
LOT 40 BERMUDA BLUFF S/D PH I PB54 P106

FOR

TD Bank
12000 Horizon Way Mount Laurel, NJ 08054

AS OF

01/03/2019

BY

William R. Cobia, SRA
Coastal Property Appraisals
P.O. Box 7523 Hilton Head Island, SC 29938

CONSTRUCTION PROGRESS INSPECTION REPORT

140 Front 01/03/2019

Borrower	Michael C. Garraway			File No.	140 Front 01/03/2019		
Address	140 Front St						
and/or Lot #	40	Block #	56	Section #	28		
City	Saint Helena Island	County	Beaufort	State	SC	Zip Code	29920
Lender/Client	TD Bank						

Builder Stevens Builders, LLC Subdivision Bermuda Bluff
 Style of Home Low Country # of Stories 2 # of Units 1

#	Items Completed	%	1st	2nd	3rd	4th	5th	6th
	DATE INSPECTED		06/09/18	09/03/2018	12/03/2018	01/03/2019		
1	Clear Lot & Rough Grade	2	2					
2	Footings	4	4					
3	Foundation Walls & Piers	7	7					
4	Floor Frame (Joists) or Slab	3	3					
5	Subfloor	3	3					
6	Outside Studs and Top Plates (including sheathing)	3	2					
7	Inside Studs and Ceiling Joists	3	1.5	1.5				
8	Roof Framing	2		2				
9	Roof Sheathing and Felt	3		3				
10	Permanent Roof (shingles)	2		2				
11	Chimney/Fireplace	1			.5	.5		
12	Rough-in Plumbing	3		3				
13	Rough-in Wiring	2		2				
14	Rough-in Heat/Cool (ductwork)	2		2				
15	Outside Windows & Doors	4		3	1			
16	Siding and/or Brick Veneer	7			6	.5		
17	Exterior Trim (including gutters)	3				1.5		
18	Exterior Paint (prime)	1						
19	Insulation (walls & ceiling)	2						
20	Interior Walls & Ceiling (sheetrock/paneling)	6						
21	Interior Trim (windows & door molding)	4						
22	Kitchen Cabinets	3						
23	Interior Doors	2						
24	Interior Paint (prime)	1						
25	Bathroom Tile (floor & walls)	3						
26	Plumbing Complete (baths & kitchen)	2						
27	Interior Paint (including wallpaper)	2						
28	Hardware (doors, windows, cabinets)	2						
29	Wiring Complete (including fixtures & trim)	2						
30	Exterior Paint Complete	1						
31	Heating/Air Conditioning Units Installed	4				2		
32	Floor Covering (carpet, vinyl, wood)	3						
33	Screens/Storm Windows	2						
34	Outside Concrete (driveway, walks, patio)	2						
35	Finish Grade & Landscape	2						
36	Miscellaneous (deck, carport)	2			1	.5		
% Completed This Advance			22.5	18.5	8.5	5		
Total % Completed To Date			22.5	41	49.5	54.5		
INSPECTOR'S INITIALS								

Comments:

Inspector/Appraiser  Serial: 10653832 Inspector (if required)

Signature

Inspector/Appraiser

License/Cert. #

License/Cert. State

Date Signed

William R. Coble, SRA

3490

SC Expires 06/30/2020

01/04/2019

Signature

Inspector/Appraiser

License/Cert. #

License/Cert. State

Date Signed

Supervisor Inspected: ☐ Did Not ☐ Exterior ☒ Interior

Subject Photo Page

Borrower	Michael C. Garraway					
Property Address	140 Front St					
City	Saint Helena Island	County	Beaufort	State	SC	Zip Code 29920
Lender/Client	TD Bank					



Subject Front

140 Front St
Sales Price
Gross Living Area
Total Rooms
Total Bedrooms
Total Bathrooms
Location
View
Site
Quality
Age



Subject Rear



Subject

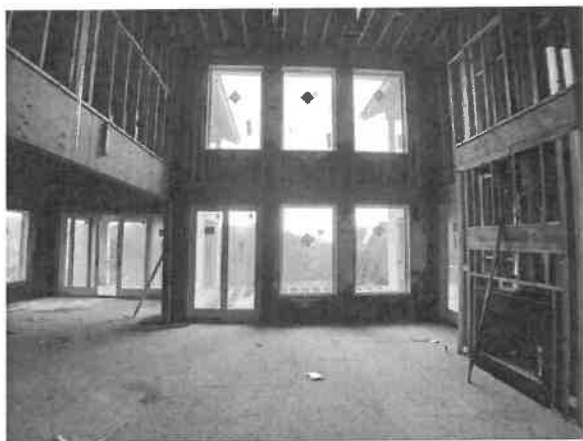
Subject Photo Page

Borrower	Michael C. Garraway					
Property Address	140 Front St					
City	Saint Helena Island	County	Beaufort	State	SC	Zip Code 29920
Lender/Client	TD Bank					



Subject

140 Front St
Sales Price
Gross Living Area
Total Rooms
Total Bedrooms
Total Bathrooms
Location
View
Site
Quality
Age



Subject



Subject

Subject Photo Page

Borrower	Michael C. Garraway						
Property Address	140 Front St						
City	Saint Helena Island	County	Beaufort	State	SC	Zip Code	29920
Lender/Client	TD Bank						



Subject

140 Front St
Sales Price
Gross Living Area
Total Rooms
Total Bedrooms
Total Bathrooms
Location
View
Site
Quality
Age



Subject



Subject



From: Michael Garraway <mrgarraway6570@yahoo.com>
Date: January 11, 2019 at 6:41:27 PM EST
To: Donna L Courchesne <Donna.Courchesne@td.com>
Cc: Herschel Stevens <stevensbuilders@bellsouth.net>, ALICIA Garraway <aliones6570@yahoo.com>, Amy H True <amy.true@td.com>
Subject: Re: 18619 ROUGH IN.pdf

Donna,

I would like to provide you with an itemized list of all disbursed payments and contractual materials purchased towards construction of our Home located at 140 Front Street Beaufort S.C. 29920 .

On February 17,2017 we paid Stevens Builders 10% Contract Deposit \$54,000.00 TD Bank Check #82516514.

On April 6,2018 Pursuant to disbursement work sheet, we paid we paid Stevens Builders the first draw of 15% \$81,000.00 TD Bank check #15298058.

On June 12,2018 Pursuant to second draw inspection report, we paid Stevens Builders 50% of draw #2 \$59,400.00 TD Bank check #15298132.

On August 9,2018 Pursuant to signed builders contract we made a deposit on the Kitchen and bathroom granite in the amount of \$4325.26 paid receipt sent to you via e-mail.

On September 4,2018 Pursuant to second draw balance of \$59,400.00 Stevens Builders was paid \$35,305.40 TD Bank check #15310142 also Broughton Cabinets paid \$19,769.24 TD Bank check #15310143 for Kitchen cabinets and bathroom vanities. Also the granite payment that we made of \$4,325.36 was also deducted from disbursement #2. Total \$59,400.00 towards home construction, completing second draw amount total \$118800.00.

On October 11,2018 pursuant builders contract(entrance door allowance \$2000.00 dollars) was paid towards the purchase of the entrance door. Receipt sent to you via e-mail.

On October 11,2018 we also submitted, pursuant to the builders contract receipts for \$6019.09 for plumbing fixtures /master tub fixtures. Receipts sent to you via e-mail.

On September 7,2018 TD Bank also released a disbursement in the amount of \$72,000.00 via wire transfer to Stevens Builders.

Payments made by Garraway's pursuant to Contract and disbursement scheduled: \$54,000.00 S. Builders

Stevens Builders 058

Builders	\$81,000.00	S.
Builders	\$59,400.00	S.
e Deposit	\$4325.26.	Granit
Builders	\$35,305.40	S.
n Cabinets / Bath Vanities	\$19,769.24	Kitche
nce door	\$2000.00	Entra
ing Fixtures/Master Tub Fixtures	\$6019.09.	Plumb

Total : **\$261,818.99** Paid
 out to Stevens Builders and Materials for House construction pursuant to signed Builders contract.

Payment made by TD Bank on 9/7/2018 to Stevens Builders
 Wire Transfer S. Builders

Total: **\$72,000.00** TD

Grand Total: \$333,818.09 Paid
 out to date for House Build by Garraway's and TD Bank.

Have a great weekend,I look forward to speaking with you on Monday.

On Jan 11, 2019, at 2:55 PM, Courchesne, Donna L <Donna.Courchesne@td.com> wrote:

Thanks. Let me double check it.

Stevens Builders 059

Donna Courchesne | VP | Loan Ops Manager I | Retail Credit and Loan Originations

TD Bank, America's Most Convenient Bank

Mailstop: ME2-001-023| 140 Mill St, Lewiston ME 04240

T: 207-755-6175 F: 207-755-6214

Out of office alert:

If at any time you are not receiving legendary service, please feel free to contact my manager Timothy Wilson at 207-755-6516 or Timothy.Wilson@td.com

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From: Buddy [<mailto:Stevensbuilders@bellsouth.net>]

Sent: Friday, January 11, 2019 2:33 PM

To: Courchesne, Donna L

Subject: Re: 18619 ROUGH IN.pdf

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 IEL EXTERNE. NE CLIQUEZ PAS SUR DES LIENS ET N'OUVREZ PAS DE PIÈCES JOINTES AUXQUELS VOUS NE FAIT

Donna

I am in agreement with funds in pink for a draw.

I do have a question however, in line item under "Total".

My total received is \$297,694.60. The total in that column is \$308,594.60 or a difference of \$10,900.

I was curious and if I missed something or was a credit for Garraway.

Stevens Builders 060

Thanks

Buddy

Sent from my iPhone

On Jan 11, 2019, at 1:37 PM, Courchesne, Donna L <Donna.Courchesne@td.com> wrote:

Hi Michael,

I attached it again. It is an excel spreadsheet.

Thank you again.

Donna Courchesne | VP | Loan Ops Manager I | Retail Credit and Loan Originations

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From: Michael Garraway [<mailto:mr garraway6570@yahoo.com>]
Sent: Friday, January 11, 2019 1:09 PM
To: Courchesne, Donna L
Cc: Buddy; ALICIA Garraway
Subject: Re: 18619 ROUGH IN.pdf

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Donna the PDF did not attach.

Michael Garraway

On Jan 11, 2019, at 12:57 PM, Courchesne, Donna L <Donna.Courchesne@td.com> wrote:

Hi Buddy and Michael,

Attached is the budget and what I show to be paid to date. Please let me know if there is something I am missing.

It appears to me we are in line with the budget. Items in pink I show could be paid based off the budget, and the inspection showing the work completed.

Please let me know if you agree with my findings.

Thank you again.

Donna Courchesne | VP | Loan Ops Manager I | Retail Credit and Loan Originations

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From: Buddy [<mailto:Stevensbuilders@bellsouth.net>]
Sent: Friday, January 11, 2019 12:07 PM
To: Courchesne, Donna L
Subject: Re: 18619 ROUGH IN.pdf

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Donna

Let me know if you have any questions.

I really would like to get the funds wired today.

Thanks

Buddy

Sent from my iPhone

On Jan 11, 2019, at 11:25 AM, Courchesne, Donna L <Donna.Courchesne@td.com> wrote:

Hi all,

I am going to review this again right now. It is possible that I missed something but will let you know as soon as I have gone over all of the numbers against the budget again.

I hope this will help resolve.

Thanks again!

Donna Courchesne | VP | Loan Ops Manager I | Retail Credit and Loan Originations

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From: Michael Garraway [<mailto:mrgarraway6570@yahoo.com>]

Sent: Friday, January 11, 2019 9:04 AM

To: Courchesne, Donna L

Cc: Buddy; ALICIA Garraway

Subject: Re: 18619 ROUGH IN.pdf

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Morning Donna,

As discussed you have copies of the Check for our kitchen cabinets also receipts for the granite deposit along with the receipt for the entrance door and plumbing fixtures . Everything purchased pursuant to our Signed builders contract.

Please let me know if you require anything additional.

Michael Garraway

On Jan 11, 2019, at 8:29 AM, Courchesne, Donna L <Donna.Courchesne@td.com> wrote:

Hi Buddy,

Here it is.

Donna Courchesne | VP | Loan Ops Manager I | Retail Credit and Loan Originations

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From: Buddy [<mailto:Stevensbuilders@bellsouth.net>]

Sent: Friday, January 11, 2019 8:26 AM

To: Courchesne, Donna L

Subject: Re: 18619 ROUGH IN.pdf

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Donna

Do you have a copy of the construction loan disbursement worksheet?

B

Sent from my iPhone

On Jan 11, 2019, at 8:20 AM, Courchesne, Donna L <Donna.Courchesne@td.com> wrote:

Hi Buddy,

What are the missing items? I will look at it again.

Donna Courchesne | VP | Loan Ops Manager I | Retail Credit and Loan Originations

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From: Buddy [<mailto:Stevensbuilders@bellsouth.net>]
Sent: Thursday, January 10, 2019 5:25 PM
To: Courchesne, Donna L
Subject: Re: 18619 ROUGH IN.pdf

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Donna

I don't know what Mr Garraway has paid or submitted to you.

You asked me several weeks ago to send you the amount of draws I have received because you didn't have that information.

I have sent you my amounts received with numbers.

Again, as I stated we were working from the documents agreed and signed for the bank titled" Construction Loan Disbursement Worksheet and not an outdated inspection list.

The inspection list I saw is not accurate with some missed items. I don't think it's been updated anytime based on the numbers assigned.

Thanks

Sent from my iPhone

On Jan 10, 2019, at 4:33 PM, Courchesne, Donna L <Donna.Courchesne@td.com> wrote:

Hi Buddy,

When we spoke you stated you would review the inspection, and the items paid by Mr. Garraway to see what I am missing. I have been waiting for you to send me the list of items you stated the borrower accounted for from his funds that were not part of the budget.

Thank you again.

Donna Courchesne | VP | Loan Ops Manager I | Retail Credit and Loan Originations

TD Bank, America's Most Convenient Bank

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From: Buddy [<mailto:Stevensbuilders@bellsouth.net>]

Sent: Thursday, January 10, 2019 4:30 PM

To: Courchesne, Donna L

Subject: Re: 18619 ROUGH IN.pdf

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Donna

We spoke at 10 am this morning and I have heard nothing back from you or the owner.

Please provide the status of the draw as soon as possible.

Stevens Builders 068

If you need to discuss further or have any questions please contact me.

Also, my cell phone number is (803) 645-0046.

Buddy Stevens

Sent from my iPhone

On Jan 9, 2019, at 8:40 AM, Courchesne, Donna L <Donna.Courchesne@td.com> wrote:

Good morning Buddy,

I am calling Mike this morning to see if I am missing something. I will let you know as soon as I talk to him.

Thanks again.

Donna Courchesne | VP | Loan Ops Manager I | Retail Credit and Loan Originations

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From: Buddy [<mailto:Stevensbuilders@bellsouth.net>]
Sent: Tuesday, January 08, 2019 5:04 PM
To: Courchesne, Donna L
Subject: Re: 18619 ROUGH IN.pdf

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Donna

That's very unfortunate news on the draw.

My records indicate a different amount and appears like the draw sheet prepared earlier is not used?

B

Sent from my iPhone

On Jan 8, 2019, at 9:28 AM, Courchesne, Donna L <Donna.Courchesne@td.com> wrote:

Good morning Buddy,

I have attached the latest inspection report showing the work is 54.5% complete.

My calculation is \$540,000.00 (cost to construct) X 54.5% = \$294,300.00 - \$72,000.00 from the loan, and \$261,819.09 paid by you. The total received by you so far is \$338,819.09.

We are still not able to release funds. Once the work is a little further along we will be able to release funds. It appears that once the insulation and sheetrock are in, we will be at the point of being able to release funds.

Thank you again.

Donna Courchesne | VP | Loan Ops Manager I | Retail Credit and Loan Originations

TD Bank, America's Most Convenient Bank

Mailstop: ME2-001-023| 140 Mill St, Lewiston ME 04240

T: 207-755-6175 F: 207-755-6214

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From: Michael Garraway [<mailto:mrqgarraway6570@yahoo.com>]

Sent: Tuesday, January 08, 2019 8:59 AM

To: Courchesne, Donna L

Cc: True, Amy H; ALICIA Garraway

Subject: Re: 18619 ROUGH IN.pdf

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MIEL EXTERNE. NE CLIQUEZ PAS SUR DES LIENS ET N'OUVREZ PAS DE PIÈCES JOINTES AUXQUELS VOUS NE FAIT

Morning Donna,

Can you send Buddy a copy of the inspection report and let him know what he needs to complete before he can get the next draw. I'm not sure and I don't want to give incorrect information.

Stevens Builders 071

Thank you.

Michael Garraway

On Jan 4, 2019, at 5:04 PM, Courchesne, Donna L <Donna.Courchesne@td.com> wrote:

Thank you Michael.

Donna Courchesne | VP | Loan Ops Manager I | Retail Credit and Loan Originations

TD Bank, America's Most Convenient Bank

Mailstop: ME2-001-023| 140 Mill St, Lewiston ME 04240

T: 207-755-6175 F: 207-755-6214

Out of office alert:

If at any time you are not receiving legendary service, please feel free to contact my manager Timothy Wilson at 207-755-6516 or Timothy.Wilson@td.com

Wire fraud and email hacking/phishing attacks are on the rise! If you receive an email containing Wire Transfer Instructions, DO NOT RESPOND TO THE EMAIL. Reach out to your point of contact at TD Bank.

This internal message and any attachments may contain confidential or privileged information and are intended only for the use of the intended recipients of this message. If you are not the intended recipient of this message, please notify the sender by return email, and delete this and all copies of this message and any attachments from your system. Any unauthorized disclosure, use, distribution, or reproduction of this message or any attachments is prohibited and may be unlawful

From: Michael Garraway [<mailto:mrgarraway6570@yahoo.com>]

Sent: Friday, January 04, 2019 5:02 PM

To: Courchesne, Donna L

Cc: True, Amy H; ALICIA Garraway

Subject: 18619 ROUGH IN.pdf

CAUTION: EXTERNAL MAIL. DO NOT CLICK ON LINKS OR OPEN ATTACHMENTS YOU DO NOT TRUST.
ATTENTION : COURRIEL EXTERNE. NE CLIQUEZ PAS SUR DES LIENS ET N'OUVREZ PAS DE PIÈCES JOINTES
AUXQUELS VOUS NE FAITES PAS CONFIANCE

Please see inspection report dated 1/02/19.

Michael Garraway

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<schedule of values.xlsx>



STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

STEVENS BUILDERS, LLC,

Plaintiff,

vs.

MICHAEL C. GARRAWAY, ALICIA
M. GARRAWAY, and TD BANK, N.A.

Defendant(s).

IN THE COURT OF COMMON PLEAS

Civil Action No. 2019-CP-07-01666

**ANSWER AND AFFIRMATIVE
DEFENSES OF TD BANK, N.A.**

Defendant TD Bank, N.A. ("***TD Bank***") submits this answer and affirmative defenses to Stevens Builders, LLC's ("***Plaintiff***") Complaint as follows:

1. Each and every allegation of the Complaint not specifically admitted, explained, or qualified is denied and strict proof is demanded.

2. TD Bank lacks sufficient knowledge to admit or deny the allegations of Paragraphs 1 and 2 of the Complaint, and those allegations are therefore denied.

3. Paragraph 3 is denied, except it is admitted that TD Bank is a national association. TD Bank further admits that it recorded a mortgage on April 15, 2019, in the Office of the Register of Deeds for Beaufort County, SC in Book 3752, at Page 0369, on the property which is the subject of this action ("***Mortgage***"). TD Bank further admits that it entered into a Construction Loan Agreement on April 15, 2019, with Michael Garraway in the amount of \$467,250.00.

4. TD Bank lacks sufficient knowledge to admit or deny the allegations in Paragraphs 4 and 5, and therefore denies those allegations.

5. Paragraph 6 is denied, except it is admitted only that TD Bank holds the Mortgage on the property at issue as reflected in the records of the Register of Deeds for Beaufort County.

6. TD Bank lacks sufficient knowledge to admit or deny the allegations in Paragraphs 7, 8, and 9, and therefore denies those allegations.

7. The allegations in Paragraph 10 are denied as legal conclusions.

8. The allegations in Paragraph 11 are denied as legal conclusions.

First Cause of Action
Breach of Contract as to the Garraways

9. No response is required to the allegations in Paragraphs 12, 13, 14, and 15, as they relate to a different Defendant. If these allegations are directed at TD Bank, then TD Bank lacks sufficient knowledge to admit or deny the allegations, and those allegations are therefore denied.

Second Cause of Action
Breach of Contract as to TD Bank

10. The allegations in Paragraphs 16, 17, 18, and 19, are denied as legal conclusions.

Third Cause of Action
Quantum Meruit

11. No response is required to the allegations in Paragraphs 20, 21, 22, and 23, as they relate to a different Defendant. If these allegations are directed at TD Bank, then TD Bank lacks sufficient knowledge to admit or deny the allegations, and those allegations are therefore denied.

Fourth Cause of Action

Foreclosure of Mechanic's Lien

12. No response is required to the allegations in allegations in Paragraphs 24, 25, 26, 27, 28, 29, 30, 31, and 32, as this Count was dismissed with prejudice. Furthermore, TD Bank lacks sufficient knowledge to admit or deny the allegations, and those allegations are therefore denied.

Prayer

WHEREFORE, Defendant TD Bank demands judgment in its favor and dismissal of Plaintiff's Complaint with an award of costs, attorney's fees, and such other relief as this Honorable Court may deem appropriate

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE

13. Plaintiff has failed to state a claim against TD Bank upon which relief may be granted.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE

14. Plaintiff's claims are barred by the equitable doctrine of unclean hands.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE

15. Plaintiff's claims are barred by the equitable doctrine of waiver.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE

16. Plaintiff's claims are barred by the equitable doctrine of estoppel.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE

17. Defendant TD Bank acted appropriately, reasonably, lawfully, properly, and in good faith.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE

18. TD Bank's Mortgage has priority over any interest in the property at issue that Plaintiff may have.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE

19. TD Bank reserves the right to amend its Answer to assert such other affirmative defenses as may become available or apparent during discovery.

WHEREFORE, TD Bank respectfully requests:

1. For a dismissal of the Plaintiff's Complaint with prejudice;
2. Judgment in favor of TD Bank on all claims herein;
3. For any further relief that the Court deems just and proper.

/s/ J. Martin Page

J. Martin Page (SC Bar No.: 100200)
 Bell Carrington Price & Gregg, LLC
 339 Heyward St., 2nd Floor
 Columbia, SC 29201
 (803)509-5078
 mpage@bellcarrington.com
 Attorneys for TD Bank, N.A.

Columbia, South Carolina
 June 23, 2020

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

STEVENS BUILDERS, LLC,

Plaintiffs,

V.

MICHAEL C. GARRAWAY, ALICIA M. GARRAWAY, and TD Bank, N.A.,

Defendants.

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)
)
) IN THE COURT OF COMMON PLEAS
)
) CIVIL CASE NO.: 2019-CP-07-1666
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**TD BANK'S MEMORANDUM OF LAW IN OPPOSITION OF
PLAINTIFF STEVENS BUILDERS'S MOTION TO COMPEL**

J. Martin Page, SC Bar No.: 100200
Bell Carrington Price & Gregg, LLC
 339 Heyward Street, 2nd Floor
 Columbia, SC 29201
 Phone: 803-508-5078

Lynne E. Evans (admitted *pro hac vice*)
Duane Morris LLP
 30 S. 17th Street
 Philadelphia, PA 19103
 Phone: 215-979-1102

Dated: January 28, 2022
Columbia, South Carolina

Attorneys for Defendants, TD Bank, N.A.

TD Bank, N.A. (“**TD Bank**”) responds to Plaintiff Stevens Builders, LLC (“**Stevens Builders**”)’s Motion to Compel Discovery Responses (“**Motion**”), and respectfully requests that the Court deny the Motion. The Court has discretion to limit discovery. *Oncology & Hematology Assocs. of S.C. LLC v. S.C. Dep’t of Health & Envtl. Control*, 387 S.C. 380, 387, 692 S.E.2d 920, 924 (2010) (“the trial court must make an effort to impose reasonable discovery limits”). *See also Hamm v. S.C. Pub. Serv. Comm’n*, 312 S.C. 238, 241, 439 S.E.2d 852, 854 (1994) (“the Rules allow the trial judge broad latitude in limiting the scope of discovery”); *Arthur v. Sexton Dental Clinic*, 368 S.C. 326, 338, 628 S.E.2d 894, 900 (Ct. App. 2006) (precluding witnesses identified after the discovery deadline).

The Motion should be denied for **three reasons**:

First, Stevens Builders’s discovery requests were untimely and thus did not require a response. The discovery deadline in this case had been extended to August 2, 2021. *See* Apr. 19, 2021 Consent Scheduling Order. Ignoring this deadline, Stevens Builders served its discovery requests on October 14, 2021—about two and a half months after discovery had closed. Thus, the requests were untimely and did not require a response. Stevens Builders has been given ample opportunity to participate in discovery in a timely manner, but has chosen to ignore Court-ordered deadlines by serving discovery requests after the discovery cutoff.

Second, Stevens Builders has consistently ignored other discovery deadlines in this case. TD Bank served discovery requests on Stevens Builders on May 21, 2021, and Stevens Builders’s responses were due June 21, 2021. After that deadline had already passed, Stevens Builders asked for a 20-day extension until July 12, 2021 to respond, and TD Bank agreed to an extension of the deadline to that date for Stevens Builders to provide discovery responses, but not objections. Stevens Builders should not be permitted to obtain further discovery from TD

Bank after it has repeatedly ignored discovery deadlines in this case and failed to pursue or respond to discovery in a diligent manner.¹ TD Bank wishes the case to proceed to summary judgment and resolution, and Stevens Builders's Motion prejudices TD Bank by extending discovery and the case further.

Third, TD Bank should be dismissed from this action because Stevens Builders's manufactured breach of contract claim against TD Bank lacks merit. *See* TD Bank's Motion for Summary Judgment filed 12/1/21. As shown in TD Bank's Motion for Summary Judgment, the breach of contract claim fails because: (1) there are no record facts showing that TD Bank failed to perform any contractual obligation under the construction loan agreement dated February 6, 2017 ("**Construction Loan Agreement**"); (2) Stevens Builders's claim that TD Bank breached the Construction Loan Agreement by not paying Stevens Builders when "Plaintiff has demanded payment" is inconsistent with, and contradicted by, the unambiguous provisions of the Construction Loan Agreement; and (3) there are no record facts showing that Stevens Builders satisfied conditions precedent to payment under the Construction Loan Agreement. *See id.* No additional discovery is needed to resolve the issues raised in TD Bank's Motion for Summary Judgment.

¹ Further, many of the requests by Stevens Builders are overbroad and unduly burdensome. *See, e.g.*, Exhibit 1, TD Bank's Objections and Responses to Plaintiff's First Set of Interrogatories, Request No. 6 ("Provide a detailed chronology of the Defendants' involvement with the construction project that is the subject of this action."); Request No. 7 ("Provide a detailed description of the Defendant's policies, procedures, and practices related to the funding of residential construction loans and its policies, procedures, and practices related to its oversight of construction projects for which it funds loans."); Request No. 9 ("Provide a list of entities, including names, telephone numbers, and addresses, which/who have complained to the Defendant that its failure to properly disburse construction loan funds to contractors has caused delays in the progression of the construction project or has caused other problems associated with the construction project or which/who have made any similar complaints, whether or not such complaint resulted in the filing of a legal action."); and Exhibit 2, TD Bank's Objections and Responses to Plaintiff's First Request for Production of Documents, Request No. 6 ("Produce all correspondence and communications, including electronic communications in any form, between and/ or among the Defendants and any contractor or other entity which has provided labor and materials for the improvement of the Garraways' property."); Request No. 8 ("Produce copies of contracts, agreements, invoices, receipts, or other documents associated with labor and materials or financing for the construction project that is the subject of this action.").

Stevens Builders also serially filed motions for default against TD Bank, which the Court repeatedly denied. *See, e.g.*, TD Bank's Opposition to Plaintiff's Third Motion for Default, filed Aug. 17, 2020. Stevens Builders seeks to further drain the Court's and parties' resources by extending discovery further, when the issues as to the breach of contract claim against TD Bank are ripe for resolution at summary judgment. For these reasons, TD Bank respectfully requests denial of the Motion and any other relief the Court deems proper.

Respectfully Submitted,

/s/ J. Martin Page

J. Martin Page, SC Bar No.: 100200

Bell Carrington Price & Gregg, LLC

339 Heyward Street, 2nd Floor

Columbia, SC 29201

Phone: 803-508-5078

Lynne E. Evans (admitted *pro hac vice*)

Duane Morris LLP

30 S. 17th Street

Philadelphia, PA 19103

Phone: 215-979-1102

Dated: January 28, 2022
Columbia, South Carolina

Attorneys for Defendants, TD Bank, N.A.

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

STEVENS BUILDERS, LLC,

Plaintiff,

v.

MICHAEL C. GARRAWAY, ALICIA M.
GARRAWAY, and TD Bank, N.A.,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL CASE NO.: 2019-CP-07-1666

**TD BANK, N.A.'S OBJECTIONS AND RESPONSES TO PLAINTIFF'S
FIRST SET OF INTERROGATORIES**

Pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, Defendant TD Bank, N.A. ("**TD Bank**") responds to Plaintiff Stevens Builders, LLC ("**Plaintiff**")'s First Set of Interrogatories ("**Interrogatories**") as follows:

GENERAL OBJECTIONS

1. TD Bank objects to the Interrogatories to the extent that they place or seek to place burdens or requirements on TD Bank that are unreasonable or inconsistent with the South Carolina Rules of Civil Procedure, or seek to impose an unreasonable burden or would otherwise create burden, hardship, or oppression beyond that authorized under the South Carolina Rules of Civil

Procedure, or seek discovery beyond that authorized under the South Carolina Rules of Civil Procedure.

2. TD Bank objects to the Interrogatories because they are untimely, as they were served after the consented to and Court-ordered discovery deadline of August 2, 2021 had passed. *See, e.g., Hamm v. S.C. Pub. Serv. Comm'n*, 312 S.C. 238, 241, 439 S.E.2d 852, 854 (1994) (“the Rules allow the trial judge broad latitude in limiting the scope of discovery”); *Arthur v. Sexton Dental Clinic*, 368 S.C. 326, 338, 628 S.E.2d 894, 900 (Ct. App. 2006) (precluding witnesses identified after the discovery deadline).

3. TD Bank objects to the Interrogatories to the extent that they are overbroad, unduly burdensome, not relevant to the claims and defenses in this lawsuit nor reasonably calculated to lead to the discovery of admissible evidence, or disproportionate to the needs of the case.

4. TD Bank objects to the Interrogatories to the extent that they require production or identification of data, documents, or information that is:

- a. subject to the attorney/client privilege, the attorney work product privilege or any other statutory or common law privilege;
- b. subject to the self-investigative privilege or self-critical analysis privilege, or concerning Anti-Money Laundering (“**AML**”), Bank Secrecy Act (“**BSA**”) or other compliance processes at TD Bank;
- c. relating to a Suspicious Activity Report (“**SAR**”) or any information that would disclose a SAR or reveal the existence of a SAR because such disclosure or revelation is expressly prohibited by federal law and regulation (*see* 31 U.S.C. 5318(g)(2)(A)(i) and 12 C.F.R. 21.11(k)(1)) and any attempts to request such disclosure or revelation will result in notification, pursuant to the foregoing federal law and regulation, to (A) Director, Litigation Division, Office

of the Comptroller of the Currency; and (B) The Financial Crimes Enforcement Network (FinCEN); or

- d. constituting or relating to OCC materials because such disclosure is expressly prohibited by federal law and regulation pursuant to 12 C.F.R. 18.9.

5. TD Bank objects to the Interrogatories to the extent that they are vague and ambiguous, or contain undefined terms.

6. TD Bank objects to the Interrogatories to the extent that they seek the identification of data, documents, or information that is protected from disclosure by Federal or State law and regulations.

7. TD Bank objects to each Interrogatory to the extent that it is cumulative and/or duplicative of another Interrogatory.

8. TD Bank objects to the Interrogatories to the extent they seek the identification of data, documents, or information that is confidential, privileged, sensitive, or proprietary to TD Bank, or confidential customer data that is prohibited or protected from disclosure under any Federal and State Privacy Law or Regulations, including the Right to Privacy Act of 1978, 12 U.S.C. § 3401 *et seq.*

OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS

1. TD Bank objects to the Definitions and Instructions to the extent that they seek documents or information that is subject to the attorney-client privilege, the attorney work product privilege or any other statutory or common law privilege.

2. TD Bank objects to the Definition of “Document” to the extent that it seeks documents “including but not limited to” those listed, as such request is vague, undefined, overbroad and unduly burdensome.

3. TD Bank objects to the Definition of “Document(s)” to the extent that it seeks documents beyond that permitted under South Carolina Rule of Civil Procedure 34(a)(1).

4. TD Bank objects to Definitions 3(a) and 3(d), which define the term “identify”, because they contain multiple subparts and seeks to impose burdens beyond the requirements of the South Carolina Rules of Civil Procedure.

5. TD Bank objects to the Interrogatories to the extent that they fail to define a relevant timeframe in its request for documents.

6. TD Bank objects to the Interrogatories to the extent that the Interrogatories fail to define that the documents and information requested is within the confines of this action. As such, TD Bank will only address interrogatories in the confines of the above-captioned matter.

RESPONSE TO INTERROGATORIES

Subject to the foregoing General Objections and Objections to Definitions and Instructions, all of which are specifically incorporated in response to each of the individual Interrogatories, TD Bank responds further to each individually numbered request as follows:

1. Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

ANSWER: TD Bank incorporates General Objections 2 and 5.

2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the party that relate to the claim or defense in the case.

ANSWER: TD Bank incorporates General Objections 1, 2, 3, 4, 5, 6, and 8, and the Objections to Definitions and Instructions 1, 2 and 3.

3. Set forth an itemized statement of all damages, exclusive of pain and suffering, claimed to have been sustained by the party.

ANSWER: TD Bank incorporates General Objections 2 and 5.

4. List the names and addresses of any expert witnesses whom the party proposes to use as a witness at the trial of the case.

ANSWER: TD Bank incorporates General Objections 2.

5. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

ANSWER: TD Bank incorporates General Objections 1, 2, 4 and 6, and the Objections to Definitions and Instructions 1.

6. Provide a detailed chronology of the Defendant's involvement with the construction project that is the subject of this action.

ANSWER: TD Bank incorporates General Objections 1, 2, 3, 4, 5, 6 and 8, and the Objections to Definitions and Instructions 1.

7. Provide a detailed description of the Defendant's policies, procedures, and practices related to the funding of residential construction loans and its policies, procedures, and practices related to its oversight of construction projects for which it funds loans.

ANSWER: TD Bank incorporates General Objections 1, 2, 3, 4, 5, 6 and 8, and the Objections to Definitions and Instructions 1, 2 and 3.

8. Give a detailed description of any and all communications between you and any party to this action.

ANSWER: TD Bank incorporates General Objections 1, 2, 3, 4, 5, 6, and 8, and the Objections to Definitions and Instructions 1, 5 and 6.

9. Provide a list of entities, including names, telephone numbers, and addresses, which/who have complained to the Defendant that its failure to properly disburse construction loan funds to contractors has caused delays in the progression of the construction project or has caused other problems associated with the construction project or which/who have made any similar complaints, whether or not such complaint resulted in the filing of a legal action.

ANSWER: TD Bank incorporates General Objections 1, 2, 3, 4, 5, 6 and 8, and the Objections to Definitions and Instructions 5 and 6.

10. Provide the name, telephone number, and address of each employee or agent of the Defendant who has knowledge of the construction project and associated loan that are the subject of this action and describe their involvement with the project and/or funding of the loan.

ANSWER: TD Bank incorporates General Objections 2, 4, 5, 6, 7 and 8, and the Objections to Definitions and Instructions 1 and 5.

Respectfully,

/s/ 

J. Martin Page, SC Bar No.: 100200

Bell Carrington Price & Gregg, LLC

339 Heyward Street, 2nd Floor

Columbia, SC 29201

Phone: 803-508-5078

Lynne Evans (admitted *pro hac vice*)

Duane Morris LLP

30 S. 17th Street

Philadelphia, PA 19103

Phone: (215) 979-1102

Dated: November 12th, 2021

Attorneys for Defendant, TD Bank, N.A.

Procedure, or seek discovery beyond that authorized under the South Carolina Rules of Civil Procedure.

2. TD Bank objects to the Requests because they are untimely, as they were served after the consented to and Court-ordered discovery deadline of August 2, 2021 had passed. *See, e.g., Hamm v. S.C. Pub. Serv. Comm'n*, 312 S.C. 238, 241, 439 S.E.2d 852, 854 (1994) (“the Rules allow the trial judge broad latitude in limiting the scope of discovery”); *Arthur v. Sexton Dental Clinic*, 368 S.C. 326, 338, 628 S.E.2d 894, 900 (Ct. App. 2006) (precluding witnesses identified after the discovery deadline).

3. TD Bank objects to the Requests to the extent that they are overbroad, unduly burdensome, not relevant to the claims and defenses in this lawsuit nor reasonably calculated to lead to the discovery of admissible evidence, or disproportionate to the needs of the case.

4. TD Bank objects to the Requests to the extent that they require production or identification of data, documents, or information that is:

- subject to the attorney/client privilege, the attorney work product privilege or any other statutory or common law privilege;
- subject to the self-investigative privilege or self-critical analysis privilege, or concerning Anti-Money Laundering (“**AML**”), Bank Secrecy Act (“**BSA**”) or other compliance processes at TD Bank;
- relating to a Suspicious Activity Report (“**SAR**”) or any information that would disclose a SAR or reveal the existence of a SAR because such disclosure or revelation is expressly prohibited by federal law and regulation (*see* 31 U.S.C. 5318(g)(2)(A)(i) and 12 C.F.R. 21.11(k)(1)) and any attempts to request such disclosure or revelation will result in notification, pursuant to the foregoing federal law and regulation, to (A) Director, Litigation Division, Office

of the Comptroller of the Currency; and (B) The Financial Crimes Enforcement Network (FinCEN); or

- constituting or relating to OCC materials because such disclosure is expressly prohibited by federal law and regulation pursuant to 12 C.F.R. 18.9.

5. TD Bank objects to the Requests to the extent that they are vague and ambiguous, or contain undefined terms.

6. TD Bank objects to the Requests to the extent that they seek documents or information that is protected from disclosure by Federal or State law and regulations.

7. TD Bank objects to each Request to the extent that it is cumulative and/or duplicative of another Request.

8. TD Bank objects to the Requests to the extent they seek data and/or information that is confidential, privileged, sensitive, or proprietary to TD Bank, or confidential customer data that is prohibited or protected from disclosure under any Federal and State Privacy Law or Regulations, including the Right to Privacy Act of 1978, 12 U.S.C. 3401 *et seq.*

OBJECTIONS TO GENERAL INSTRUCTIONS AND DEFINITIONS

1. TD Bank objects to the General Instructions and Definitions to the extent that they seek documents or information that is subject to the attorney-client privilege, the attorney work product privilege or any other statutory or common law privilege.

2. TD Bank objects to the Definition of “Document” to the extent that it seeks documents “including but not limited to” those listed, as such request is vague, undefined, overbroad and unduly burdensome.

3. TD Bank objects to the Definition of “Document(s)” to the extent that it seeks documents beyond that permitted under South Carolina Rule of Civil Procedure 34(a)(1).

4. TD Bank objects to the Requests to the extent that they fail to define a relevant timeframe in its request for documents.

5. TD Bank objects to the Requests to the extent that the Requests fail to define that the documents requested are within the confines of this action. As such, TD Bank will only address requests in the confines of the above-captioned matter.

RESPONSE TO REQUESTS

Subject to, and without waiver of the foregoing General Objections and Objections to Definitions and Instructions, all of which are specifically incorporated in response to each of the individual Requests, TD Bank further responds to each individually numbered Request as follows:

1. Please produce all documents and statements identified in the Defendant’s responses to the Plaintiff’s First Set of Interrogatories.

RESPONSE: TD Bank incorporates General Objections 2, 6 and 8, and the Objections to General Instructions and Definitions 2 and 3.

2. Please produce all documents the Defendant intends to use at the trial of this case as exhibits, demonstrative evidence, or any other purpose.

RESPONSE: TD Bank incorporates General Objections 1, 2, 5, 6, 7 and 8, and the Objections to General Instructions and Definitions 2 and 3.

3. Please produce copies of all documents obtained by the Defendant or anyone acting on their behalf via Subpoena Duces Tecum, signed authorization form, or other legal process.

RESPONSE: TD Bank incorporates General Objections 1, 2, 3, 4, 5, 6, 7 and 8, and the Objections to General Instructions and Definitions 1, 2, 3, 4 and 5.

4. Please produce all documents received from or sent to any expert witness, including but not limited to any correspondence, written opinions, reports, or drafts.

RESPONSE: TD Bank incorporates General Objections 1, 2, 3, 4, 6, 7 and 8, and the Objections to General Instructions and Definitions 1, 2, 3, 4 and 5.

5. Produce all correspondence and communications, including electronic communications in any form, between and/or among the parties (or anyone acting on their behalf) to this action.

RESPONSE: TD Bank incorporates General Objections 2, 3, 4, 6, 7 and 8, and the Objections to General Instructions and Definitions 1 and 4.

6. Produce all correspondence and communications, including electronic communications in any form, between and/or among the Defendants and any contractor or other entity which has provided labor and materials for the improvement of the Garraways' property.

RESPONSE: TD Bank incorporates General Objections 2, 3, 5 and 7, and the Objections to General Instructions and Definitions 4.

7. Produce all correspondence and communications, including electronic communications in any form, between and/or among the employees and/or agents of the Defendant concerning the construction project that is the subject of this action from June 2016 to present.

RESPONSE: TD Bank incorporates General Objections 2, 3, 4, 5, 6, 7 and 8, and the Objections to General Instructions and Definitions 1.

8. Produce copies of contracts, agreements, invoices, receipts, or other documents associated with labor and materials or financing for the construction project that is the subject of this action.

RESPONSE: TD Bank incorporates General Objections 1, 2, 3, 5, 6, 7 and 8, and the Objections to General Instructions and Definitions 2, 3 and 4.

Respectfully,

/s/ 

J. Martin Page, SC Bar No.: 100200
Bell Carrington Price & Gregg, LLC
339 Heyward Street, 2nd Floor
Columbia, SC 29201
Phone: 803-508-5078

Lynne Evans (admitted *pro hac vice*)
Duane Morris LLP
30 S. 17th Street
Philadelphia, PA 19103
Phone: (215) 979-1102

Dated: November 12th, 2021

Attorneys for Defendant, TD Bank, N.A.

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

STEVENS BUILDERS, LLC,

Plaintiff,

vs.

MICHAEL C. GARRAWAY, ALICIA M.
GARRAWAY, and TD Bank, N.A.,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL CASE NO.: 2019-CP-07-1666

**NOTICE OF MOTION, MOTION FOR
RECONSIDERATION, AND
MEMORANDUM IN SUPPORT**

PLEASE TAKE NOTICE that the Plaintiff, Stevens Builders, LLC, shall move the Court to alter or amend its order filed May 27, 2022 (hereinafter the “Order”) at such time and place as directed by the Court, upon the following grounds:

FACTS AND PROCEDURAL HISTORY**Facts**

The Plaintiff finds the first paragraph of the Court’s Findings of Fact to be accurate. However, the Court failed to include and consider relevant factual matter which occurred simultaneously with and subsequent to the execution of the Construction Loan Agreement.

On February 6, 2017, the same date of the execution of the Construction Loan Agreement, Defendant TD Bank, N.A. (hereinafter “TD”) required the Plaintiff and the Defendants Michael C. Garraway and Alicia M. Garraway (hereinafter the “Garraways”) to execute an attachment to the Construction Loan Agreement entitled “Construction Loan Disbursement Worksheet” (hereinafter “Worksheet”). The Worksheet set forth the particular items and the percentage of completion of the construction project necessary for the disbursement from both the Garraways

and from TD to the Plaintiff.¹ This document became the basis for the conduct of the parties during the course of the construction project. However, over the course of the construction project, TD issued amended Worksheets and otherwise changed the requirements of the Construction Loan Agreement.

In response to TD's interrogatories to the Plaintiff, the Plaintiff outlined the many changes to the Construction Loan Agreement over the course of the Project. It stated, in part, as follows:

When the parties executed the CLA, they also signed a Construction Loan Disbursement Worksheet (Worksheet 1) provided by TD Bank. Worksheet 1 required disbursement to be made upon the completion of certain tasks, which tasks, cumulatively, amounted to a certain percentage of project completion. Percentages of project completion for individual tasks were not designated on Worksheet 1. On or about April 6, 2018, TD Bank began using a different Construction Loan Disbursement Worksheet (Worksheet 2) to determine the timing and amount of disbursements. Worksheet 2 recognized that \$540,000.00, not \$585,000.00, was to be distributed over the course of the project. It also amended the tasks to be completed prior to disbursements. It appears that the parties loosely followed the guidelines of Worksheet 2 through the Third Disbursement.

On or about June 11, 2018, TD Bank sent the Plaintiff a Construction Progress Report to use as guidance for the timing of disbursements. It assigned percentages of project completion to specific tasks, but those percentages did not directly reflect the percentages on Worksheet 2 and the tasks necessary for disbursements did not directly reflect those shown on Worksheet 2.

Later, TD Bank generated a spreadsheet entitled Field Inspection Report. It listed tasks and assigned monetary values, but not percentages of project completion, to those tasks. In late December 2018, the Field Inspection Report showed that 53% of the project had been paid for.

On January 3, 2019, William R. Cobia, SRA, upon the request of TD Bank, conducted an inspection of the project and provided TD Bank with a Construction Progress Inspection Report. This was not in the same form as the Construction Progress Report referenced above and Mr. Cobia has stated that the form he used was his own,

¹ See Ex. A to TD's Motion for Summary Judgment, pp. 7-8

i.e., it was not Provided by TD Bank and had no relation to either of the Worksheets, the Construction Progress Report, or the Field Inspection Report. Indeed the percentages of project completion on Mr. Cobia's report were different from those on any of the forms previously provided by TD Bank. Mr. Cobia's report showed the project as being 54.5% complete. However, when applying the percentages of project completion as shown on Worksheet 2 and the Construction Progress Report, as well as the percentages of project completion as derived from monetary values assigned to tasks on the Field Inspection Report, to Mr. Cobia's findings, it is clear that a much higher percentage of the project was complete.

When, in December 2018, TD failed to disburse funds according to the requirements it had, itself, set forth, the Plaintiff, Michael Garraway, and Donna Courchesne, an agent of TD, engaged in correspondence concerning whether a disbursement should be made. This correspondence culminated with Ms. Courchesne's recognizing that, based on TD's investigation of the matter, a \$71,400.00 disbursement was due from TD to the Plaintiff. Without the funding necessary to proceed with the construction project, progress stalled and this action was the result.

Procedural History

The Plaintiff filed a Summons and Complaint on July 18, 2019 alleging TD breached its contract by failing to pay the Plaintiff as required by the Construction Loan Agreement. TD was served by personal service on September 30, 2019.² TD defaulted, failed to participate in a default damages hearing, and did not file an Answer until June 23, 2020. On October 21, 2020, the Court very graciously granted TD relief from default. The Plaintiff filed a Motion for Reconsideration on November 2, 2020. That motion was heard on January 25, 2021 and an Order denying it was issued on January 27, 2021. As such, substantial delay was caused by TD's failure to participate in the action, and litigation of the material issues of the case did not begin until January of 2021.

² See Affidavit of Service filed October 14, 2019

On April 19, 2021, the Court entered a Consent Scheduling Order which required discovery to be completed on or before August 2, 2021. Due to the Plaintiff's counsel's oversight of this deadline, the Plaintiff did not serve discovery requests upon TD until October 14, 2021. TD responded to the discovery request by objecting to them as untimely. The Plaintiff filed a Motion to Compel Discovery Responses, which was heard on April 20, 2022. The Court denied that Motion but indicated that an amended scheduling order which allowed for an extension of the deadline for the completion of discovery would be proper. During the hearing and in its April 21, 2022 Order on the Motion to Compel Discovery Responses, the Court ordered the parties to coordinate on the Consent Scheduling Order which was discussed during the hearing.

On April 22, 2022, counsel for the Plaintiff prepared a proposed Amended Consent Scheduling Order which counsel believed to be in conformity with the Court's instructions. On the same day, counsel for the Plaintiff emailed a copy of that proposed order to counsel for the Garraways and TD seeking input on or consent to file the same. Neither counsel for the Garraways nor for TD responded to that email or a subsequent email seeking response from the other parties. When the other parties failed to communicate with regard to the proposed scheduling order, the Plaintiff submitted the same to the Court on May 18, 2022.

On May 23, 2022, the Court held a hearing on TD's Motion for Summary Judgment. TD argued that it had no duty to make disbursements to the Plaintiff at any particular time or in any particular amount because the Construction Loan Agreement was unambiguous and TD "retain[ed] the option, in its sole discretion, to change the timing and amounts of disbursements provided in any schedule established by or in connection with this loan . . . [t]he method by which it disburses the money shall be at the discretion of [TD Bank], based upon the percentage of work completed."

The Plaintiff argued, first, that a reading of that contract provision and any other terms of the Construction Loan Agreement as relieving TD of any duty whatsoever to the Plaintiff would

be an interpretation that rendered the provisions of the Construction Loan Agreement meaningless or superfluous. Second, it argued that the Construction Loan Agreement should be interpreted in favor of the Plaintiff because it was ambiguous in that the main body of the document and the Worksheet were contradictory. The former placed no obligation on TD to make disbursements or take any other action while the latter established very clear duties for both parties. Third, the Plaintiff argued that the Construction Loan Agreement had been modified both by the express agreement of the parties (in accepting and adhering to amended worksheets) and by the course of conduct of the parties during the course of the construction project.

LAW AND ANALYSIS

Reconsideration

A party may move the court to alter or amend its order when the court has misunderstood or failed to fully consider an argument or issue and the party wishes for the court to reconsider it.³ It is inherently unfair to disallow a party an opportunity to call the court's attention to a possible misapprehension of an earlier argument and also revisit a previously raised argument, even if it means rehashing all or part of those arguments.⁴

Summary Judgment Standard

Summary judgment is available when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.⁵ A motion for summary judgment is a search of the record to determine if there is a genuine dispute of material fact.⁶ Summary judgment is denied if a genuine dispute exists, even if the court believes that the movant will eventually prevail at the trial on the merits.⁷ Summary judgment is inappropriate even if the facts are

³ *Elam v. S.C. DOT*, 361 S.C. 9, 602 S.E.2d 772 (2004).

⁴ *Id.*

⁵ Rule 56, SCRPC, *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 644 S.E.2d 724 (2007).

⁶ *Higgins v. MUSC*, 326 S.C. 592, 599, 486 S.E.2d 269, 272 (Ct. App. 1997)

⁷ *Hammond v. Scott*, 268 S.C. 137, 232 S.E.2d 336 (1977).

undisputed, if the uncontested facts support different inferences.⁸ When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party.⁹ Summary judgment is a drastic remedy to be invoked cautiously and must be denied if the non-moving party demonstrates a scintilla of evidence in support of her claims.¹⁰

Contract Interpretation

An interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous.¹¹ Where one construction makes the provision unusual or extraordinary and another construction which is equally consistent with the language employed would make it reasonable, fair and just, the latter construction must prevail.¹² If the Court reads the Construction Loan Agreement as placing no duties upon TD, the construction loan agreement would be totally meaningless and superfluous. The Plaintiff provided evidence that the intention of the parties was that the Worksheet and its successors be incorporated into the Construction Loan Agreement and that the parties were to be bound by the requirements of the same.

A contract is ambiguous when the terms of the contract are inconsistent on their face, or are reasonably susceptible of more than one interpretation.¹³ A contract is ambiguous only when it may fairly and reasonably be understood in more ways than one or is unclear because it expresses its purpose in an indefinite manner.¹⁴ Ambiguous language in a contract should be construed

⁸ *Koester v. Carolina Rental Ctr., Inc.*, 313 S.C. 490, 443 S.E.2d 392 (1994); *Dowling v. Home Buyers Warranty Corp.*, 303 S.C. 295, 400 S.E.2d 143 (1991).

⁹ *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997).

¹⁰ *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)

¹¹ *Stevens Aviation, Inc. v. DynCorp Int'l LLC*, 407 S.C. 407, 756 S.E.2d 148 (2014)

¹² *Sanders v. General Motors Acceptance Corp.*, 180 S.C. 138, 185 S.E. 180 (1936)

¹³ *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585 (Ct. App. 1997)

¹⁴ *Farr v. Duke Power Co.*, 265 S.C. 356, 218 S.E.2d 431 (1975)

liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity.¹⁵

Ambiguity exists in the contract here because, on the one hand, the Construction Loan Agreement requires no duty to disburse funds on the part of TD while, on the other hand, the Worksheet which was made a part of the contract, clearly lays out the Plaintiff's duty provide labor and materials as well as the Defendants' duties to pay the Plaintiff. Liberal construction in the Plaintiff's favor requires the court to determine that there is evidence in the record that tends to show that the parties were bound by the Worksheet and that there is a question of material fact as to whether TD breached the Construction Loan Agreement.

Contract Modification

A written contract may be modified by a subsequent agreement of the parties, provided the subsequent agreement contains all the requisites of a valid contract.¹⁶ In order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement.¹⁷ A written contract may be modified by the parties thereto in any manner they choose.¹⁸

Here, the parties modified the Construction Loan Agreement on several occasions when TD sent the Plaintiff and the Garraways new worksheets and other documents detailing the parties' duties. Once these documents were sent and received, the parties would abide by the terms of those documents. So, in January 2019, the Plaintiff was abiding by the Construction Loan Agreement as modified. TD acknowledged that the parties were bound by its modifications when Donna

¹⁵ *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 499-500, 649 S.E.2d 494, 502 (Ct. App. 2007)

¹⁶ *Florence City-County Airport Comm'n v. Air Terminal Parking Co.*, 283 S.C. 337, 341, 322 S.E.2d 471, 473 (Ct. App. 1984)

¹⁷ *Hughes v. Edwards*, 265 S.C. 529, 220 S.E. (2d) 231 (1975)

¹⁸ *Evatt v. Campbell*, 234 S.C. 1, 6-7, 106 S.E.2d 447, 450 (1959)

Courchesne sent the Plaintiff and Michael Garraway an email acknowledging that the Plaintiff had provided the labor and materials necessary for the disbursement of funds. As such, there is a genuine issue as to a material fact and summary judgment is inappropriate.

Necessity of Opportunity to Complete Discovery

Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.¹⁹ As discussed above, TD refused to participate in discovery when the Plaintiff served discovery requests upon it. While the discovery requests certainly should have been served within the applicable deadline, the Plaintiff should not be deprived of its full and fair opportunity to complete discovery because of its counsel's oversight. This is especially true in this case, in which TD has been habitually dilatory, has caused substantial delay from the outset, and ultimately refused to communicate with counsel for the Plaintiff regarding the proposed scheduling order requested by the Court. As such, it grossly unfair and unjust that TD be afforded great mercy from the court and then attempt to preclude the extension of the same to the Plaintiff. The completion of discovery would, undoubtedly, reveal additional evidence which would support the Plaintiff's allegations and make summary judgment inappropriate.

CONCLUSION

For the foregoing reasons, it is necessary that the court reconsider its Order dated May 27, 2022 and deny TD's Motion for Summary Judgment.

¹⁹ *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991)

Submitted June 6, 2022.

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STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

STEVENS BUILDERS, LLC,

Plaintiff,

V.

MICHAEL C. GARRAWAY, ALICIA M. GARRAWAY, and TD Bank, N.A.,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL CASE NO.: 2019-CP-07-1666

**TD BANK, N.A.'S RESPONSE
AND MEMORANDUM OPPOSING
PLAINTIFF'S MOTION FOR
RECONSIDERATION**

TO: Benjamin T. Copping, Esq.
Attorney for Plaintiff

Defendant TD Bank, N.A. (“**TD Bank**”) respectfully submits this Response and Memorandum Opposing Plaintiff Steven Builders (“**Steven Builders**”)’s Motion for Reconsideration (“**Motion**”) of the Court’s May 27, 2022 Order granting summary judgment in favor of TD Bank (“**Order**”). There are **two reasons** why the Motion should be denied:

First, Steven Builders's Motion fails to meet any of the grounds for reconsideration; and

Second, this Court appropriately considered and correctly granted TD Bank's Motion for Summary Judgment because (i) there are no record facts

showing TD Bank failed to perform any contractual obligation under the Construction Loan Agreement, (ii) Stevens Builders's claim is inconsistent with and contradicted by the clear and unambiguous provisions of the Construction Loan Agreement, and (iii) there are no record facts showing that Stevens Builders satisfied conditions precedent to payment under the Construction Loan Agreement.

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I. INTRODUCTION

Defendant TD Bank, N.A. (“**TD Bank**”) respectfully submits this Opposition to Plaintiff Steven Builders (“**Steven Builders**”)’s Motion for Reconsideration (“**Motion**”) of the Court’s May 27, 2022 Order granting summary judgment in favor of TD Bank (“**Order**”). Steven Builders’s Motion merely reargues issues that were fully briefed, considered and resolved by the Court. There are **two reasons** why Motion should be **denied**:

First, Steven Builders’s Motion fails to meet any of the grounds for reconsideration; and

Second, this Court appropriately considered and correctly granted TD Bank’s Motion for Summary Judgment because (i) there are no record facts showing TD Bank failed to perform any contractual obligation under the Construction Loan Agreement, (ii) Stevens Builders’s claim is inconsistent with and contradicted by the clear and unambiguous provisions of the Construction Loan Agreement, and (iii) there are no record facts showing that Stevens Builders satisfied conditions precedent to payment under the Construction Loan Agreement.

II. RELEVANT BACKGROUND

The heart of this action is a dispute between a building contractor, Stevens Builders, and two of its customers, Defendants Michael Garraway and Alicia Garraway (collectively, “**Garraways**”). But, Stevens Builders, searching for a deep pocket, asserted an additional claim against TD Bank, whose involvement was only as the Garraways’ construction lender.

In 2016, the Garraways entered into a contract with Stevens Builders for the construction of a new home in South Carolina (“**Construction Contract**”). After the Garraways and Stevens Builders entered their Construction Contract, they both made an agreement with TD Bank (“**Construction Loan Agreement**”). Specifically, on February 6, 2017, the Garraways made a loan agreement with TD Bank for a construction loan of \$280,000. Stevens Builders became a party to and executed the Construction Loan Agreement as the “Contractor.”

The Construction Loan Agreement contains several clear and unambiguous terms about TD Bank’s rights and obligations concerning construction loan disbursements.

Importantly, the Construction Loan Agreement states that TD Bank would make construction loan disbursements only if certain conditions were met. Specifically, construction loan disbursements:

- Were not to be made “***unless and until. . . the Borrower presents proper written demand from the Contractor***”;¹
- Were to be made “based upon the percentage of work completed”;
- Were to be made “only for work already completed and deposits for supplies as approved by Lender on a case by case basis, and only for work contemplated in the original Construction Contract and contract price”; and
- Were to be made “only as long as construction progresses in accordance with the specifications, drawings and plans (as determined by the Lender in its sole discretion, and for the Lender’s benefit only), and only provided that there are no violations of any terms of this documents of any other documents signed in connection with this loan”.

¹ Emphasis added throughout unless indicated to the contrary.

Construction Loan Agreement, Sect. III, ¶ 1.

Moreover, as to the timing and amount of disbursements, **TD Bank “retain[ed] the option, in its sole discretion, to change the timing and amounts of disbursements provided in any schedule** established by or in connection with this loan . . . [t]he method by which it disburses the money shall be at the discretion of [TD Bank], based upon the percentage of work completed.” Construction Loan Agreement, Sect. III, ¶ 1.

TD Bank properly disbursed funds to Stevens Builders in compliance with the Construction Loan Agreement. It is undisputed that TD Bank was never presented with a written demand from the Garraways to pay Stevens Builders the amount Stevens Builders seeks to recover in this action. Per the Construction Loan Agreement, TD Bank was unable to disburse funds until this prerequisite was met. The Construction Loan Agreement specifically states: “The advances will not be made unless and until, in addition to meeting the other requirements of this Agreement, the Borrower presents proper written demand from the Contractor.”

The Construction Loan Agreement also provided that an inspector, of TD Bank’s choosing, would periodically inspect the property to determine the progress of the work. Section III ¶ 1 of the Construction Loan Agreement provides:

The advances will be paid out only for work already completed and deposits for supplies as approved by Lender on a case by case basis, and only for work contemplated in the original Construction Contract and contract price. **The advances will be paid out only as long as construction progresses in**

accordance with the specifications, drawings and plans (as determined by the Lender in its sole discretion, and for the Lender's benefit only)

The Lender retains the option, in its sole discretion, to change the timing and amounts of disbursements provided in any schedule established by or in connection with this loan. ***In order to determine whether adequate progress has been made, an individual selected by the Lender will visit the site to determine that the project is being completed according to plans and specifications (as determined by the Lender in its sole discretion, and for the Lender's benefit only).***

The agreement does not specify any particular worksheet to be used in determining or tracking the progress made. *See generally id.* To the contrary, the Construction Loan Agreement clearly and unambiguously states that TD Bank retains the option, in its sole discretion, to change the timing and amounts of disbursements provided in any schedule. Construction Loan Agreement, Sect. III, ¶ 1.

On or about July 18, 2019, Stevens Builders filed its Complaint. On or about April 13, 2021, the case was referred to the Hon. Marvin H. Dukes III. Thereafter, on December 2, 2021, TD Bank filed its Motion for Summary Judgment. On May 27, 2022, after hearing on TD Bank's Motion for Summary Judgment, the Court entered an Order granting TD Bank's Motion. On June 6, 2022, Stevens Builders filed the instant Motion for Reconsideration.

III. ARGUMENT

A. Steven Builders's Motion Should Be Denied Because It Fails To Meet Any Of The Grounds for Reconsideration.

A motion for reconsideration is appropriate when ***"the court has misunderstood, failed to fully consider, or perhaps failed to rule on an***

argument or issue, and the party wishes for the court to reconsider or rule on it,” or when “an issue or argument has been raised, but not ruled on[.]” *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 778 (2004).²

Thus, where a court has already considered and rejected an argument raised by a party for reconsideration, the motion for reconsideration should be denied. *See, e.g., Saj v. Adams*, No. 2015CP4601222, 2016 WL 9053015, at *1 (S.C.Com.Pl. Aug. 02, 2016) (**denying reconsideration** of motion for summary judgment order **because there was “no matter presented** [in the reconsideration briefing] **that was not addressed expressly or by clear implication in the prior order.**”). Further, motions for reconsideration are granted sparingly. *See, e.g., Bray v. Marathon Corp.*, No. 97-CP-21-292, 1999 WL 35115057 (S.C.Com.Pl. Dec. 02, 1999) (explaining that “[t]he official notes to [South Carolina] Rule 59 state ‘[t]his Rule 59 is substantially the federal rule[.]’” and recognizing that federal courts have held “Rule 59(e) motions should be granted sparingly.”) (citing *Rouse v. Nielson*, 851 F. Supp. 717, 734 (D.S.C. 1994) (citations omitted)).

Here, Stevens Builders’s Motion should be denied because it fails to meet any of the grounds necessary to justify reconsideration of the Court’s Order. The Motion fails to identify any issue that the Court misunderstood or failed to fully consider. Stevens Builders attempts to argue that the Court failed to

² Rule 59(e) is the procedural vehicle for a motion for reconsideration. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004) (“A motion under Rule 59(e) long has been viewed as a ‘motion for reconsideration’ despite the absence of those words from the rule.”).

consider “relevant factual matter which occurred simultaneously with and subsequent to the execution of the Construction Loan Agreement,” citing the “Construction Loan Disbursement Worksheet.” See Motion, a 1.

This argument fails because the Court considered and properly rejected this argument. **First**, as the Motion itself makes clear, Stevens Builders already presented and the Court rejected these very arguments. See, e.g., Motion, at 4-5 (explaining that Stevens Builders “argued [at the hearing] that the Construction Loan Agreement should be interpreted in favor of the Plaintiff because it was ambiguous in that the main body of the document and the [Construction Loan Disbursement] Worksheet were contradictory.”).

Second, the Court considered and properly rejected this argument made by Stevens Builders’s at the hearing because Stevens Builders cannot overcome the clear and unambiguous language of the Construction Loan Agreement that (1) gives TD Bank “sole discretion” to change “the timing and amounts of disbursements provided in any schedule,” and (2) required the borrowers to present written demand before any disbursement could be made, and the undisputed record is clear that no such demand was ever made. See May 7, 2022 Order, at 2-3, 5; Construction Loan Agreement, Sect. III, ¶ 1.

B. This Court Correctly Granted TD Bank’s Motion for Summary Judgment.

Stevens Builders’s Motion also should also be denied because the Court’s decision to grant summary judgment was correct.

“Summary judgment shall be granted ‘if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits,

if any, show there is no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Loflin v. BMP Development, LP*, 2016 WL 11597897 *Mullen, J. (citing SCRCP 56(c)); *see also ARB, Inc. v. Integrated Recycling Group of SC, LLC*, 432 S.C. 545, 551, 854 S.E.2d 171, 174 (Ct. App. 2021), reh’g denied (Feb. 12, 2021). When the moving party demonstrates no evidentiary basis for nonmoving party’s claims, the nonmoving party must “come forward with specific facts showing there is a genuine issue for trial.” *Id.* (citing *Singleton v. Sherer*, 377 S.C. 185, 197-98, 659 S.E.2d 196, 203 (Ct. Appl. 2008)).

There are three reasons why summary judgment dismissing Stevens Builders’s breach of contract claim against TD Bank was correct.

1. The Contract Claim Fails Because There Are No Facts Showing TD Bank Failed to Perform Any Contractual Obligations.

There are no record facts showing TD Bank failed to perform any contractual obligation under the Construction Loan Agreement. It is black letter contract law in South Carolina that, if the language of a contract is unambiguous, then the contract’s language determines the force and effect. *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004). Courts “are without authority to alter an unambiguous contract by construction or to make new contracts for the parties. A court must enforce an unambiguous contract according to its terms . . .” *S.C. Dep’t of Transp. v. M & T Enters. Of Mt. Pleasant*, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008). Under South Carolina law, a Plaintiff has the burden of proof to establish the

elements of a breach of contract claim, which are: (1) a contract existed; (2) a breach of that contract; and (3) that breach caused plaintiff damages. *Maro v. Lewis*, 389 S.C. 216, 222, 697 S.E.2d 684, 688 (S.C. Ct. App. 2010). It is common sense that a party cannot breach a contract where the alleged obligation under the contract does not exist. *See Allegro, Inc. v. Scully*, 791 S.E.2d 140, 145 (S.C. 2016).

Here, Stevens Builders failed to identify a single term in the Construction Loan Agreement supporting its claim that TD Bank was required to make a distribution simply because Stevens Builders “demanded payment.” To the contrary, the Construction Loan Agreement sets forth, in clear and unambiguous terms, the specific conditions that were required to be met before TD Bank could make construction loan disbursements, including the “Borrower present[ing] proper written demand from the Contractor.” Construction Loan Agreement, Sect. III, ¶ 1. Likewise, there is no contract term requiring TD Bank to use a particular worksheet. To the contrary, the Construction Loan Agreement states that TD Bank “retain[ed] the option, in its sole discretion to change the timing and amounts of disbursements provided in any schedule established by or in connection with this loan.” *Id.*

Further, it is undisputed that ***there is no evidence in the record that the Garraways presented a written demand for payment to TD Bank for the amount at issue in this case.*** In fact, ***the Complaint even admits that the Garraways “failed and refused to pay” Stevens Builders,*** despite Stevens Builders’s demand. Compl. ¶ 9. Accordingly, not only is Stevens

Builders's contract claim contrary to the express and unambiguous terms of the Construction Loan Agreement, which make clear that payment may only be made if certain conditions are met, but ***Stevens Builders has failed to produce any evidence that any of the conditions of payment were in fact met.***

The Motion incorrectly argues that, “[i]f the Court reads the Construction Loan Agreement as placing no duties upon TD, the construction loan agreement would be totally meaningless and superfluous.” Motion, at 5. This is a gross misstatement of the Order. TD Bank has not argued, nor has the Court held, that TD Bank had no duties under the Construction Loan Agreement. To the contrary, TD Bank argued—and the Court agreed—that the Construction Loan Agreement is clear as to TD Bank's duties. TD Bank, according to the clear and unambiguous language of the contract, was only required to disburse funds to the contractor if certain conditions were met. The undisputed record shows those conditions were not met in this case.

Further, the Motion also incorrectly argues that the contract was somehow modified and this entitled Stevens Builders to a disbursement. Motion, at 7. Even if a different worksheet were considered during construction, this does not alter, nor does Stevens Builders explain why this would alter, the preconditions required for TD Bank to make a disbursement, or TD Bank's clear and unambiguous right to change the timing and amount of any disbursement provided in any schedule. The Construction Loan Agreement still clearly required a proper, written demand and for payment to be made as

measured against the progress of the build, as determined in TD Bank's sole discretion.

In sum, the Court correctly found that "the Construction Loan Agreement is unambiguous in its requirement, among others, that the Garraways present a proper written demand to TD Bank for any disbursement to Stevens Builders, and there is no evidence in the record that the Garraways presented such a demand on TD Bank for the amount Stevens Builders seeks in this action." Order, at 5. Thus, "[v]iewing the facts in a light most favorable to the non-moving party, Stevens Builders has failed to submit evidence that TD Bank breached any contractual provision in this case[.]" and summary judgment in TD Bank's favor is proper. *Id.*

2. The Contract Claim Fails Because It Is Inconsistent With, and Contradicted By, The Unambiguous Provisions of the Construction Loan Agreement.

As shown above, the Construction Loan Agreement contains clear and unambiguous terms, and Stevens Builders's claim is inconsistent with and contradicted by its provisions. Instead of stating that TD Bank must pay the Contractor whenever the Contractor makes a demand, the Construction Loan Agreement expressly states that TD Bank would only make construction loan disbursements if specified conditions were met, and, as shown above, those conditions were not met in this case. *See also* TD Bank's Motion for Summary Judgment, at 8-10. Thus, the Court's Order was further correct because Stevens Builders's claim is contradicted by the clear and unambiguous contract terms.

3. The Contract Claim Fails Because There Are No Record Facts Showing That Stevens Builders Satisfied Conditions Precedent to Payment.

Finally, there are no record facts showing that Stevens Builders satisfied conditions precedent to payment under the Construction Loan Agreement. “**A condition precedent** to a contract is ‘any fact other than the lapse of time, which, unless excused, **must exist or occur before a duty of immediate performance arises.**” *Brewer v. Stokes Kia, Isuzu, Subaru, Inc.*, 364 S.C. 444, 449, 613 S.E.2d 802, 805 (Ct.App.2005) (citing *Worley v. Yarborough Ford, Inc.*, 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct.App.1994)).

As the language of the Construction Loan Agreement makes clear, the condition precedent to disbursement required that the Borrower presented a proper, written demand for payment, such demand was based on the percentage of work completed, only for work already completed and only as long as construction progressed in accordance with the specifications, drawings and plans, as determined by TD Bank. It is undisputed that the proper, written demand never occurred. As the Court correctly held, the “series of emails,” which Stevens Builders submitted “do not meet the clear disbursement request requirements of the unambiguous contract.” Order, at 5. The Court thus correctly found that “there is no evidence in the record” that a proper demand was ever submitted to TD Bank for disbursement. *Id.*

The Motion incorrectly argues that TD Bank “refused to participate in discovery[,]” and that further discovery “would, undoubtedly, reveal additional evidence which would support the Plaintiff’s allegations and make summary

judgment inappropriate[.]” Motion, at 8. This is wrong. TD Bank properly participated in discovery by serving Stevens Builders timely discovery requests, and timely responding to Stevens Builders’s discovery requests. It is Stevens Builders who failed to properly participate in discovery, despite ample time and opportunity to do so, by only serving TD Bank untimely discovery requests two and a half months after an already extended discovery deadline had passed.

More importantly, however, discovery would not change the outcome of the Order or resolution of summary judgment. The Motion for Summary Judgment raises an issue of contract interpretation. As the Court stated in its Opinion, “[i]t is black letter contract law in South Carolina that, if the language of a contract is unambiguous, then the contract’s language determines the force and effect.” Order, at 5 (citing *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004)). The clear and unambiguous Construction Loan Agreement requires, among other things, that the Garraways present a proper written demand to TD Bank for any disbursement to Stevens Builders. There is no evidence in the record that the Garraways presented such a demand. Accordingly, judgment in TD Bank’s favor is correct.

IV. CONCLUSION

TD Bank respectfully submits that Steven Builders’s Motion for Reconsideration should be denied, and the Court’s Order affirmed, for the reasons in TD Bank’s Memorandum Supporting TD Bank’s Motion for Summary Judgment and the following two reasons:

First, Steven Builders's Motion fails to meet any of the grounds for reconsideration; and

Second, this Court appropriately considered and correctly granted TD Bank's Motion for Summary Judgment because (i) there are no record facts showing TD Bank failed to perform any contractual obligation under the Construction Loan Agreement, (ii) Stevens Builders's claim is inconsistent with and contradicted by the clear and unambiguous provisions of the Construction Loan Agreement, and (iii) there are no record facts showing that Stevens Builders satisfied conditions precedent to payment under the Construction Loan Agreement.

Respectfully Submitted,

/s/ J. Martin Page
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Dated: June 29, 2022
 Columbia, South Carolina

Attorneys for Defendant, TD Bank, N.A.

1 STATE OF SOUTH CAROLINA)
) Court of Common Pleas
 2 COUNTY OF BEAUFORT) Case No. 2019-CP-07-1666
)
 3 _____)
 4 STEVENS BUILDERS, LLC,)
)
 5 Plaintiff,)
)
 6 VS.) Transcript of Record
)
 7 MICHAEL C. GARRAWAY,)
 8 ALICIA M. GARRAWAY, and)
 9 TD BANK, N.A.,)
)
 Defendant.) DATE: February 26, 2020
)
 _____)

10
 11 B E F O R E:

12 THE HONORABLE CARMEN T. MULLEN
 13

14 A P P E A R A N C E:

15 BENJAMIN TERRELL COPPAGE
 16 Attorney for the Plaintiff

17 JAMES JOHN WEGMANN
 18 Attorney for the Defendants, Michael C. Garraway and
 Alicia M. Garraway

19 JAMES MARTIN PAGE
 20 Attorney for the Defendant, TD Bank

21 ORIGINAL TRANSCRIPT ORDERED BY:
 22 Coppage Law Firm

23 Stenographically recorded and transcribed by:

24 Karen V. Andersen
 25 Registered Merit Reporter
 Certified Realtime Reporter
 Certified Shorthand Reporter

1 THE COURT: All right. I have signed your order on
2 the mechanic's lien. Do you want us to upload it, Mr.
3 Wegmann?

4 MR. WEGMANN: Yes, ma'am. Before I came, the
5 clerk's office said I need to send it to Judge Jefferson.
6 And I figured I would just ask while I was up here.

7 THE COURT: It's perfect. Okay. Let's upload it,
8 because it's easier. So we are going to upload it. And then
9 I will get a copy of it.

10 All right. Mr. Page, this is your motion.

11 MR. PAGE: Thank you, Your Honor. Martin Page for
12 TD Bank. We filed this motion to be relieved from default
13 and to allow us to file an answer or otherwise plead in this
14 formerly mechanic's lien action. The standard to be relieved
15 from default is a showing of good cause. And once that
16 analysis is complete, there are three additional factors the
17 Court is to consider, timeliness of filing the motion, a
18 meritorious defense and prejudice to the plaintiff.

19 And then in general, South Carolina courts have said
20 that Rule 55(c) is to be liberally construed to promote
21 justice and the disposition of cases on the merits. So
22 there's a bias in this state to actually allowing parties to
23 be relieved from default and then to be privy to answers to
24 actually decide cases on the merits, not, you know, on a
25 default basis.

1 In the present case, we think there's good cause
2 here because it has it styled as a mechanic's lien. There
3 are -- TD Bank, because it does a lot of construction loans,
4 it's served with a high number of mechanic's lien actions.
5 Generally, we are only noticed in these actions because of
6 our mortgage interest. And there's actually very strong
7 statutory protection in South Carolina, basically saying if
8 the mortgage is filed before the mechanic's lien, you know,
9 there's no way that you get -- no matter what they plead,
10 they are going to meet it based on that statutory protection.

11 So from that perspective, there's a little bit --
12 you know, the banks kind of see so many of those that they
13 are a little bit desensitized to that.

14 In this particular action, it contained a cause of
15 action for breach of contract, which was pretty novel in that
16 the construction -- the plaintiff's counsel or the plaintiff
17 asserted that the construction loan agreement imposed a
18 contractual obligation on the bank to pay the builders in the
19 event that there was a dispute between the builder and the
20 homeowner or the bank's customer. So that -- that was in
21 three lines in the complaint that contained that.

22 In terms of -- so we think we've shown good cause.
23 And this is the reason why. It's also a lower standard than
24 had a judgment been entered.

25 The timeliness factor, we filed this immediately.

1 As stated, I think we have a meritorious defense in that
2 we -- you know, in that there's no real actual language in
3 the construction loan agreement that imposes such a
4 contractual obligation on the bank to pay a builder. So we
5 have -- we think we have a good defense on that.

6 Prejudice to the plaintiff, we think this is --
7 procedurally, it's very early in the case. I don't think
8 there's been a lot of discovery or anything like that. So I
9 don't think there's a lot of prejudice to the plaintiff in
10 allowing us out of default and permitting us to answer and
11 otherwise plead.

12 So we would ask the Court to grant our motion and to
13 relieve us from default and then permit us to file an answer
14 within 15 days.

15 THE COURT: Thank you.

16 Mr. Coppage?

17 MR. COPPAGE: Thank you, Your Honor. May it please
18 the Court. The defendant TD here has filed relief from the
19 entry of default in this case. I believe the correct
20 standard to be applied here would be Rule 60(b)(1) of the
21 rules of procedure rather than 55(c) of the rules of
22 procedure. Since we have had a damages hearing and you have
23 issued a ruling from the bench on that damages hearing, I
24 believe there is a judgment in this case. Rule 54(a) says
25 that a judgment is any decree or order which dismisses the

1 action as to any party or finally determines the rights of
2 any party.

3 Now, there's Rule 58, which talks about the entry of
4 a judgment. But there can certainly be a judgment before
5 it's entered. That's the case here. Since that is a
6 judgment in this case, the rule to be applied here is 60(b),
7 which is a much more rigorous standard, which TD hasn't
8 addressed here.

9 THE COURT: Let me ask you a question. Why has your
10 builder not been paid; do you know?

11 MR. COPPAGE: Why has the builder not been paid?

12 THE COURT: Right.

13 MR. COPPAGE: There was disagreement about work that
14 had been done or had not been done, the quality of work that
15 had been done. It's complicated.

16 THE COURT: Okay.

17 MR. COPPAGE: And there were certainly negotiations
18 with both the homeowner borrower as well as TD, the lender,
19 trying to get that disbursement that my client believed he
20 was due.

21 THE COURT: Okay. I'm sorry. Go ahead.

22 MR. COPPAGE: Certainly.

23 THE COURT: I was wondering about the genesis of the
24 case.

25 MR. COPPAGE: So the fact that there has been a

1 judgment in this case already, Rule 60(b) should apply. And
2 that standard should be taken into consideration by the Court
3 whether or not there's mistaken, inadvertence or excusable
4 neglect. And there's certainly plenty of law on that. And
5 we can go into that if the Court so desires, but I don't
6 believe it's properly before the Court, as TD has not raised
7 that in its motion. It only seeks relief from the entry of
8 default.

9 If the Court is inclined to move forward with the
10 motion for entry of default, despite there being a judgment
11 in this case, I would call the Court's attention to that
12 standard. First, the *Sundown Operating Company* case requires
13 that the defaulting defendant give a reasonable explanation
14 why it didn't answer. Why is it in default? And once it's
15 given an explanation that satisfies the Court as to why it
16 didn't answer, then you move into those good cause elements
17 that are set out in the *Wham* case. I don't believe that TD
18 has addressed that explanation here.

19 In its written memorandum, it gives the explanation
20 as it's served with a high-volume of mechanic's liens cases
21 and it's failure to file a timely response was inadvertent
22 and unintentional, which I just see as them saying, well, we
23 get sued a lot and we didn't mean to not answer the
24 complaint, which I think is particularly weak.

25 There are several cases in the last several years

1 where our fellow courts have upheld rulings from lower courts
2 where the defaulting defendant has had a much stronger reason
3 for why --

4 THE COURT: Let me ask you. As far as TD Bank is
5 concerned, I assume you have an agent for service; is that
6 correct?

7 MR. PAGE: Yes, Your Honor.

8 THE COURT: So is that in Columbia?

9 MR. PAGE: Yes, Your Honor.

10 THE COURT: And so who reviews those? Does in-house
11 counsel review them first, or who reviews the losses?

12 MR. PAGE: Your Honor, they would be sent to TD
13 Bank's legal team for review.

14 THE COURT: Where is their legal team?

15 MR. PAGE: In New Jersey.

16 THE COURT: And they are in-house legal team?

17 MR. PAGE: Yes, Your Honor.

18 THE COURT: Okay. I mean, do we know if it was
19 received, sent to in-house counsel? Do we know where it
20 went?

21 MR. PAGE: Your Honor, I believe it did reach the
22 bank. I don't have anything to contradict that.

23 THE COURT: I guess my question is, it got served on
24 the agent for service in Columbia. Did it get forward
25 actually to the bank, is what you are saying? Yes, it did.

1 MR. PAGE: Yes.

2 THE COURT: And legal counsel looked at it? Didn't
3 look at? Just ignored it because they thought it was a
4 mechanic's lien?

5 MR. PAGE: I don't know exactly the thought process
6 of in-house legal, but they do see a lot of these mechanic's
7 liens that come out of South Carolina. And that was the
8 rationale for not treating it with the seriousness that I
9 think it deserved.

10 THE COURT: Correct me if I am wrong. I think, Mr.
11 Coppage, I either asked you or Mr. Wegmann, we went forward
12 on a damages hearing. Didn't you also serve them notice of
13 the damages hearing?

14 MR. COPPAGE: Ten days' notice, correct.

15 THE COURT: So did you do it on the agent of
16 service? Is that what you did it, to Columbia?

17 MR. COPPAGE: The rule requires it to be sent to
18 their last known address, so I sent it to their
19 headquarters.

20 THE COURT: Okay.

21 MR. PAGE: That was another issue we had, is that
22 the damages hearing notice went to corporate headquarters;
23 whereas, we designated an agent for process in South
24 Carolina. And it was not sent to the location the complaint
25 was served at, which I thought was a little odd. I don't

1 know --

2 THE COURT: Corporate office is in New Jersey?

3 MR. COPPAGE: Well, we know we are not going to get
4 a response if they sent it to their corporate agent. So we
5 sent it to their corporate headquarters. We didn't get a
6 response when we sent the summons and complaint there. And
7 the rule does say the last known address. So we sent it to
8 corporate headquarters which we know TD is actually located
9 at.

10 THE COURT: Okay.

11 MR. PAGE: Your Honor, I just think the corporate
12 address or the corporate agent we designated in South
13 Carolina for the sole purpose of receiving legal pleadings,
14 had it gone there, the notice, the damages hearing, I don't
15 know if it would have caused a different reaction. But it
16 certainly would have been reviewed by legal instead of just
17 going to the general corporate headquarters in New Jersey
18 with, you know, everything else that they receive every
19 day.

20 THE COURT: I don't think that's a great
21 explanation, considering it was actually served on your agent
22 here and sent to, apparently, corporate, and no one did
23 anything with it. Okay.

24 Mr. Wegmann, do you have a position in this?

25 MR. WEGMANN: As we talked about last time, Your

1 Honor, as it relates to their pleadings, not really. But as
2 it stands, my clients are extremely prejudiced in this in
3 that there are indemnification clauses in the construction
4 loan agreement. My clients are going to be on the hook,
5 despite the fact, they've already been on the hook and
6 already had to take out a loan that was \$90,000 by TD Bank,
7 above and beyond what they needed because of the mechanic's
8 lien filing. So they are paying that back now. And it's
9 just sitting in the account doing nothing.

10 Now that I've got that dismissed, hopefully, I will
11 be able to work with the bank. But their indemnification
12 clause is in that contract. And that contract doesn't
13 require that the bank or my clients pay the builder if
14 there's a dispute.

15 THE COURT: Okay. Yes, sir. Anything else you want
16 to add, Mr. Coppage?

17 MR. COPPAGE: Yes, ma'am. I will go ahead. I
18 believe we were discussing the explanation for default.
19 There is a case that is very similar -- it's escaping my mind
20 right now -- to what sounds like happened with TD. I will be
21 happy to provide it if the Court would like. But it's where
22 the defaulting defendant gave the excuse that, well, we got
23 it or somebody at corporate headquarters was served, he gave
24 it to somebody else, he gave it to their in-house counsel,
25 they gave it to somebody else. And the Court said, that

1 doesn't all matter, you have to pay attention to the
2 pleadings in the case.

3 But I don't believe any of what's been offered here
4 is a reasonable explanation for default. Further, the
5 excuses offered are all factual assertions that aren't in the
6 record.

7 THE COURT: Affidavit.

8 MR. COPPAGE: Exactly. So I don't think there's
9 something the Court can consider anyway. So I don't think
10 there's any excuse that's been offered that the Court can
11 consider. I object to the Court's consideration of any
12 excuse that's been offered, since there's no affidavit. TD
13 has brought no witness here to testify to that.

14 Based on that, I don't think that the Court should
15 consider those good cause elements. Again, if it's inclined
16 to consider those good cause elements, I do believe it fails
17 there as well. The first one, the first of those *Wham*
18 elements is the timeliness of relief from the entry of
19 default. TD was served on September 30th. The default was
20 entered on December 4th. TD waited a full two months before
21 moving to get relief from default. It waited 18 days after
22 it received notice of a damages hearing. It didn't come to
23 the damages hearing. So I think its motion for relief is
24 anything but timely. And there are plenty of cases where the
25 judges are upholding much more timely motions for relief.

1 And as to the meritorious defense, I think, again,
2 what's been brought up here is our assertions of fact that
3 aren't in the record. So I would ask the Court not to
4 consider those.

5 And as to the degree of prejudice, I think my client
6 would be extremely prejudiced. If he were DR Horton or
7 something, maybe not. But my client is a single member LLC
8 who is just trying to do right by his subcontractors in this
9 action. TD is the fifth largest bank in America with \$384
10 billion in total assets. So to say this would be a David and
11 Goliath thing would be putting it lightly. He's already
12 spent a lot for him. And when I say "him", I mean the
13 business.

14 THE COURT: I understand. Right.

15 MR. COPPAGE: To get to this point, to have the
16 default judgment hearing, to argue this motion, this is all a
17 very big deal for him. So to allow TD to get out from under
18 default when they've got really no good reason to get out
19 from under it, would be extremely prejudicial to him. They
20 would just be able to crush him, frankly.

21 Based on that, I would just ask the Court to deny
22 the motion and go ahead and have the judgment on the default
23 entered.

24 THE COURT: Okay. Do you want to respond?

25 MR. PAGE: Your Honor, I think just underlying the

1 entire cause of action against TD for the breach of contract
2 is just not what the construction loan agreement says. And I
3 don't have the transcript. And I haven't gotten it yet for
4 the damages hearing. And I don't know what -- but that's not
5 what this contract says. It's not what any loan construction
6 agreement says.

7 So, yeah, they probably would lose on the argument
8 of, you know -- I don't really know if -- maybe there are
9 causes of action against TD, but breach of contract --

10 THE COURT: What other causes of action were in the
11 complaint against you?

12 MR. PAGE: That's the -- we were noticed because of
13 the mechanic's lien, and then, you know, obviously, to
14 foreclose the mechanic's lien, and then this sole cause of
15 action.

16 THE COURT: Okay.

17 MR. PAGE: Thank you, Your Honor.

18 The COURT: I will let y'all know something. All
19 right. Thank you.

20 (Whereupon, the proceedings are adjourned.)
21
22
23
24
25

CERTIFICATE OF REPORTER

I, Karen V. Andersen, Registered Merit Reporter,
Certified Realtime Reporter for the State of South Carolina
at Large, do hereby certify that the foregoing transcript is
a true, accurate and complete Transcript of Record of the
proceedings.

I further certify that I am neither related to nor
counsel for any party to the cause pending or interested in
the events thereof.


Karen V. Andersen
Registered Merit Reporter
Certified Realtime Reporter

1 STATE OF SOUTH CAROLINA) **TRANSCRIPT OF RECORD**
2 COUNTY OF BEAUFORT) CASE NO.: 2019-CP-07-01666

3 **ORIGINAL - VIA WEBEX**

4 -----
5 September 22, 2020

6 **BEFORE:** The Honorable Maite Murphy

7 -----
8 STEVENS BUILDERS, LLC.,

9 Plaintiff,

10 vs.

11 MICHAEL GARRAWAY, et. al,

12 Defendants.
13 -----

14
15 APPEARANCES VIA WEBEX:

16
17 Benjamin Coppage, Esq.
18 Appearing for the Plaintiff.

19 J. Martin Page, Esq.
20 James Wegmann, Esq.
21 Appearing for the Defendants.

22 Natalie Dahl, RPR
23 State of South Carolina Official Court Reporter
24 Stenographic Registered Professional Reporter
25

1 **NOTE: Pursuant to Rule 607 (h)(1)(B), SCACR "A Court**
2 **REPORTER SHALL RECEIVE THE FEE OF \$1.00 PER PAGE FOR**
3 **FURNISHING A COPY OF A PREVIOUSLY PREPARED TRANSCRIPT."**
4 **All requests for a copy of the enclosed transcript**
5 **shall be sent to: Natalie Dahl, RPR**
6 **P.O. Box 762**
7 **Conway, SC 29526**

8 P-R-O-C-E-E-D-I-N-G-S

9 THE COURT: For default judgment with Stevens
10 Builders versus Michael Garraway. Do we have all?

11 MR. COPPAGE: Ben Coppage for the plaintiff,
12 Stevens Builders.

13 MR. PAGE: Martin Page for the defendant TD Bank.

14 THE COURT: Counsel, you may proceed.

15 MR. COPPAGE: Thank you very much. And, also, to
16 note, we also have Jim Wegmann on the call, who is a
17 party to this suit as well, but isn't really involved
18 in this motion for default judgment; so just wanted to
19 make you aware that Jim was participating as well.

20 THE COURT: All right. Yes, sir.

21 MR. COPPAGE: Thank you, Your Honor. May it
22 please the Court. The plaintiff is a residential
23 builder who was hired as a general contractor by the
24 Garraways, a couple here in Beaufort County, to build
25 their house. Stevens Builders, the plaintiff, sued
 the Garraways for failing to make payments after it
 provided labor and materials on that project under a
 construction loan agreement entered into by Stevens

1 Builders, the Garraways, and TD Bank. TD also had an
2 obligation to pay the plaintiff.

3 TD, likewise, failed to pay the plaintiff for the
4 labor and materials provided, so the plaintiff
5 asserted a cause of action for breach of action
6 against TD as well as the Garraways. The suit against
7 TD sought payment from TD for the labor and materials
8 provided, as well as prejudgment interest. TD was
9 served by personal service on September 30th of
10 2019, but didn't answer within 30 days as required by
11 Rule 12. Believing that TD would eventually answer,
12 Stevens Builders held off on filing for default until
13 September 2, 2019 when it filed an affidavit of
14 default and motion for default judgment.

15 The Court held a damages hearing on that motion
16 on January 31st, 2020, and TD was given notice of
17 that hearing; however, it didn't participate. Buddy
18 Stevens, who is the principal member of Stevens
19 Builders, testified at that hearing to damages of
20 \$101,655.34 and requested prejudgment interest of
21 \$8,894.84. Judge Mullen, who was hearing that motion,
22 made it clear during the hearing that she would issue
23 a judgment against TD for that amount as soon as a
24 proposed order was filed.

25 On February 7, about 30 minutes before the

1 proposed order was filed, TD filed a motion to be
2 relieved from default. That motion was heard on
3 February 26th by Judge Mullen, and she issued an
4 order granting it, granting TD relief on
5 March 9th of this year. That order relieving TD
6 from default required TD to file an answer or other
7 pleading to the complaint within 15 days of the order.
8 TD did not file an answer or other pleadings within 15
9 days of that order; however, the supreme court's
10 Coronavirus orders forgave defaults for responses due
11 from March 13th to May 14th, and the time for that
12 response certainly fell within that period. But
13 May 14th came, the last chance under the supreme
14 court order -- May 14 came and went, and TD still
15 didn't file an answer or other pleading.

16 Again, giving TD the benefit of the doubt, the
17 plaintiff refrained from filing its affidavit of
18 motion of default until June 5th of this year. TD
19 finally filed an answer on June 23rd, which was
20 nearly nine months after it was served, and three
21 months after its answer was due as required by Judge
22 Mullen's order. TD does not claim that it filed an
23 answer or pleading as required by Judge Mullen's
24 order; instead, it claims it is not in default because
25 it filed a motion to dismiss within 15 days of Judge

1 Mullen's order. Of course, under normal
2 circumstances, responding to a complaint that you've
3 been served, that would be fine. Rule 12(a) allows a
4 party to file such a motion and amendment. If the
5 motion is denied, answer within 15 days from the
6 denial; however, TD failed to avail itself of the
7 timeline set out in Rule 12 and forewent the
8 protections provided by that rule.

9 Since TD had to be granted relief from default in
10 order to participate in the litigations, its options
11 for answering were limited to those provided in Judge
12 Mullen's order filing an answer or other pleading;
13 that is to say, her order didn't just set the clock
14 back to the time before TD was in default; instead, it
15 only allowed for the filing of the pleading in order
16 to avoid the default. It did not allow for the filing
17 of a motion like TD did. The order could have
18 specifically allowed for the filing of that motion; it
19 did not. The order could have specifically said that
20 TD can answer or otherwise respond as set out in Rule
21 12(a); it did not. Instead, Judge Mullen made it
22 clear that TD's only option was to file a pleading.

23 Now, Rule 7(a) is very clear about what pleadings
24 are. It gives a list of them and states that outside
25 of those, no other pleadings shall be allowed. Among

1 the things listed in Rule 7(a) is not a motion, and
2 Rule 7(b) actually deals with motions. So a motion is
3 not a pleading. If TD believes Judge Mullen's order
4 was vague or ambiguous, it could have reached out to
5 her for clarification. Likewise, it could have filed
6 an answer at any time, even prior to Judge Mullen's
7 order when it decided to become involved in this
8 litigation and filed a motion to be relieved. It
9 could have filed an answer at any time and followed
10 that answer up with a motion for judgment on the
11 pleadings seeking the same relief as a 12(b)(6)
12 motion. It did neither of those, and instead chose to
13 ignore the order of Judge Mullen and filed its answer
14 when it saw fit, which was, in this case, three months
15 later.

16 TD's best argument for not having to be bound by
17 Judge Mullen's order is South Carolina's policy to
18 favor disposition on the merits rather than on
19 technicalities. It cites a case Micronics,
20 Incorporated, versus South Carolina Department of
21 Revenue in which a pro se party participated in a
22 case, but missed a hearing before an administrative
23 law judge because of a misunderstanding about
24 scheduling. When the party didn't appear to the
25 hearing, the judge dismissed the case. That party

1 immediately apologized and sought relief. The court
2 of appeals found that in a case like that it was good
3 policy to favor disposition on the merits.

4 This is a very different case. TD is a very
5 sophisticated party; one of the largest banks in
6 America. It failed to participate in any way in this
7 litigation until four months after it was served, and
8 doesn't have a default judgment against it only
9 because Judge Mullen was exceedingly lenient in
10 granting relief when it was that far in default.
11 Despite this leniency, TD and all three of its lawyers
12 chose to ignore the requirements of her order and do
13 something different. So we're not dealing with a mere
14 technicality here like the Court was in Mictronics.
15 We are dealing with a sophisticated party which
16 refuses to follow the Rules of Procedure and the
17 Court's order when it's granting them relief.

18 That being the case, TD forfeited the relief
19 granted by Judge Mullen's order and remains in
20 default. Rule 55 (b) (2) authorizes the Court to
21 conduct a hearing prior to entering default if it's
22 necessary to take into account or determine the amount
23 of damages. There is no necessity to take an account
24 and determine the amount of damages here because that
25 was done by Judge Mullen back in January. A

1 transcript of the hearing was submitted to the Court
2 as an exhibit to the plaintiffs' memorandum in support
3 of its motion for default.

4 In that hearing, Mr. Stevens testified that the
5 plaintiffs' damages were \$101,655.34 and, again,
6 requested that prejudgment interest, coming to a total
7 of \$110,550.18. Again, Judge Mullen acknowledged that
8 she was ready to grant the plaintiff a judgment in
9 that amount, so I would request that the Court find TD
10 is now in default, as therefore admitted all
11 allegations of the complaint, that no additional
12 hearing on damages is necessary, and that the
13 plaintiff be awarded judgment against TD in the amount
14 of \$110,550.18.

15 THE COURT: Thank you, Mr. Coppage.
16 Mr. Page.

17 MR. PAGE: Martin Page for TD Bank. Your Honor,
18 we believe that we did comply with Judge Mullen's
19 order. On March 24th, we filed -- timely filed a
20 motion to dismiss. On March 8th, that motion was
21 denied, and within 15 days as required by Rule 12(a),
22 we filed our answer. This is the third affidavit of
23 default that the plaintiff filed against us. You
24 know, there was a second one filed that hasn't been
25 removed from the record yet, and we think their

1 attempt to put us in default shows how weak their
2 underlying case is. You know, the sole allegation
3 asserted against us is breach of contract under those
4 construction loan agreement basically saying that
5 because they asked TD to pay the builder, that we're
6 obligated to pay, where reading the contract clearly
7 indicates otherwise.

8 You know, it's actually the opposite of what they
9 are alleging. The contract gives TD Bank the
10 exclusive authority to change the timing and amount of
11 disbursement and, you know, that is just how the
12 contract reads. Nowhere in it does it say that if
13 Stevens Builders, or any builder, asks for payment,
14 they have to give it to them. I mean, I think the
15 fundamental dispute that caused this case to arise is
16 that the Garraways weren't pleased with the builder's
17 work and instructed TD to not pay the builder.

18 So, you know, I just don't think -- I think, one,
19 we've definitely complied with the order, and we filed
20 a motion and an answer timely. Then, you know, just
21 going to the argument of the case, I think it just
22 shows the continuous attempt to put us in default to
23 show there really is not much substance to the
24 underlying cause of action against TD Bank.

25 THE COURT: Thank you.

1 Any response, Mr. Coppage?

2 MR. COPPAGE: His statement that we filed three
3 defaults; that is correct. The second one was during
4 that time period covered by the supreme court's
5 Coronavirus order. I was unaware of all of the
6 parameters of that order, so when I became aware of
7 it, I instructed the clerk of court to withdraw the
8 second one, which apparently they may not have done.
9 It still may be on the record; however, I think that
10 fact, that there was a second one filed and later
11 withdrawn, only indicates further TD's refusal to obey
12 the Court's orders. My client kind of showed his hand
13 by doing that, kind of let TD know that, look, you
14 haven't followed this order; you filed a motion to
15 dismiss instead of an answer or pleading, and we're
16 going to look to find you in default. It still chose
17 not to file an answer or pleading. I think that works
18 to the plaintiffs' favor rather than TD's. Otherwise,
19 I just rely on the memorandum submitted to the Court
20 and my previous argument.

21 THE COURT: All right, Counsel. I'll take the
22 matter under advisement in order to review your
23 memorandums, along with the record on this case. Have
24 a good morning.

25 (Whereupon, the proceedings concluded.)

CERTIFICATE OF REPORTER

State of South Carolina)

County of Beaufort)

I, Natalie Dahl, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the proceedings held via Webex of the captioned case, relative to appeal, in the Court of Common Pleas for Beaufort County, South Carolina, on the 22nd day of September, 2020.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

August 24, 2022

NATALIE DAHL, RPR

Natalie Dahl, RPR

Court Reporter

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
COUNTY OF BEAUFORT	)	C/A No. 2019-CP-07-
01666		
Stevens Builders, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Michael C. Garraway,	)	
Alicia M. Garraway, and	)	
TD Bank, N.A.,	)	
	)	
Defendants.	)	
-----	)	

VIRTUAL HEARING

Monday, May 23, 2022
11:01 a.m. - 11:47 a.m.

The hearing before the Honorable Marvin H. Dukes, III, Master-In-Equity for Beaufort County, was conducted virtually on the 23rd day of May, 2022 before Katherine M. Boone, Court Reporter and Notary Public in and for the State of South Carolina.



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EXHIBITS

(No exhibits were marked during the hearing.)



CALL TO ORDER:

THE COURT: Good morning. We are here on 2019-CP-07-01666. This is Stevens Builders, LLC versus Garraway and TD Bank, TD Bank's Motion for Summary Judgment filed December 1st, 2020. Mr. Page, I'm happy to hear from you, sir.

POSITION STATEMENT - TD BANK:

MR. PAGE: Thank you, Your Honor, Martin Page for TD Bank. This is just a little background for the Court on this matter. This is, essentially, a dispute between Stevens Builders and Garraway, related to the construction of a house for the Garraways. Stevens Builders was the contractor, and the Garraways were, obviously, the party that wanted their house built. TD Bank is solely a lender in this matter, and we are brought into this by virtue of a construction loan agreement between the, I guess, Garraways, Stevens Builders, and TD Bank. In the Plaintiff's complaint, the only allegation asserted against TD Bank is for breach of the construction loan agreement. Specifically, the Plaintiff alleges that they demanded a payment from TD, and that they did not receive payment from TD, and that resulted



1 in a breach of the construction loan agreement.
2 We believe that summary judgment is proper in
3 this matter for three reasons, primarily that
4 the Plaintiff has not really shown how -- any
5 specific contractual terms that TD Bank
6 breached with regard to the construction loan
7 agreement. The construction loan agreement,
8 you know, itself, does not require that upon
9 demand of payment by the builder, that TD would
10 be obligated to pay, and we don't think that
11 Stevens Builders satisfied the conditions
12 precedent to payment under the construction
13 loan agreement. So the construction loan
14 agreement is very specific as to when loan
15 disbursements would be made, and, specifically,
16 it requires as a threshold as that it will not
17 -- that a disbursement under the construction
18 loan would not be made unless and until the
19 borrower presents a written demand from the
20 contractor. And here, if you see the, I guess,
21 the Garraways' response to TD Bank's request to
22 admit an item -- let's see -- two of that, we
23 asked them to admit that they never presented
24 TD Bank with a written demand for Stevens
25 Builders to be paid the amount Stevens Builders



1 is seeking to recover in litigation. They
2 admitted that they had never presented such
3 demand. So that's kind of a threshold issue
4 there. And because that demand was never
5 presented to the bank, then that doesn't
6 trigger an obligation on the bank to even -- to
7 disburse funds. And even if we had received
8 that demand, there's a number of other things
9 that have to occur. The demands are to be
10 based upon percentage of work completed. They
11 were to be made only for work already completed
12 and deposits for supplies as approved by the
13 lender on a case-by-case basis, and only for
14 work contemplated in the original construction
15 contract, contract price, and they were to be
16 made only as long as the construction
17 progresses in accordance with the
18 specifications, drawing, and plans, as
19 determined by the lender in its sole
20 discretion, and for the lender's benefit only.
21 So that -- that kind of lays out the -- when
22 payment or disbursements would be made under
23 the construction loan agreement. And we have
24 not, you know, through our discovery, have not
25 received any documents that show that TD



1 breached that. In fact, we don't have any
2 evidence that the demand was ever sent to us
3 from the borrowers, and so under that reason,
4 we don't think we've breached any part of the
5 construction loan agreement, and the provision
6 that is the basis for the claim that they could
7 -- that the builder could demand payment on --
8 on the bank and the bank would be forced to
9 pay, just is not in the construction loan
10 agreement. So for the -- you know, that's
11 another reason why we think, you know, if the
12 contractual argu- -- or contractual provision
13 they're citing to doesn't actually exist, then
14 we don't think we can breach the contract by
15 not, you know -- by not paying when they
16 demanded payment. So, let's see -- and then
17 we've also, I guess, received from Stevens
18 Builders -- you know, their responses are in
19 our interrogatories, and they don't really
20 provide any specific facts showing that we have
21 breached the agreement. What they attached was
22 basically these loan disbursement schedules
23 that are done, and they kind of predicted which
24 rate the loan will be disbursed. However,
25 those are not really dispositive here. It's



1 the -- if the borrower provided that, you know,
2 that signed demand from the builder, which they
3 never did here, and the -- and we also, the
4 lender, under the agreement, has the ability to
5 change the timing and amounts of disbursements
6 on our -- at our sole discretion. So, you
7 know, I don't think any part of the record here
8 shows that we've breached the construction loan
9 agreement, and therefore we think we're
10 entitled to judgment in our favor. And I'm
11 happy to answer any questions the Court might
12 have.

13 **THE COURT:** No questions right now. Thank you so
14 much. Mr. Coppage, happy to hear from you,
15 sir.

16 **POSITION STATEMENT - STEVENS BUILDERS, LLC:**

17 **MR. COPPAGE:** Thank you, Judge. I represent Stevens
18 Builders, who is the Plaintiff in this case.
19 As was said, this is a case where my client was
20 the contractor and TD was the bank that was
21 funding the loan for the construction project.
22 So this being a breach of contract claim, of
23 course, is a preponderance of the evidence
24 burden of proof. In those cases the scintilla
25 of evidence standard applies, the motion of



1 summary judgment. So, of course, if we have a
2 scintilla of evidence in support of our claims,
3 then the motion for summary judgment can't be
4 granted. That's certainly the case here,
5 Judge. Not only is there a significant
6 question of fact about the breach of contract
7 itself, but there's significant questions of
8 fact about what constituted the contract
9 itself. As you've seen, attached to the
10 Defendant TD's motion memorandum is the loan
11 agreement, which, of course, got things started
12 here. Attached to that is a disbursement
13 worksheet, which were their initial
14 requirements. Through the course of dealings
15 in this construction project, TD changed things
16 from time to time. They changed what their
17 requirements were. They changed the
18 submissions they required. They changed how
19 they disbursed money. And that is all laid out
20 to a large degree and, again, submitted to the
21 Court. Plaintiff's responses to TD's
22 interrogatories, response to their
23 interrogatory number five, much of this is laid
24 out. We've already told TD about this. It's
25 been submitted to the Court. It started with



1 that first disbursement worksheet in early
2 2017. In April, 2018 they changed that
3 worksheet again. On July 11, 2018, they left
4 the requirements of just the disbursement
5 worksheet, and started with a construction
6 progress report to use as guidelines for the
7 timing of disbursements, and all of these have
8 different percentages of construction
9 completion that are required to receive a
10 disbursement. Later, TD generated a
11 spreadsheet entitled, Field Inspection Report,
12 again requiring different things to receive
13 disbursements required. On January 3rd, 2019,
14 they sent a field inspector to the project, and
15 he used a field inspection report that was
16 totally different from the disbursement
17 worksheets and the reports that had previously
18 been used. There are a few other incidences of
19 these as well. In the Plaintiff's responses to
20 TD's request for production documents, there
21 are several of these incidences. There is a
22 schedule of values, for example, on page 78,
23 which shows different percentage completions
24 required for disbursement, and as these would
25 happen, as TD would change requirements for



1 what it wanted from the borrower and what it
2 wanted from the contractor, the borrower and
3 the contractor would do their best to abide by
4 those requirements. But in December of 2018
5 and January of 2019, the ambiguity of these
6 items and the confusion that TD had caused with
7 regard to what its contract requirements
8 actually were came to a head when my client
9 began requesting an additional draw. Several
10 emails went back and forth. Excuse me. And
11 many of these emails are provided, as in the
12 attachment to TD's memorandum, as well as what
13 I submitted to the Court earlier today. These
14 emails are between Donna Courchesne, who works
15 for TD Bank, between my client, Mr. Stevens,
16 and between the borrower, Michael Garraway. In
17 those, my client is requesting a disbursement,
18 a draw, and there is some discussion of what
19 standard is to apply, what the amount that is
20 actually to be disbursed. After some
21 discussion of it, it looked like Ms. Courchesne
22 did a considerable amount of work, and after
23 she did that she came to the conclusion that --
24 an email she wrote on January 11 of 2019, she
25 said, it appears that we are in line with the



1 budget. Items in pink could be based off the
2 budget and the inspection showing the work
3 completed. So she's saying there that ---

4 **THE COURT:** Can I interrupt you one second?

5 **MR. COPPAGE:** Of course.

6 **THE COURT:** You mentioned a minute ago you had
7 submitted some things this morning, and so I
8 was frantically scrolling back, and I don't see
9 them. Were they ---

10 **MR. COPPAGE:** They were emailed to the Court, so
11 Heather and Jarrod should have received copies
12 of those.

13 **THE COURT:** All right. Has other counsel -- you
14 guys have, what ...

15 **MR. COPPAGE:** Everyone was -- yes, sir ---

16 **THE COURT:** Okay.

17 **MR. COPPAGE:** --- copied on that email.

18 **THE COURT:** Let me mute real quick and see if they
19 can find those. And just -- okay, Jarrod just
20 sent them to me. All right. Y'all give me a
21 second to get all that stuff up.

22 **MR. COPPAGE:** Sure.

23 **THE COURT:** It says all folders are up to date, but
24 I know that's not true. I'm still waiting.
25 I'm sorry, this county system is slow. Tell



1 you what, Ben, you go on. I'll listen. And
2 I'm just ---

3 **MR. COPPAGE:** Certainly. Certainly.

4 **THE COURT:** And then, as soon as it pops up, I'll
5 ...

6 **MR. COPPAGE:** As I said, Ms. Courchesne sent an
7 email to Mr. Garraway, the borrower and the
8 property owner, and to my client, again, saying
9 that the items in pink on the spreadsheet that
10 she had attached should be paid, and that work
11 had been completed. Those items added up to a
12 \$71,400 draw. Whenever you get that pulled up
13 in the document entitled, 1179 documents
14 produced, that spreadsheet that she had
15 attached there is on page 76 and 77 -- and it
16 does show in pink those items that have been --
17 to which Mr. Stevens, or Stevens Builders, was
18 entitled for a draw. So even after that
19 acknowledgment that Mr. Stevens had done what
20 he needed to do and held up his end of the
21 bargain pursuant to the contract with TD and
22 Mr. Garraway, TD continued to withhold payment,
23 and that was really the catalyst for things
24 falling apart on this construction project.
25 When TD withheld this payment that it



1 acknowledged that was due pursuant to its
2 contract and pursuant to its course of dealing
3 with Stevens Builders -- it withheld that
4 payment anyway -- the project could no longer
5 continue, and things really fell apart at that
6 point. So not only did Stevens suffer for not
7 having that particular disbursement, but it
8 caused the rest of the contract to fail, and
9 not be able to complete it. So Mr. Stevens is
10 seeking damages, in addition to just that
11 disbursement. With regard to the assertion
12 that Stevens Builders is claiming that it made
13 a request, that is not a part of the complaint.
14 It's not saying that it made a request. They
15 didn't fulfill that request. That is the case,
16 as is shown on these emails. It's just simply
17 saying that TD failed to make a disbursement as
18 required by its contract with Mr. Stevens and
19 Mr. Garraway. And so that is why there is an
20 admission in the request to admit that. No, he
21 did not request the specific amount sought in
22 this lawsuit. He only requested that a
23 disbursement be made, not that TD pay him the
24 full amount of what is -- what's being sought
25 in this suit. So just based on those things,



1 I believe there is certainly more than a
2 scintilla in support of my client's claim.
3 One, just the trier of fact has to determine
4 what the contract was. And then, there's --
5 once that's determined, there's plenty of
6 things that must be decided to determine
7 whether that contract, whatever it was, was
8 breached. And finally -- I know you'll get to
9 this later, but I think to bring it in under
10 this argument is appropriate -- there is
11 outstanding discovery requests, as we discussed
12 during our last call with the Court. I, on
13 behalf of my client, made late discovery
14 requests under the prior scheduling order by
15 Judge Price, made those discovery requests. TD
16 refused to respond to them because they were
17 late. We had a call with the Judge. I
18 requested that they be compelled to respond to
19 those. The Judge said -- or the Court said
20 that -- weren't able to do that, but asked that
21 the parties get together, get a scheduling
22 order together, and get back to you with that.
23 I have reached out to opposing counsel on a
24 couple of incidences with proposed scheduling
25 orders. They never got back to me. So that



1 was the reason that I went ahead and submitted
2 my own scheduling order and sent it to the
3 Court as well. So I would request that that
4 scheduling order be accepted by the Court, and
5 if it is, or if some other scheduling order
6 which requires the Defendants to go ahead and
7 respond to our discovery request is granted,
8 then we would have outstanding discovery, which
9 would provide additional facts regarding what
10 was happening here. So on its own, even
11 without that additional discovery, summary
12 judgment is not proper at this time. And if
13 the time for additional discovery is granted,
14 that will be even more the case. Thank you,
15 Judge.

16 **THE COURT:** Thanks. A quick question here, because
17 I've got the construction loan agreement. The
18 construction loan agreement, of course, is
19 between the property owner -- Mr. Page earlier
20 said somewhere in this construction agreement --
21 -- and I know y'all have studied it and know
22 every paragraph of it -- is a portion that
23 says, essentially, until the borrower makes a
24 formal request, money isn't going to be paid
25 out. Mr. Page, where is that in here?



1 **MR. PAGE:** Your Honor, that's on page four of the
2 construction loan agreement. It's section
3 three, part one. And it would be the third
4 line down of that, on that paragraph.

5 **THE COURT:** Okay. So the advances will not be made
6 unless and until in addition to meeting the
7 other requirements of this agreement, the
8 borrower presents proper written demand from
9 the contractor. So Ben, are you saying that
10 you all have a disagreement as to whether or
11 not proper written demand from the contractor
12 was made?

13 **MR. COPPAGE:** On two fronts, Your Honor. One, in
14 that the particular -- well, I guess on three
15 fronts -- one, that there is some ambiguity in
16 the contract, because once it says that phrase
17 that Mr. Page just quoted, and then also goes
18 on to say the method by which it disburses the
19 money shall be at the discretion of the lender,
20 so it really gives itself very broad latitude.
21 So there's some ambiguity about what is
22 actually required. And second, the course of
23 dealing of the parties, and TD's changing how
24 it did, time and again, not requiring that
25 writing from the borrower making the claim that



1 the contractor's requesting, that was not how
2 it did things for other disbursements. So --
3 and third, just review of these emails, I
4 believe that it does appear that in
5 corresponding with Mr. Garraway and Mr.
6 Stevens, that that's exactly what was going on
7 here, that they were saying, this thing needs
8 to keep going, the next necessary work has been
9 completed, so TD needs to go ahead and disburse
10 this money. So there is certainly question of
11 fact as to whether that request had been made.

12 **THE COURT:** So -- thank you. Mr. Page, quick
13 question, so proper written demand, is that
14 defined anywhere? Is that -- I understand
15 perhaps the position is maybe the email doesn't
16 count, or what is TD's position, what proper
17 written demand?

18 **MR. PAGE:** Your Honor, it's not a defined term, and
19 -- but I don't think we've received any -- a
20 borrower properly written demand. And I think
21 that's responded to in the borrower's response
22 to our request to admit, saying there was no
23 such properly written demand. And I don't
24 think the contract's ambiguous. I mean, it
25 says, the advances will not be made unless and



1 until, as previously read by the Court. And
2 then it gives the lender, my client, very broad
3 discretion to change the timing and amounts of
4 disbursement. So, you know, they're saying we
5 -- you know, we could -- we don't have to make
6 advances until we receive the written demand
7 from the borrower. And then, also, we have the
8 option, at our sole discretion, to change it
9 later, which is exactly what Mr. Coppage is
10 describing us doing. So I don't see how that
11 is -- how those terms act together to be
12 ambiguous at all. I think they just support
13 the events that occurred here.

14 **THE COURT:** And other than what you have sent this
15 morning, is there any -- you had described a
16 part of the story where they discussed things
17 back and forth and changed things. Is there
18 any -- is there any supporting affidavits or
19 anything with regard to that -- that narrative?

20 **MR. COPPAGE:** There are several emails back and
21 forth, and there are -- included in what the
22 Court has are these different forms that TD
23 gave out from time to time, where things would
24 be changed significantly.

25 **MR. PAGE:** Yeah. And the loan agreement provides



1 that we can change, you know, provide any
2 schedule or establish any connection with this
3 loan. So I don't really see the loan agreement
4 in its plain language provides us the ability
5 to edit and to change the schedule. So I don't
6 really see how -- if the schedule was changed,
7 that somehow shows we've breached this
8 agreement. It seems like we're allowed to,
9 under this agreement, at our sole discretion.

10 **MR. COPPAGE:** And, Your Honor, I would just argue
11 that if TD is claiming that it had reserved
12 that amount of discretion, that amount of
13 latitude in its contract, then the contract
14 terms would really be meaningless. That would
15 be -- that would mean that it could withhold
16 money at any time and really throw the
17 construction project off the rails, just decide
18 to say to the borrower and the contractor, you
19 just go ahead and finish this whole project,
20 and then we'll disburse some money, you guys
21 deal with it, which is more or less what
22 happened here. So if that's -- that's the
23 argument, I really think -- got a contract that
24 is without meaning. It just can't be completed
25 at all.



1 **THE COURT:** All right. Thanks. And, of course, the
2 contract is between a owner and the ---

3 **MR. COPPAGE:** Well, it's all three of the parties,
4 Your Honor.

5 **THE COURT:** Are they all party to it? I didn't see
6 one signed by all of them.

7 **MR. COPPAGE:** They are.

8 **THE COURT:** Okay. Good. Good. All right. Mr.
9 Wegmann, happy to hear from you, sir.

10 **POSITION STATEMENT - MICHAEL AND ALICIA GARRAWAY:**

11 **MR. WEGMANN:** Judge, it's not my motion, but I'd
12 like to point out a couple of things.

13 **THE COURT:** And you're distant. I don't know if you
14 can turn your volume up or get your microphone
15 closer or something, but.

16 **MR. WEGMANN:** Is that better, Judge?

17 **THE COURT:** A little bit. You sort of sound like
18 you're at the end of a tunnel -- a very
19 patriotic tunnel with the flag -- but a tunnel,
20 nonetheless, so. It's getting worse, whatever
21 you're doing.

22 **MR. WEGMANN:** Whatever I'm doing, it's getting
23 worse. That's not good, Judge.

24 **THE COURT:** If you're talking, we can't hear you.

25 **MR. WEGMANN:** Is that any better?



1 **THE COURT:** Madam Court Reporter, can you hear him?
2 Just thumbs up or thumbs down.

3 **COURT REPORTER:** That little bit, I could hear a
4 little bit better.

5 **THE COURT:** Okay. Give it a try, and we'll see what
6 happens.

7 **MR. WEGMANN:** I'll try and speak loudly.

8 **THE COURT:** That's good, perfect. Don't change
9 anything, whatever you're doing. Okay. Go.

10 **MR. WEGMANN:** All right, Judge. So Mr. Coppage
11 provided you a copy of the contract agreement
12 between my client and his client. And you'll
13 note that it's for \$540,000. If you go down to
14 what else he provided you, and that was -- that
15 started at Stevens Builders 001, on that -- in
16 that list of documents. Then, there's the
17 construction loan agreement, the appraisal.
18 And then, there is in this, essentially, what
19 I wanted to really point out, was at this point
20 in time where Mr. Coppage argues things came
21 off the rail, TD Bank had only done one
22 disbursement. As Your Honor is familiar with,
23 on a construction loan, my client's responsible
24 for putting in his money first. And so there
25 had been disbursements from my client totaling



1 \$261,818.99. And then a \$72,000 disbursement
2 by TD September of 2018, before this started
3 coming apart December and January. And so he
4 had already taken \$333,818.09. And, as you
5 know from our counterclaim, is we claim that he
6 was already way over budget. And if you look
7 through the emails, that comes out through TD
8 Bank and my client that no, he's not due a
9 draw, he needs to do more work. That's where
10 it fell apart. It had nothing to do with TD
11 Bank not paying him. It had everything to do
12 with he was ahead of schedule in the amount of
13 completion compared to what he had been paid
14 with on a \$540,000 contract. But I think it's
15 important to note that TD Bank had only done
16 one transfer at this point in time. All the
17 other transfers were from my client to the
18 other side of their money in first, and that
19 included a \$54,000 deposit, an \$81,000
20 disbursement, a \$59,400 disbursement, another
21 35, another 19, another 118. I mean, it just
22 -- it kept building. So -- but TD Bank, at
23 this point, had only done one transfer of that
24 -- the actual construction loan at that point
25 in time. And my client had not given them



1 permission to release any more. Because my
2 client's position is quite clear. We think he
3 owes my client close to \$200,000, based on what
4 it cost to complete, and based on what we think
5 he was over, and what he'd already been paid
6 for the amount that was already completed, or
7 was only completed at that point. So that's my
8 two cents, at this point.

9 **THE COURT:** Okay. So just to be clear, the borrower
10 not only did not ask for an advance to be made,
11 the borrower sought not to give further
12 advances to the contractor.

13 **MR. WEGMANN:** Yes, sir. But in the January
14 timeframe, based on the percentage of
15 completion, and when you take what the borrower
16 had input at that point of their own funds, 261
17 -- almost \$262,000, plus the 72 from the first
18 draw of TD Bank, the borrower's position was he
19 was already ahead of schedule, as they like to
20 say, at that point in time, and wasn't due a
21 draw at that point in time, based on the
22 inspections or anything else, until he
23 completed more work. That's when things fell
24 apart. He was not gonna come back out until he
25 got paid. And my client wasn't gonna authorize



1 payment, because he was already ahead of
2 schedule.

3 QUESTIONS BY THE COURT:

4 **THE COURT:** Okay. All right. Thanks. Ben, is
5 there something in this contract -- first of
6 all, is that undisputed narrative of the facts
7 based on everything I've got, or is there a
8 dispute? And if so, what is it?

9 **MR. COPPAGE:** No, I'll certainly say, all of that's
10 in dispute.

11 **THE COURT:** Okay.

12 **MR. COPPAGE:** It's my client's position that he had
13 done everything that he needed. I think what's
14 in front of you tends to support his position.
15 He's got an email there from the TD Bank
16 representative saying yes, you have done what
17 you need to do to get this next draw. Here's
18 a spreadsheet showing exactly what you're
19 entitled to. And Judge ---

20 **THE COURT:** What page is that?

21 **MR. COPPAGE:** Let's see.

22 **THE COURT:** It's got Bates stamp Stevens Builders
23 20, et cetera, on the bottom.

24 **MR. COPPAGE:** Sure. It's got Stevens Builders 62.
25 Then she's referencing a spreadsheet that's at



1 page 76 and 77. So she's saying he's done what
2 he needs to do. There's certainly a material
3 fact in dispute as to whether the work was
4 done, or whether it hadn't been done.

5 **MR. PAGE:** Your Honor, I'd say, you know, regardless
6 of where they were in the construction, the
7 agreement requires the borrower to present a
8 proper written demand from the contractor, and
9 I think it's pretty clear that there was no
10 written demand at the time of, you know -- that
11 this occurred. The borrower was actually
12 telling TD not to disburse any more funds to
13 the contractor. So how could that, you know --
14 how could that exist?

15 **THE COURT:** Ben, let me ask you this. Under the
16 contract, if the borrower says, don't lend them
17 another dime, don't give them another dime,
18 it's your position, obviously, that the bank
19 doesn't have any choice, they have to give you
20 the money, have to give your client the money.
21 I mean, that's the position of the contractor;
22 is that accurate?

23 **MR. COPPAGE:** I believe once -- especially once they
24 have determined that he's entitled to that
25 disbursement and under their operations, under



1 the course of dealing as they've gone through
2 this contract, I believe that's correct. They
3 would need to go ahead and issue a draw.

4 **MR. PAGE:** That language just is not in this
5 contract. I mean, I don't -- it seems like the
6 law in this state requires that if it's
7 unambiguous term, the contract would govern.
8 And we've been sued for breach of this
9 contract, and that term that if you -- that we
10 would be required to make a payment upon demand
11 by the contractor, it just isn't in here.

12 **THE COURT:** Ben, is there anything from the owner
13 saying yes, there's -- there's not, that's
14 clear -- but you're saying, or are you saying,
15 that there's some question as to whether or not
16 the owners said to the bank, here's a bill,
17 please pay it? Maybe, not in so many words?

18 **MR. COPPAGE:** I am looking back through what I have.
19 There's nothing I can call the Court's
20 attention to, as we sit here right now. I
21 believe I recall something like that, but
22 again, there's nothing.

23 **MR. WEGMANN:** So prior -- if you'll look at our
24 pleadings, our general responses under our
25 answer in counterclaim paragraph 10, responding



1 to the allegations contained in paragraph 11 of
2 the complaint, demands for proof would further
3 proffer to the Court Stevens Builders requested
4 additional funds beyond the work that had been
5 -- actually been completed, and therefore no
6 further funds were disbursed on the
7 construction loan to Stevens Builders or by
8 Garraways directly to the Plaintiff. It's
9 exactly what I said, and that was his position.

10 **MR. COPPAGE:** All right. Judge, if you could look
11 at page 67, Stevens Builders 67, there's an
12 email. Excuse me, Your Honor, I'm looking at
13 the wrong thing there. I apologize.

14 **THE COURT:** 67, you said?

15 **MR. COPPAGE:** Your Honor, I'm sorry. I was looking
16 at the wrong thing.

17 **THE COURT:** So, which page?

18 **MR. COPPAGE:** I don't have it, Your Honor.

19 **THE COURT:** Okay. All right. All right. Okay.

20 **MR. COPPAGE:** Okay. Sorry, Your Honor, 71.

21 **THE COURT:** 71.

22 **MR. COPPAGE:** So here we've got Mr. Garraway
23 emailing Ms. Courchesne saying -- asking her to
24 send a copy of the inspection report, letting
25 him know what needs to be complete before he



1 can get the next draw. So he's requesting --
2 he's obviously wanting to know what needs to be
3 done, if anything, to get that draw done. Over
4 the course of the next day or so, they go back
5 and forth. She gets that information, and she
6 says he's done it, he's entitled to a draw. So
7 Mr. Garraway knows the project needs to be
8 continued. He's asking for that information.
9 Ms. Courchesne provides it and says, yeah, it's
10 time. He's entitled to a draw.

11 **THE COURT:** Now, doesn't she -- if I'm reading
12 correctly, January 8th, 2019, 928, Donna says,
13 we can't release funds -- am I -- are these
14 lined up in reverse?

15 **MR. COPPAGE:** They are, so the ---

16 **THE COURT:** This is unfortunate news on the draw.
17 So they're disagreeing on January 8th as to the
18 amount.

19 **MR. COPPAGE:** Correct. And, as you keep going up
20 that chain, there is some discussion back and
21 forth until Ms. Courchesne gets to the point
22 where she's saying, well, it does appear that
23 he's done what he needs to do. He's entitled
24 to this draw.

25 **THE COURT:** And then, at what point do the Garraways



1 say, send the contractor the money, if at all?

2 **MR. COPPAGE:** I think that's what he's saying there
3 on January 11th. He's -- I don't think he's
4 using the word, demand, but he's saying, let us
5 know what we need to do to get this next draw.

6 **MR. PAGE:** Which email is that?

7 **MR. COPPAGE:** It's on page 71. It's -- let's see,
8 it's Michael Garraway to Donna Courchesne, can
9 you send Buddy a copy of the inspection report,
10 and let him know what he needs to complete
11 before he can get the next draw. I'm not sure,
12 and I don't want to give him incorrect
13 information.

14 **MR. WEGMANN:** Yeah, and what you haven't been
15 provided, Judge, is a series of other emails
16 between Mr. Walker -- or Mr. Stevens, the
17 Plaintiff, and Donna at -- there's a January
18 22nd, 2019 email that basically says, based on
19 the review of the budget, you know, blah, blah,
20 blah, blah, the items -- the other items that
21 show are not completed according to inspections
22 and the photos you provided. I'm not sure what
23 is missing. I do understand you are looking
24 for a release of funds, but we cannot release
25 money in advance of work being completed. I'm



1 including Mr. Garraway for his review as well,
2 and I want to make sure we're all on the same
3 page. So he hasn't provided you some of his
4 own client's emails later on that they're still
5 going back and forth, and this is as of January
6 22nd. His client responds on the 23rd, I
7 should be entitled to a draw, also, the pre-
8 funded items, including the very expensive
9 exterior door, should fall under the service to
10 your customer. Well, my client had already
11 paid that \$2,000 for the door to him. But I
12 funded many items big ticket that should be
13 funded as draw, so they're still going back and
14 forth on January 23rd. And again, my client
15 hasn't authorized the release of anything at
16 this point, and doesn't appear he's included
17 those emails from his client in that diatribe.

18 **THE COURT:** I don't know if it turns into a diatribe
19 yet. But, anyway, I'll try to read it all.
20 Okay. Anything else from anyone?

21 **MR. PAGE:** No, Your Honor.

22 **THE COURT:** Let me take a look at it. If y'all
23 don't hear from me in ten days, shoot me an
24 email. Now, Ben, you had mentioned -- because
25 I recall that motion hearing -- basically it



1 was a motion to compel. But it was a motion to
2 compel discovery, which fell outside of the
3 scheduling order compel period. So I think I
4 properly denied it, 'cause I can't really
5 compel outside of that. But I was hoping y'all
6 would try to get back together and see if there
7 was -- because it sounded like the discovery
8 stuff was fairly simple. Is that something
9 y'all have a schedule on? Has this thing been
10 mediated?

11 **MR. WEGMANN:** No, Your Honor.

12 **MR. PAGE:** No, Judge.

13 **MR. COPPAGE:** And like I said, Judge, I have
14 submitted a schedule to the Court, which just
15 required that the discovery response be
16 produced within 30 days of the Court's order.
17 So I'll respectfully request that that be
18 granted, give us what we need to complete
19 discovery, get mediation done, let everybody
20 know where they stand. And would just
21 reiterate -- I made this point before, but this
22 has largely been more -- I certainly realized
23 that I erred in not getting the discovery to
24 them in the time provided for in the scheduling
25 order, but this case has also been largely



1 driven by TD's refusal to participate. It took
2 us seven months to get them to respond to the
3 complaint, seven months to even answer this
4 thing. And there were subsequent motions that
5 took a good bit of time. So even though it's
6 been pending since 2019, it's -- it seems like
7 a much newer case. So I think the Court had
8 granted a lot of -- was very -- granted a lot
9 of grace to TD. I would just ask for the same
10 for my client.

11 **MR. PAGE:** Your Honor, I -- we would object to that
12 characterization of this case. We have been --
13 you know, Mr. -- the Plaintiff serially tried
14 to default TD, and every chance we got that
15 they would get -- they would try and file an
16 affidavit of default and put us in default on
17 this matter. And then, they appealed one of
18 the orders. So it's not like TD has been
19 dragging its feet on this litigation. I just
20 wanted the record to be clear on that.

21 **THE COURT:** Well, the fact is, COVID knocked
22 everything back two years. So when I see a
23 2019 case, or whatever, I'm not surprised. But
24 -- and with regard to the mediation, I'm sure
25 Mr. Page is saying, well, I'd love to know



1 whether I'm in or out before we schedule any
2 mediation, which is fair, so.

3 **MR. PAGE:** Yes, Your Honor. I think we also, in
4 terms of additional discovery, you know, it's
5 a breach of contract cause of action. We --
6 the contract, everyone's got it. So I don't
7 really -- you know, we just kind of wanted to
8 be heard on this before we start engaging in
9 discovery.

10 **THE COURT:** I understand. Okay.

11 **MR. WEGMANN:** And I'll just state, Your Honor, from
12 my client's perspective, I -- you know, it was
13 almost two months later that requests were sent
14 to my client, and I can't -- I don't have
15 authority to consent to a scheduling as it
16 relates to my client answering discovery that's
17 been submitted two months late. I can properly
18 consent to some of the mediation and other
19 stuff, but I think that would be more prudent
20 once we know whether or not TD Bank is going to
21 be involved or not in what would be a final
22 hearing, so.

23 **THE COURT:** Ben, you said you had submitted a
24 scheduling order. Did you upload that to the
25 system?



1 **MR. COPPAGE:** I uploaded it, and sent an email to
2 Heather.

3 **THE COURT:** Okay. Yeah, try -- if you would, don't
4 upload stuff like that, because it might get in
5 our system as a consent order, and I don't know
6 what's happened to it. But, I guess, maybe
7 Heather has it. But when you put them in the
8 system like that, it's sort of a message to me
9 that everybody agrees, and you've uploaded it,
10 so.

11 **MR. COPPAGE:** Certainly, and I wouldn't want that to
12 be the case. Like I said, I emailed Heather.
13 I just didn't want to run afoul of what I
14 understood the Court's request to be from our
15 last discussion of the matter, which was ---

16 **THE COURT:** No, no, I'd love to have you all ---

17 **MR. COPPAGE:** --- asking us to ---

18 **THE COURT:** --- agree. But I just don't want
19 anybody unilaterally coming up with one that is
20 not agreed. So all right, again, if y'all
21 haven't heard from me in ten days, shoot me an
22 email to remind me, and I'll see what I can
23 figure out. Just out of curiosity, Mr.
24 Wegmann, did this house get finished? Somebody
25 in the house, or is it sitting there in the



1 condition in the pictures?

2 **MR. WEGMANN:** No, sir. We hired another contractor
3 who finished it, and so, you know, we figured
4 in what the cost to finish based on what was
5 left, et cetera, and then the overruns that we
6 believe they were ahead of schedule, and then
7 some -- as in every one of these cases, Judge,
8 as you know, there's always a complaint for
9 well, they did this wrong and they did that
10 wrong, and that number comes out to be
11 somewhere around \$200,000.

12 **THE COURT:** Ouch. Okay. I just always wonder,
13 'cause you see the ones that are left open to
14 the weather, and then it really is a problem,
15 'cause they've got to tear the whole thing
16 down. So I'm glad to hear it got finished, at
17 least. I don't know if that will ---

18 **MR. WEGMANN:** Yeah, we got a different contractor on
19 it as soon as we could.

20 **THE COURT:** Well, that's good for all parties, I
21 would think. All right. Well, let me think
22 about it. Again, y'all remind me if you
23 haven't heard from me in ten days, and I'll try
24 to come up with something. Y'all have a great
25 day.



1 **MR. COPPAGE:** Thank you, Judge.

2 **MR. PAGE:** Thank you, Your Honor.

3 **MR. WEGMANN:** Thank you, Your Honor.

4 **THE COURT:** Thank you, Madam Court Reporter.

5 That'll conclude the record. Thanks.

6 **(There being nothing further, the hearing concluded**
7 **at 11:47 a.m.)**



Field Inspection Report

TD Bank N. A.

Borrower: 0
Job Address:

Date:
Req. #

	Item	Revised	Paid by MrG to buddy	%	Paid by MrG not part of budget	%	Paid by MrG part of budget	%	Total	%	Actual	Balance	Notes
1	Permits	6,000.00		0%		#DIV/0!	6,000.00	100%	6,000.00	100%		0.00	
2	Job Conditions	2,000.00		0%		#DIV/0!	2,000.00	100%	2,000.00	100%		0.00	
3	Overhead / Profit	43,200.00		0%		#DIV/0!	43,200.00	100%	43,200.00	100%		0.00	
4	Contingency	5,400.00		0%		#DIV/0!	5,400.00	100%	5,400.00	100%		0.00	
5	Earthwork / Excavating	12,000.00		0%		#DIV/0!	12,000.00	100%	12,000.00	100%		0.00	
6	Sewer / Septic System	29,000.00		0%		#DIV/0!	29,000.00	100%	29,000.00	100%		0.00	
7	Landscaping	8,000.00		0%		#DIV/0!	8,000.00	100%	8,000.00	100%		0.00	
8	Paving	4,000.00		0%		#DIV/0!		0%	0.00	0%		4,000.00	
9	Water / Well	0.00		#DIV/0!		#DIV/0!		#DIV/0!	0.00	#DIV/0!		0.00	
10	Concrete Foundation	22,500.00		0%		#DIV/0!	22,500.00	100%	22,500.00	100%		0.00	
11	Concrete Slabs	12,000.00		0%		#DIV/0!	12,000.00	100%	12,000.00	100%		0.00	
12	Masonry	9,500.00		0%		#DIV/0!	9,500.00	100%	9,500.00	100%		0.00	
13	Pre-Cast Steps	0.00		#DIV/0!		#DIV/0!		#DIV/0!	0.00	#DIV/0!		0.00	
14	Metals	0.00		#DIV/0!		#DIV/0!		#DIV/0!	0.00	#DIV/0!		0.00	
15	Major Materials	98,900.00	48,400.00	49%		0%	50,500.00	51%	98,900.00	100%		0.00	
16	Carpentry Labor	60,000.00	60,000.00	100%		0%		0%	60,000.00	100%		0.00	
17	Interior Trim / Stairs	15,000.00		0%		#DIV/0!		0%	0.00	0%		15,000.00	
18	Finish Labor	9,600.00		0%		#DIV/0!		0%	0.00	0%		9,600.00	
19	Roofing	5,500.00	5,500.00	100%		0%		0%	5,500.00	100%		0.00	
20	Siding	14,500.00	14,500.00	100%		0%		0%	14,500.00	100%		0.00	
21	Insulation	6,000.00		0%		#DIV/0!		0%	0.00	0%		6,000.00	
22	Windows	15,000.00	15,000.00	100%		0%		0%	15,000.00	100%		0.00	
23	Exterior Doors	8,000.00	4,000.00	50%		0%	2,000.00	25%	6,000.00	75%		2,000.00	Part of budget paid by borrower
24	Interior Doors	3,000.00		0%		#DIV/0!		0%	0.00	0%		3,000.00	
25	Drywall	16,000.00		0%		#DIV/0!		0%	0.00	0%		16,000.00	
26	Exterior Paint	19,500.00		0%		#DIV/0!		0%	0.00	0%		19,500.00	
27	Interior Paint	14,500.00		0%		#DIV/0!		0%	0.00	0%		14,500.00	
28	Flooring	16,000.00		0%		#DIV/0!		0%	0.00	0%		16,000.00	
28	Bath Accessories	4,000.00		0%		#DIV/0!		0%	0.00	0%		4,000.00	
30	Cabinets and Tops	30,000.00	24,094.60	80%		0%		0%	24,094.60	80%		5,905.40	Part of budget paid by borrower
31	Appliances	12,300.00		0%		#DIV/0!		0%	0.00	0%		12,300.00	
32	Plumbing & Fixtures	5,900.00		0%		#DIV/0!	5,900.00	100%	5,900.00	100%		0.00	Part of budget paid by borrower
33	H.V.A.C.	16,500.00		0%		#DIV/0!		0%	0.00	0%		16,500.00	
34	Drilled Well	0.00		#DIV/0!		#DIV/0!		#DIV/0!	0.00	#DIV/0!		0.00	
35	Security System	0.00		#DIV/0!		#DIV/0!		#DIV/0!	0.00	#DIV/0!		0.00	
36	Electrical	21,000.00		0%		#DIV/0!		0%	0.00	0%		21,000.00	
37	Electrical Fixtures	4,000.00		0%		#DIV/0!		0%	0.00	0%		4,000.00	
38	Electrical Service	2,700.00		0%		#DIV/0!		0%	0.00	0%		2,700.00	
39	Elevator	25,000.00		0%		#DIV/0!		0%	0.00	0%		25,000.00	
40	Generator	8,500.00		0%		#DIV/0!		0%	0.00	0%		8,500.00	
	Subtotal	585,000.00	171,494.60	29%	0.00	0%	208,000.00	36%	379,494.60	65%	0%	205,505.40	
	Retainage			#DIV/0!		#DIV/0!		#DIV/0!	0.00	#DIV/0!		0.00	
	Total			#DIV/0!		#DIV/0!		#DIV/0!	0.00	#DIV/0!		0.00	

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

Feb 21 2023

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable Carmen T. Mullen, Circuit Court Judge;
The Honorable Maite Murphy;
and
The Honorable Marvin H. Dukes, III, Master-in Equity and Special Circuit Judge

Appellate Case No. 2022-001132
Case No. 2019-CP-07-1666

Stevens Builders, LLC.....Appellant,

v.

Michael C. Garraway, Alicia M. Garraway, and TD Bank, N.A. Defendants,

Of whom TD Bank, N.A. is the.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.

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February 1, 2023

Beaufort, South Carolina