

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master-in-Equity

Appellate Case No. 2012-213632

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JUN 18 2013

SC Court of Appeals

HSBC Bank USA, National Association as Trustee
for Wells Fargo Asset Securities Corporation,
Mortgage Pass-Through Certificates Series 2006-AR18,.....Respondent,

v.

Kenneth C. Feagin,Appellant.

MOTION TO DISMISS APPEAL

Respondent moves to dismiss this appeal on the grounds that the notice of appeal was not served within the time required by Rule 203(b)(1), SCACR. The grounds for this motion are as follows:

1. Appellant has appealed from two orders, an Order and Decree of Foreclosure dated and filed August 10, 2012, and an Order Denying Plaintiff's [sic] Motion to Reconsider dated and filed November 15, 2012.

2. Appellant's Notice of Appeal states that Appellant received written notice of the Order and Decree of Foreclosure on August 11, 2012, that Appellant filed a motion for reconsideration of the order, and that the motion was denied by the order dated November 15, 2012.

3. The time for serving a notice of appeal from the Order and Decree of Foreclosure was stayed by the motion for reconsideration only if the motion was timely filed. Rule 203(b)(1), SCACR; Rule 59(f), SCRCP.

4. To be timely, the motion for reconsideration had to be served no later than 10 days after receipt of written notice of the entry of the order. Rule 59(e), SCRCP.

5. The time for serving a notice of appeal cannot be extended. Rule 263(b), SCACR.

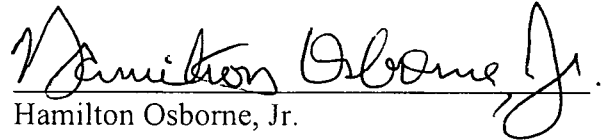
6. As previously mentioned, Appellant's Notice of Appeal states that Appellant received written notice of the Order and Decree of Foreclosure on August 11, 2012.

7. Appellant's motion for reconsideration of the Order and Decree of Foreclosure is dated, and was served and filed, August 24, 2012, which was a Friday. (See the attached copy of the motion, without the exhibits thereto.)

8. To be timely, Appellant's motion for reconsideration had to be served no later than Tuesday, August 21, 2012, which was the 10th day after Appellant received notice of the Order and Decree of Foreclosure.

9. Because Appellant's motion for reconsideration was not timely, the time for appealing from the Order and Decree of Foreclosure was not stayed, and it expired on September 10, 2012, which was 30 days after Appellant received notice of the Order and Decree of Foreclosure.

10. Appellant's notice of appeal was not served until December 12, 2012, and was thus not timely.



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June 18, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master-in-Equity

Appellate Case No. 2012-213632

HSBC Bank USA, National Association as Trustee
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v.

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PROOF OF SERVICE

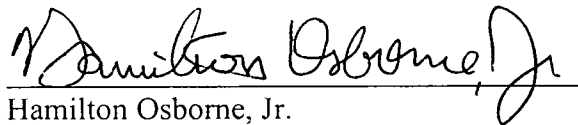
I, the undersigned attorney for Respondent, certify that I served the attached motion by causing true copies thereof to be mailed by first-class mail, postage prepaid, to the following persons at their respective addresses set forth below on June 18, 2013:

Max T. Hyde, Esquire
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Attorneys for Respondent


Hamilton Osborne, Jr.
Attorney for Respondent

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

) IN THE COURT OF COMMON PLEAS
)
) C. A. NO: 2011-CP-42-1284
)
)

HSBC Bank of USA, National Association as
Trustee for Wells Fargo Asset Securities
Corporation, Mortgage Pass-Through Certificates
Series 2006-AR 18,

Plaintiff,

v.

Kenneth C. Feagin and Mountain 1st
Bank & Trust Co.,

Defendants.

) **DEFENDANT FEAGIN'S MOTION**
) **FOR AND MEMORANDUM**
) **IN SUPPORT OF RECONSIDERATION**
)
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JAMES BLAUGHER

TO: MICHAEL CASHMAN, ESQUIRE, ATTORNEY FOR PLAINTIFF

YOU WILL HEREBY TAKE NOTICE that Defendant Kenneth C. Feagin, by and through his undersigned counsel, shall within ten days from the undersigned date, or as soon thereafter as counsel may be heard, move for an Order of this Court altering and/or amending this Court's Order of August 10, 2012, in the above captioned mater. In support of this motion, Defendant Feagin would respectfully submit the foregoing memorandum of law in support of his Motion for Reconsideration. This motion is made pursuant to Rule 59(e), SCRCF, and the applicable case law of South Carolina.

ISSUES PRESENTED

The issues presented by way of this Memorandum in Support of Defendant Feagin's Motion for Reconsideration are three-fold:

- 1. That this Court should alter and/or amend its Order to deny Summary Judgment to the Plaintiff;**

2. That this Court should alter and/or amend its Order to exercise its inherent discretion to deny a deficiency judgment against Feagin to the Plaintiff; and
3. That this Court should alter and/or amend its Order to reflect the awarding of attorney fees that are reasonable.

FACTUAL BACKGROUND/PROCEDURAL HISTORY

Plaintiff HSBC Bank USA, National Association as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates Series 2006-AR18 ("Plaintiff"), through Rogers Townsend & Thomas, PC ("Rogers Townsend") law firm in Columbia, South Carolina, filed the original Complaint (**Exhibit 1**) on March 29, 2010 to initiate the foreclosure.

Paragraph 13 of the original Complaint states: "Plaintiff's right to a personal or deficiency judgment pursuant to South Carolina Code Sections 29-3-650 and 29-3-660 is expressly waived." Also, in the caption of this pleading, Plaintiff states "Deficiency Judgment Waived." Travis S. Greene, Esquire, filed an Answer on May 14, 2010 on behalf of Feagin asserting the affirmative defense of Unclean Hands (**Exhibit 2**). Defendant Mountain 1st Bank & Trust Co. never filed any responsive pleading.

On May 17, 2010, Rogers Townsend served notice (**Exhibit 3**) of a foreclosure hearing scheduled for June 3, 2010 at 9:30 a.m. before the Honorable Gordon G. Cooper, Spartanburg County Master-in-Equity. In the caption of the Certificate of Service, Plaintiff states: "Deficiency Judgment Waived." Rogers Townsend sent a letter on May 28, 2010 (**Exhibit 4**) giving notice that the hearing had been cancelled.

On November 24, 2010, Michael S. Cashman, Esquire, of the Greenville, South Carolina office of Womble Carlyle Sandridge and Rice, PLLC and Rogers Townsend filed a Motion for Substitution of Counsel (**Exhibit 5**). An Order for Substitution of Counsel signed by the Honorable J. Derham Cole was filed on December 6, 2010 (**Exhibit 6**).

In a Form 4 order filed on November 5, 2010 (**Exhibit 7**), the action (2010-CP-42-1689) was stricken from the docket pursuant to Rule 40(j), SCRC, on the basis the "matter has been placed on hold, pending review by Lender." Three (3) e-mails from Rogers Townsend (**Exhibit 8**) indicate that Plaintiff canceled two (2) hearings because the file was contested.

In a letter to Travis Greene dated February 27, 2011 (**Exhibit 9**), after evidencing his intent to restore the case, Michael Cashman states, "Additionally, in light of your client's unclean hands affirmative defense, we intend to amend the complaint to delete our waiver of a deficiency judgment." Mr. Cashman attached to this letter a red-lined copy of the proposed Amended Complaint. This red-lined copy deletes Paragraph 13 and deletes the phrase in the caption "Deficiency Judgment Waived." Otherwise, the proposed Amended Complaint is the same as the original Complaint. Critically, no affirmative language was inserted to demand a deficiency judgment.

On March 16, 2011, Michael Cashman filed a motion to restore the case to the docket and amend the Complaint "by deleting any waiver of a deficiency judgment" (**Exhibit 10**). Mr. Cashman states in this Plaintiff's Motion to Restore Case to Docket and to Amend Complaint that "[t]his motion shall certify that the undersigned has communicated, orally and in writing, with Travis S. Greene, Esq., counsel for Defendant Kenneth C. Feagin on March 1, 2011, and opposing counsel has consented to the above-captioned motions to restore this matter to the docket and to amend the plaintiff's complaint." The motion was granted by way of the Order (**Exhibit 11**) signed by the Honorable J. Mark Hayes, II on March 16, 2011 and filed on same day which states: "Plaintiff is granted leave to Amend its Complaint." The Order does not mention deficiency. In the Order, a new case number was assigned to the matter (2011-CP-42-1284).

An Amended Complaint was filed on March 16, 2011. Like the proposed red-lined version, its content is the same as the original Complaint except that Paragraph 13 of the original Complaint was deleted and the phrase in the caption "Deficiency Judgment Waived" was deleted. There is no affirmative language that demands a deficiency judgment. The filed Amended Complaint, therefore, is silent as to deficiency. An Answer (**Exhibit 12**) was filed on March 31, 2011 in response to the Amended Complaint.

On May 18, 2011, Hamilton Osborne, Jr., Esquire, of the Columbia, South Carolina office of Haynsworth Sinkler Boyd, P.A., filed a Motion for Summary Judgment (**Exhibit 13**) with respect to the Second Defense (Unclean Hands). Max T. Hyde, Jr., Esquire, filed a Notice of Appearance on August 29, 2011 to join Travis S. Greene as counsel for Feagin (**Exhibit 14**). The Honorable Gordon G. Cooper heard plaintiff's Motion for Partial Summary Judgment on February 14, 2012 at 2:30 p.m. An Order Granting Plaintiff's Motion for Summary Judgment was filed on March 1, 2012 (**Exhibit 15**).

The foreclosure hearing was held on Tuesday, July 3, 2012 at 2:30 p.m. before the Honorable Gordon G. Cooper. At this hearing, Feagin pointed out that the Amended Complaint does not demand a deficiency. Accordingly, Feagin asked the Court to exercise its discretion and deny any deficiency. The Court asked the parties to brief the issue of whether the court has discretion to deny a deficiency judgment where the complaint does not ask for one.

Following the submission of briefs by both parties, this Court issued an Order of August 10, 2012 (**Exhibit 16**), wherein this Court affirmed the earlier granting of partial summary judgment; granted the Plaintiff a deficiency judgment against Feagin; and, granted the Plaintiff its attorneys fees as submitted without any hearing on the matter. This Order was received on August 15, 2012, by the undersigned counsel, and this motion follows.

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LEGAL AUTHORITY

I. **Unauthorized Practice of Law**

The South Carolina Supreme Court has the duty to regulate the practice of law in this state and, accordingly, has the authority to define what constitutes the unauthorized practice of law. Hambrick v. GMAC Mortg. Corp., 370 SC 118, 120 (Ct. App. 2006). South Carolina Code § 40-5-10 expressly states: “The inherent power of the Supreme Court with respect to regulating the practice of law, determining the qualifications for admission to the bar and disciplining, suspending and disbaring attorneys is hereby recognized and declared.” S.C. Code § 40-5-10 (2001). The purpose behind laws prohibiting the unauthorized practice of law is to protect the public from incompetent, unethical, or irresponsible representation. *See Hambrick*, 370 SC at 120 (quoting Renaissance Enters. Inc. v. Summit Teleservices, Inc., 334 SC 649, 652 (1999)).

Additionally, the South Carolina Supreme Court has held that an attorney must supervise all real estate and mortgage loan closings. *See Doe v. McMaster*, 355 SC 306 (2003); State v. Buyers Serv. Co., 292 SC 426 (1987). The SC Supreme Court in *Buyers*, stated in pertinent part: “performing a title search, preparing title and loan documents, and closing a loan without the supervision of an attorney constitutes the unauthorized practice of law.” Buyers Ser., 292 SC at 430-34.

As stated by the SC Supreme Court in Doe Law Firm v. Richardson, there are four stages of a real estate closing which involve the practice of law: (1) the title search; (2) the loan documents; (3) the closing itself; and, (4) the recordation of documents. Doe Law Firm v. Richardson, 371 SC 14, 17 (2006). Included in each of these four stages was a description by the South Carolina Supreme Court of what each stage involved. The South Carolina Supreme Court stated as to step two, the loan documents, that “[A] lender may prepare legal documents for use

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in financing or refinancing a real property loan so long as an independent attorney reviews them and makes any correction necessary to ensure their compliance with the law.” Id (internal quotations omitted). As to the closing itself, the SC Supreme Court stated that, “[R]eal estate closings and mortgage loan closings should be conducted only under an attorney’s supervision.”

Id.

Implicit in the Supreme Court’s holding in Richardson supra., as well as in other cases involving real estate transactions, is that any step that must be accomplished by an attorney should be done by an attorney who is licensed in the state of South Carolina. This implication is clear from the Court’s discussion of the relevant facts that surround Doe Law Firm. Namely, the Richardson Court notes that the lender is an out of state lender offering loans and mortgages to people in South Carolina, and Doe Law Firm is a South Carolina law firm which employs South Carolina licensed attorneys. Id. Critically the Supreme Court says of these South Carolina licensed attorneys, that their involvement at the closing stage is to be present at the closing, to explain the loan documents to the borrower and to supervise the execution of the documents, including the HUD statements, as required by state law. Id. at 16.

II. Unclean Hands

The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant. Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 74 (Ct. App. 2010) (quoting Fist Union Nat’l Bank of S.C. v. Soden, 333 S.C. 554, 568 (Ct. App. 1998)). The Court in Coffey held that where a Plaintiff, who is a lender, engages in conduct that constitutes the unauthorized practice of law in a real estate transaction, that such a Plaintiff is found to have unclean hands. *See generally Coffey*, 389 S.C. at 76. The Coffey Court went on to state that where a lender has unclean

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hands, that their foreclosure action should be barred as well. Id. Specifically, South Carolina precedent holds “. . . that no person be permitted to acquire a right of action from their own unlawful act and that one who participates in an unlawful act cannot recover damages for the consequence of that act.” Id.

III. Discretion To Deny A Deficiency Judgment

South Carolina Code § 29-3-660 states:

“In actions to foreclose mortgages the court may adjudge and direct the payment by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such person a party to the action and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person and may enforce such judgment as in other cases.”

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S.C. Code § 29-3-660 (1976).

The South Carolina Supreme Court has stated, “The rendition of a personal judgment in mortgage foreclosure proceedings is thus discretionary with the court.” See Perpetual Bldg. and Loan Ass’n of Anderson v. Braun, 270 S.C. 338, 343 (1978) (citing Berry v. Caldwell et al., 121 S.C. 418 (1922)). In reaching its ultimate holding, that the trial judge did not abuse his discretion in entering a deficiency, the Braun court indicated that the United States Supreme Court had noted that a lower court’s decision to render a personal decree for a deficiency under a general prayer for relief in a bill of equity was within the judge’s discretion. See Id. at 341 (citing Shepherd v. Pepper, 133 U.S. 626 (1890)). Additionally, the Braun court goes on to quote South Carolina Code § 29-3-660 in pertinent part: “In actions to foreclose mortgages the court *may* adjudge and direct the payment by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises. . .” Id. at 343 (emphasis added)

(quoting S.C. Code § 29-3-660 (1976)). Critically, in Braun, the “sole matter for review [was] the propriety of granting a deficiency judgment when it was not specifically demanded in the foreclosure complaint.” Id. at 339.

In expanding upon the principles espoused in Braun, the South Carolina Court of Appeals has held that discretion to cut off the right to a deficiency in a foreclosure action exists unless: “(1) the complaint in the foreclosure action asks for personal judgment, (2) the amount of the debt is fixed in the foreclosure decree, and (3) the sale is insufficient to satisfy the entire debt.” *See generally* Bartles v. Livingston, 282 S.C. 448, 461 (Ct. App. 1984):

IV. Reasonableness Of Attorney Fees.

The South Carolina Court of Appeals has stated that there are certain factors that are to be considered when determining the reasonableness of attorney fees. These factors are: (1) nature, extent, and difficulty of the case; (2) time necessarily devoted to case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *See* Mallett v. Mallett, 323 S.C. 141, 153 (Ct. App. 1996).

ANALYSIS

This Court should issue an Order amending or altering its Order of August 10, 2012, because the Court erred in its decision to grant the Plaintiff partial summary judgment against Feagin; the Court erred in deciding to grant a deficiency against Feagin where the Amended Complaint was silent on the issue; and the Court erred in deciding to summarily grant the Plaintiff its attorneys fees where such fees are unreasonable.

I. This Court should alter and/or amend its Order to deny summary judgment to the Plaintiff against Feagin.

This Court should grant the instant motion and alter and/or amend its earlier Order to deny the Plaintiff summary judgment against Feagin. Such an Order would be proper because a

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South Carolina licensed attorney did not properly close the underlying mortgage. Based on the deficiencies that exist from the failure to properly close the loan, the Plaintiff is estopped by the doctrine of unclean hands from foreclosing upon the same property.

- a. **The loan documents were not properly prepared and/or supervised by a South Carolina attorney and a South Carolina licensed attorney did not properly close the loan.**

The fact that the loan documents in question were prepared solely by the Plaintiff and its agents is an undisputed fact. The Plaintiff by way of all of its pleadings, motions, memoranda, and supporting affidavits, has clearly established that the loan documents were drafted and prepared directly by them, without the input or supervision of a licensed South Carolina attorney. In its Order granting partial summary judgment for the Plaintiff, this Court stated that the loan documents were properly prepared and/or supervised because those documents were reviewed by Mr. Neil, who was not licensed in South Carolina, but was nonetheless an attorney. Further, the Court implied that because Mr. Phillips, who is a licensed South Carolina attorney, had been involved in the transaction, even to the slightest degree, then the loan was properly closed.

However, Mr. Neil's own affidavit states that he "personally conducted the closing and supervised the execution of the loan documents." See Aff. Neil (**Exhibit 17**). Taking that statement in combination with the affidavit of Mr. Phillips (**Exhibit 18**) and Mr. Feagin (**Exhibit 19**), it is clear that there was no South Carolina lawyer who was actually physically present at the closing of the loan, and supervised the execution of the loan documents at issue, even though this was a loan that was issued directly pertaining to property that is located in South Carolina.

While this Court has stated that Mr. Phillip's involvement would moot any issue of the unauthorized practice of law the undisputed facts indicate that Mr. Phillip's involvement in this transaction was minimal at best, and he was by all accounts not present for each one of the stages

of the transaction. Mr. Phillips claims to have recorded the documents and to have done the title search. However, there is no indication or assertion by the Plaintiff, Mr. Neil, or Mr. Phillips that he ever took any action to supervise the drafting of the documents at issue, or to supervise the actual closing and execution of said documents. As such, Mr. Phillips did not participate in each of the four stages of the transaction as laid out in Richardson, supra. Thus, there was no involvement from a South Carolina licensed attorney during several of the critical stages of the instant transaction, which under the law require legal supervision.

In reaching its conclusion that the documents were properly prepared, and that the closing was properly conducted, this Court overlooked the underlying policy of each of the South Carolina Supreme Court's decisions on these very issues. Each case that the South Carolina Supreme Court has decided regarding the unauthorized practice of law in real estate/mortgage closing matter contains an underlying policy rationale that there is a need for an attorney to be involved in certain aspects of those transactions. However, implicit in each of those decisions is the assumption that the supervision will be in the form of a South Carolina licensed attorney. Nowhere is the implication stronger than in the Richardson case, supra. Like the case *sub judice*, the Richardson Court was examining what supervision must be given in real estate transactions that involved out of state lenders who were engaging in real estate transactions within South Carolina relating to property located within the borders of South Carolina. The Richardson Court clearly spelled out that the law firm at issue there was a South Carolina law firm, which employed South Carolina attorneys. This point cannot be understated.

It is axiomatic that the supervision envisioned in Richardson, as well as all of the other South Carolina decisions on this topic, come from a South Carolina licensed attorney, rather than simply any attorney licensed anywhere. Such a policy exists because the South Carolina

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Supreme Court has sought to protect the general public of the state in matters relating to real estate transactions, as declared by the Court in Hambrick, *supra*. Clearly, if the supervising attorney was not impliedly required to be licensed in South Carolina then the South Carolina Supreme Court would have little to no way to regulate the conduct of that attorney.

Therefore, this Court was incorrect when it stated in its Order granting partial summary judgment to the Plaintiff that, “[T]he Courts of South Carolina do not have jurisdiction to regulate the practice of law in other states, and a refusal by this court to enforce the terms of the mortgage securing the Loan would conflict with the doctrine of *lex locus contractus*, which permits a contract to be enforced in this state if it is enforceable under the law of the state where the contract was executed.” *See* Exhibit 15 at page 9. Clearly, based on the decision in Richardson, *supra*, the Courts of South Carolina have the jurisdiction to regulate the practice of law in matters that concern real estate transactions that relate to land within the borders of this state, and the South Carolina Supreme Court has expressly done so as it pertains to out of state lenders and loans within the state. *E.g.* Richardson, *supra*.

Thus, this Court should note that there is an overwhelming need to issue an Order altering and/or amending its earlier Order to deny summary judgment to the Plaintiff, because the loan documents at issue were not properly prepared and/or supervised, and the closing of the underlying transaction was not properly performed by a South Carolina licensed attorney as required under the laws of South Carolina.

- b. **Based on the holding in Coffey, this Court should deny summary judgment to the Plaintiff and amend the Court’s Order to grant summary judgment to Feagin.**

In its Order granting partial Summary Judgment to the Plaintiffs, this Court stated that Feagin’s defense of unclean hands should fail because South Carolina law does not allow it to

proceed based on the opinion in Matrix v. Fin Servs. Corp. v. Frazer, 393 SC 134 (2011). However, such a holding by this Court was in error because the Matrix opinion does not expressly subsume the South Carolina Court of Appeals' holding in Coffey, *supra*.

Specifically, the South Carolina Supreme Court has granted a writ of certiorari as it pertains to Coffey. Had the South Carolina Supreme Court intended for Matrix to apply to Coffey, then surely the Court would have stated such in their opinion, and the Court would have not taken the time to grant cert. in Coffey.

Therefore, the holding in Coffey, that where a lender has acted in such a way that it constitutes the unauthorized practice of law, then such a lender has come to the Court with unclean hands, and they should be barred from recovering on an action for foreclosure, is still valid and applicable law. Importantly, should this Court embrace the holding of Coffey, and apply it to the actions of the instant Plaintiff, this Court would be embracing the most equitable of solutions. Based on Coffey's lack of any restriction of its application, this Court would not run afoul of the law by issuing an Order altering and/or amending its Order of August 10, 2012, and denying Summary Judgment to the Plaintiff, because the Plaintiff has engaged in conduct that has left it with unclean hands.

II. This Court should alter and/or amend its Order to deny the Plaintiff a deficiency judgment against Feagin.

This Court should issue an Order altering and/or amending its Order of August 10, 2012, and this Court should exercise its discretion under the applicable case law to deny the Plaintiff a deficiency judgment against Feagin. Such an Order would be consistent with not just the law but with the overall equities that are present in the instant case.

Based on the silence of the Amended Complaint as to the seeking of a deficiency, this Court was vested with the discretion whether to waive deficiency. Further, because Plaintiff did

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not originally seek a deficiency and only wanted to assert such at a later date, as a punishment for Feagin's assertion of the affirmative defense of Unclean Hands, equity would require that this Court issue an Order addressing such inequitable behavior on the part of the Plaintiff.

Imperative to this Court's analysis in the case *sub judice* is the fact that the Plaintiff has admitted that it is only seeking a deficiency judgment under a general prayer for relief. *See* Plt. Memo. In Opp. To Def. Mot. To Strike Deficiency July 13, 2012 at page 4. In fact, the Amended Complaint to which Plaintiff craves reference is devoid of any mention of the word "deficiency" within the body of the pleading. As such, the three prong test of Bartles cannot restrict this Court from exercising its discretion in determining whether a deficiency judgment should be entered. Additionally, this Court's discretion is clearly available pursuant to the holdings of the South Carolina Supreme Court in Braun, *supra*, and the United States Supreme Court in Shepherd, *supra*, as well as the plain reading of South Carolina Code § 29-3-660.

A seminal distinction should be drawn between the underlying litigation and the South Carolina Supreme Court's holding in Braun, *supra*. Here, Plaintiff originally waived any deficiency against Feagin but now seeks a deficiency as a form of punishment against Feagin simply because he exercised his right to raise an affirmative defense.¹ In Braun, however, the plaintiff never expressly waived a demand for a deficiency and never sought to enter a deficiency judgment as a form of punishment. This Court, then, is not obligated to exercise its discretion in favor of deficiency judgment. Instead, it can exercise its discretion to deny a deficiency judgment.

¹ Based on the express language in Exhibit 10 it would appear that had Feagin not raised any affirmative defenses, but simply acquiesced to the Plaintiff's action then a deficiency would not have been sought.

Inherent in each of the above-referenced cases is the concept that under certain circumstances a trial court has the discretion to grant a deficiency judgment against a defendant in a foreclosure action. Necessarily, if a court has the discretion to determine whether a deficiency judgment should be granted, then it reasonably follows that a court has the discretion to determine whether a deficiency judgment should be denied.

If this Court precludes the entry of a deficiency judgment, it would embrace the equitable principle that a litigant should not be punished for raising an affirmative defense. Allowing a deficiency in light of Plaintiff's actions in the present case would establish a dangerous precedent. Foreclosure plaintiffs would be encouraged to mobilize the deficiency judgment not as a mechanism to recoup potential losses but as a weapon to punish and deter Defendants from raising the defenses they are afforded under the law. Such a result would be inequitable.

Thus, the case law is clear that where equitable a Court should exercise its discretion to deny the entry of a deficiency judgment against a defendant, where the operative pleading is silent on the matter. Therefore, this Court should alter and/or amend its Order of August 10, 2012, to reflect this principle by denying a deficiency against Feagin. Furthermore, this Court should take such steps, as equity requires in the face of this Plaintiff's actions. Namely, coming before this Court with unclean hands, and for attempting to manipulate the law of this state to punish Feagin for asserting his right to a defense in this matter.

III. This Court should alter and/or amend its Order as it relates to the Plaintiff's attorney fees.

In its Order of August 10, 2012, this Court summarily states that it is granting an award to the Plaintiff of its attorney fees, without ever delving into whether or not such fees were reasonable in the instant case. To summarily accept the attorney fees as offered by the Plaintiff, without any examination was error by the Court.

Plaintiff's counsel has submitted a petition for fees, which are in excess of forty thousand dollars (\$40,000.00). Such an amount is clearly outside of the bounds of reason for a case of this nature. There is no novel issue of law that has been presented to the Court that required some exorbitant amount of time to be spent on this case as opposed to another case. Furthermore a fee of over forty thousand dollars is not customary in a case such as this one. Therefore, this Court should issue an Order altering and/or amending the Plaintiff's petition for attorney fees, or at the very least should hold a hearing on the record regarding the same.

CONCLUSION

For the foregoing reasons, Feagin would respectfully request that this Court issue an Order granting Feagin's instant Motion for Reconsideration. Furthermore, Feagin would respectfully request that this Court issue an Order that would alter and/or amend this Court's August 10, 2012, Order and to deny summary judgment to the Plaintiff; to exercise the Court's discretion in denying the Plaintiff the right to a deficiency judgment against Feagin; and, to modify the amount of attorney fees that are due to the Plaintiff. Such an Order is proper pursuant to SCRPC 59 and the applicable case law.

RESPECTFULLY SUBMITTED,


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August 24, 2012
Spartanburg, South Carolina

ATTORNEY FOR DEFENDANT
KENNETH C. FEAGIN

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MAX HYDE LAW FIRM, P.A.

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

HSBC Bank of USA, National)
Association As Trustee for Wells Fargo)
Asset Securities Corporation, Mortgage)
Pass-Through Certificates Series 2006-)
AR18,)

CERTIFICATE OF SERVICE

C. A. No.: 2011-CP-42-1284

Plaintiff,)

v.)

Kenneth C. Feagin and Mountain 1st Bank)
and Trust Co.,)

Defendants.)

The undersigned herby certifies that she is employed in the Law Office of Hyde Law Firm, P.A., 517 E. St. John Street, Spartanburg, South Carolina, and is a person of such age and discretion as to be competent to serve papers.

That on August 24, 2012 she served a copy of a Defendant Feagin's Motion for Memorandum in Support of Reconsideration on the person hereinafter named by hand delivering a copy to the person named below at the place and address stated below.

The Honorable Gordon G. Cooper
180 Magnolia Street
Spartanburg, SC 29306

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JUN 18 2013

SC Court of Appeals

By: Christy R. Snow
Christy R. Snow, Paralegal