

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

JUL 31 2013

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

SC Court of Appeals

James O. Spence, Master-in-Equity for Lexington County

Case No. 2012-CP-32-2757

Appellate Case No. 2013-001250

Capital Bank successor in interest by merger to Carolina
National Bank & Trust Company, Respondent,

v.

Attic Space Self Storage, LLC, James Michael Sequin
a/k/a James Michael Sequin and Christy Duffell-Sequin
a/k/a Christy Duffell-Sequin, Appellants.

INITIAL BRIEF OF RESPONDENT

Frank B.B. Knowlton, Esquire
A. Mattison Bogan, Esquire
Tara C. Sullivan, Esquire
Nelson Mullins Riley & Scarborough,
LLP
1320 Main St./ 17th Floor
Columbia, SC 29201
(803)799-2000
Attorneys for Respondent

RECEIVED

JUL 31 2013

SC Court of Appeals

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE..... 2

STATEMENT OF FACTS..... 3

ARGUMENT..... 8

I. This Court should affirm the trial court’s order granting Capital Bank summary judgment on its claim for foreclosure as to Appellants’ liability because Appellants admit their default on the subject loan and obligation to repay the monies borrowed and Appellants’ affirmative defense fails as a matter of law. 8

 A. Appellants admit default on the subject loan. 8

 B. Appellants’ defense against the foreclosure action fails as a matter of law. 10

 i. Appellants’ argument that Capital Bank was not authorized to pay the 2011 property taxes as early as it did fails to provide Appellants any relief from this foreclosure action as a matter of law..... 10

 ii. Appellants’ argument that they would have been able to make up their delinquency had Capital Bank not added the 2011 property tax liability to the amount demanded by Capital Bank fails to provide Appellants any relief from this foreclosure action as a matter of law..... 13

II. The Master-in-Equity did not err in relying on Capital Bank’s Affidavit. 16

CONCLUSION..... 19

TABLE OF AUTHORITIES

Cases

<u>Allendale Furniture Co., Inc. v. Carolina Commercial Bank,</u> 284 S.C. 76, 325 S.E.2d 530 (1985)	15
<u>Armstrong v. Collins,</u> 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005)	16
<u>Black v. Lexington Sch. Dist. No. 2,</u> 327 S.C. 55, 488 S.E.2d 327 (1997)	18
<u>Englert, Inc. v. LeafGuard USA, Inc.,</u> 377 S.C. 129, 659 S.E.2d 496 (2008)	17
<u>Huggins v. Metts,</u> 371 S.C. 621, 640 S.E.2d 465 (Ct. App. 2006)	8
<u>Loftis v. S.C. Elec. & Gas Co.,</u> 361 S.C. 434, 604 S.E.2d 714 (Ct. App. 2004)	17
<u>MCC Financial Services, Inc. v. Duffel,</u> 265 S.C. 519, 220 S.E.2d 127 (1975)	17
<u>PPG Industries, Inc. v. Orangeburg Paint & Decorating Center, Inc.,</u> 297 S.C. 176, 375 S.E.2d 331 (Ct. App. 1988)	17
<u>Schmidt v. Courtney,</u> 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003)	18
<u>Team IA, Inc. v. Lucas,</u> 395 S.C. 237, 717 S.E.2d 103 (Ct. App. 2011)	17
<u>U.S. Bank Trust Nat'l Assn. v. Bell,</u> 385 S.C. 364, 684 S.E.2d 199 (Ct. App. 2009)	14, 15
<u>Wilder Corp. v. Wilke,</u> 330 S.C. 71, 497 S.E.2d 731 (1998)	16

Rules

25 S.C. Jur. <u>Rules of Civil Procedure</u> § 56.2 (2013).....	18
South Carolina Rule of Appellate Procedure Rule 241(b)(4).....	3
South Carolina Rule of Civil Procedure Rule 56	16, 18

STATEMENT OF ISSUES ON APPEAL

- I. This Court should affirm the trial court's order granting Capital Bank summary judgment on its claim for foreclosure as to Appellants' liability because Appellants admit their default on the subject loan and obligation to repay the monies borrowed and Appellants' affirmative defense fails as a matter of law.
- II. The Master-in-Equity did not err in relying on Capital Bank's Affidavit.

STATEMENT OF THE CASE

Respondent Capital Bank, successor in interest by merger to Carolina National Bank & Trust Company (“Capital Bank”), filed a foreclosure action against Appellants Attic Space Self Storage, LLC (“Attic Space”), James Michael Sequin a/k/a James Michael Seguin (“Mr. Seguin”), and Christy Duffell-Sequin a/k/a Christy Duffell-Sequin (“Mrs. Seguin,” and collectively with Attic Space and Mr. Seguin, the “Appellants”) on July 2, 2012, seeking a foreclosure judgment and a deficiency judgment against Appellants. (R. p. __; Complaint). On August 1, 2012, Appellants filed an Answer admitting that they were two months behind on the subject loan but asserting that they would have been able to make up their delinquency had Capital Bank not added the 2011 tax liability, which they claimed was not in default yet, to the amount demanded by Capital Bank. (R. p. __; Answer p. 2).

On January 15, 2013, Capital Bank filed a Motion for Summary Judgment on its foreclosure complaint. (R. p. __; Motion for Summary Judgment). A hearing was held on this Motion on April 18, 2013, before Judge James O. Spence, Master-in-Equity for Lexington County. (R. p. __; Transcript of Hearing). By Order filed May 17, 2013, the court granted Capital Bank’s Motion for Summary Judgment as to Appellants’ liability on the note and mortgage. (R. p. __; Order Granting Plaintiff’s Motion for Summary Judgment as to Defendants’ Liability). Specifically, the court held that Capital Bank is entitled to foreclose the subject property based on Appellants’ default on the subject loan; Appellants’ affirmative defense fails to provide Appellants any relief from the foreclosure as a matter of law and the affirmative defense was

stricken/dismissed; and that Capital Bank is allowed to proceed with a hearing on the amount of its deficiency judgment.¹ (Id.).

Appellants served the Notice of Appeal on May 31, 2013, and their Initial Appellants' Brief on July 1, 2013. (R. p. __; Notice of Appeal). This Respondent's brief follows.

STATEMENT OF FACTS

On January 10, 2008, Attic Space executed a promissory note in favor of Capital Bank in the original principal amount of \$510,000.00 with interest thereon ("Note"). (R. p. __; Complaint p. 3). To secure the Note, Attic Space executed a mortgage ("Mortgage") dated January 10, 2008, in favor of Capital Bank on the subject real property located in Lexington County, South Carolina ("Property"). (R. p. __; Complaint p. 3-4). To further secure the Note, Mr. and Mrs. Seguin each signed a personal guaranty of the Note on January 10, 2008 (collectively, the "Guarantees"). (R. p. __; Complaint p. 6-9).

Under the loan documents, Attic Space was responsible for the payment of the property taxes. (R. p. __; Capital Bank's Memorandum in Support of its Motion for Summary Judgment p. 2; R. p. __; Complaint at Exhibit C—Real Estate Mortgage p. 2; R. p. __; Capital Bank's Memorandum in Support of its Motion for Summary

¹ Capital Bank has filed a motion asking the Master-in-Equity to require Appellants to show cause as to why a security bond should not be posted to stay the proceeding below. Because the appeal affects title to real property, the underlying action is not stayed and Capital Bank is entitled to move forward with the sale of the subject property and a determination as to the amount of the deficiency owed by Appellants. See Rule 241(b)(4). Unless a security bond is posted, and the Master goes forward with the sale of the property and entry of a deficiency judgment, Appellants' appeal will be mooted.

Judgment at Exhibit A—Seguin Dep. at 50:22-25). However, Appellants admit that Attic Space had financial difficulty and was unable to pay the 2010 taxes when they came due in January 2011 or thereafter. (R. p. __; Capital Bank’s Memorandum in Support of its Motion for Summary Judgment p. 2-3; R. p. __; Capital Bank’s Memorandum in Support of its Motion for Summary Judgment at Exhibit A—Seguin Dep. at 51:22-52:2). Appellants advised Capital Bank that Attic Space could not afford to make the overdue 2010 tax payment in the amount of \$6,944.42 and asked Capital Bank for help with the payment:

But I had talked to Brian about the tax bill and the onset of that bill coming. And I told him on probably three or four visits that we were in a position where we were struggling, my wife and I were personally struggling financially, and we did not have the money in the company at that point to make the, I think it was near-\$7,000 tax payment at that point, and had asked him for some consideration and help.

(R. p. __; Capital Bank’s Memorandum in Support of its Motion for Summary Judgment p. 3; R. p. __; Capital Bank’s Memorandum in Support of its Motion for Summary Judgment at Exhibit A—Seguin Dep. at 52:10-17; R. p. __; Capital Bank’s Memorandum in Support of its Motion for Summary Judgment at Exhibit A—Seguin Dep. at 54:3-5).

As of December 2011, Appellants were two months behind in their monthly mortgage payments and had yet to pay the 2010 property taxes. (R. p. __; Capital Bank’s Memorandum in Support of its Motion for Summary Judgment p. 2-3; R. p. __; Capital Bank’s Supplemental Memorandum in Support of its Motion for Summary Judgment p. 2; R. p. __; Capital Bank’s Supplemental Memorandum in Support of its Motion for Summary Judgment at Exhibit 1—Capital Bank’s Affidavit p. 2; R. p. __; Answer p. 2; R. p. __; Capital Bank’s Memorandum in Support of its Motion for

Summary Judgment at Exhibit A—Seguin Dep. at 51:22-52:2). Due to Appellants' non-payment of the 2010 taxes, the subject property was scheduled to be sold by Lexington County at tax sale on Monday, December 5, 2011. (R. p. __; Capital Bank's Memorandum in Support of its Motion for Summary Judgment p. 3; R. p. __; Capital Bank's Supplemental Memorandum in Support of its Motion for Summary Judgment p. 2; R. p. __; Capital Bank's Supplemental Memorandum in Support of its Motion for Summary Judgment at Exhibit 1—Capital Bank's Affidavit p. 3; R. p. __; Capital Bank's Memorandum in Support of its Motion for Summary Judgment at Exhibit A—Seguin Dep. at 56:7-57:25). Capital Bank paid the 2010 taxes on Friday, December 2, 2011, to prevent the property from being sold. (R. p. __; Capital Bank's Memorandum in Support of its Motion for Summary Judgment p. 3; R. p. __; Capital Bank's Supplemental Memorandum in Support of its Motion for Summary Judgment p. 2; R. p. __; Capital Bank's Supplemental Memorandum in Support of its Motion for Summary Judgment at Exhibit 1—Capital Bank's Affidavit p. 3).

The bill for the 2011 taxes in the amount of \$6,170.37 had already been issued by the time Capital Bank paid the back-taxes to prevent the sale, and Lexington County required Capital Bank to pay the amount owed for 2011 along with the 2010 taxes because the 2011 tax notice had already issued. (R. p. __; Capital Bank's Memorandum in Support of its Motion for Summary Judgment p. 3-4; R. p. __; Capital Bank's Supplemental Memorandum in Support of its Motion for Summary Judgment p. 2; R. p. __; Capital Bank's Supplemental Memorandum in Support of its Motion for Summary Judgment at Exhibit 1—Capital Bank's Affidavit p. 3; R. p. __; Capital Bank's Memorandum in Support of its Motion for Summary Judgment at Exhibit A—

Seguin Dep. at 58:18-59:1; R. p. __; Capital Bank’s Memorandum in Support of its Motion for Summary Judgment at Exhibit A—Seguin Dep. at 69:18-21). Capital Bank paid the 2010 and 2011 taxes as required by the Lexington County tax assessors office. (R. p. __; Capital Bank’s Memorandum in Support of its Motion for Summary Judgment p. 3-4; R. p. __; Capital Bank’s Supplemental Memorandum in Support of its Motion for Summary Judgment p. 2; R. p. __; Capital Bank’s Supplemental Memorandum in Support of its Motion for Summary Judgment at Exhibit 1—Capital Bank’s Affidavit p. 3; R. p. __; Capital Bank’s Memorandum in Support of its Motion for Summary Judgment at Exhibit A—Seguin Dep. at 58:18-59:1).

Due to Appellants’ multiple defaults (including the failure to pay property taxes), on April 19, 2012, Capital Bank sent a notice of default and acceleration to Appellants, demanding the entire balance owed under the Note as of that date:

Principal:	\$ 457,070.09
Interest:	8,400.07
Late Charges:	969.50
Taxes Paid:	13,114.79
Appraisal & Review:	<u>3,500.00</u>
TOTAL:	\$ 483,054.45

(R. p. __; Capital Bank’s Memorandum in Support of its Motion for Summary Judgment p. 4; R. p. __; Capital Bank’s Supplemental Memorandum in Support of its Motion for Summary Judgment p. 2; R. p. __; Capital Bank’s Supplemental Memorandum in Support of its Motion for Summary Judgment at Exhibit 1—Capital Bank’s Affidavit p. 3; R. p. __; Capital Bank’s Memorandum in Support of its Motion for Summary Judgment at Exhibit A—Seguin Dep. at 74:22-75:7). The taxes listed in the amount of \$13,114.79 include Capital Bank’s payment of the 2010 taxes in the amount of \$6,944.42 and the 2011 taxes in the amount of \$6,170.37 as described

above. (R. p. __; Capital Bank's Memorandum in Support of its Motion for Summary Judgment p. 4; R. p. __; Capital Bank's Supplemental Memorandum in Support of its Motion for Summary Judgment p. 2; R. p. __; Capital Bank's Supplemental Memorandum in Support of its Motion for Summary Judgment at Exhibit 1—Capital Bank's Affidavit p. 3).

Appellants have not cured their defaults or paid the accelerated balance. (R. p. __; Capital Bank's Memorandum in Support of its Motion for Summary Judgment p. 4; R. p. __; Capital Bank's Supplemental Memorandum in Support of its Motion for Summary Judgment p. 2; R. p. __; Capital Bank's Supplemental Memorandum in Support of its Motion for Summary Judgment at Exhibit 1—Capital Bank's Affidavit p. 4; R. p. __; Answer p. 2; R. p. __; Capital Bank's Memorandum in Support of its Motion for Summary Judgment at Exhibit A—Seguin Dep. at 44:14-18). The Note subsequently matured during the pendency of this litigation on January 10, 2013. (R. p. __; Capital Bank's Supplemental Memorandum in Support of its Motion for Summary Judgment p. 2; R. p. __; Capital Bank's Supplemental Memorandum in Support of its Motion for Summary Judgment at Exhibit 1—Capital Bank's Affidavit p. 4). Judge Spence entered judgment in favor of Capital Bank on Appellants' liability under the note and mortgage. (R. p. __; Order Granting Plaintiff's Motion for Summary Judgment as to Defendants' Liability).

ARGUMENT

- I. This Court should affirm the trial court's order granting Capital Bank summary judgment on its claim for foreclosure as to Appellants' liability because Appellants admit their default on the subject loan and obligation to repay the monies borrowed and Appellants' affirmative defense fails as a matter of law.

The trial court properly granted summary judgment to Capital Bank on its foreclosure complaint as to Appellants' liability for two reasons. (R. p. __; Order Granting Plaintiff's Motion for Summary Judgment as to Defendants' Liability). First, Appellants admit that they were in default on the subject loan. Second, Appellants' defense against the foreclosure action--that they would have been able to make up their delinquency had Capital Bank not paid the 2011 tax liability, which they claim was not in default yet--fails as a matter of law. Summary judgment was therefore proper because there are no genuine issues of material fact regarding default or Appellants' affirmative defense to the foreclosure action. Huggins v. Metts, 371 S.C. 621, 625, 640 S.E.2d 465, 467 (Ct. App. 2006) (affirming the circuit court's grant of summary judgment where there were no genuine issues of material fact):

A. Appellants admit default on the subject loan.

The Note provides that Attic Space will be in default if Attic Space fails to make monthly payments on time, breaches any promise on any debt agreement with Capital Bank, or does or fails to do something that causes Capital Bank to believe that it will have difficulty collecting the amount owed. (R. p. __; Capital Bank's Supplemental Memorandum in Support of its Motion for Summary Judgment p. 2; R. p. __; Complaint at Exhibit A—Promissory Note p. 2). Similarly, the Mortgage provides that Attic Space will be in default if Attic Space fails to make any payments when due or

breaches any term or covenant of the mortgage, or if Lender has a good faith belief that it is insecure or the prospect of payment is impaired or the value of the subject property is impaired. (R. p. __; Capital Bank's Supplemental Memorandum in Support of its Motion for Summary Judgment p. 2-3; R. p. __; Complaint at Exhibit C—Real Estate Mortgage p. 4).

Attic Space admits that it was two months behind on the monthly payments for the subject loan and failed to pay the 2010 property taxes as required. (R. p. __; Answer p. 2; R. p. __; Capital Bank's Memorandum in Support of its Motion for Summary Judgment at Exhibit A—Seguin Dep. at 51:22-52:2). Specifically, in December 2011, Attic Space had failed to make its monthly payments due November 10, 2011, and December 10, 2011; had failed to pay the 2010 property taxes as it was required to do under the loan documents; and had caused Capital Bank's collateral to be at risk of being sold at tax sale. (R. p. __; Capital Bank's Supplemental Memorandum in Support of its Motion for Summary Judgment p. 3; R. p. __; Capital Bank's Supplemental Memorandum in Support of its Motion for Summary Judgment at Exhibit 1—Capital Bank's Affidavit p. 2-3; R. p. __; Answer p. 2; R. p. __; Capital Bank's Memorandum in Support of its Motion for Summary Judgment at Exhibit A—Seguin Dep. at 51:22-52:2). Therefore, Attic Space defaulted under the terms of the subject loan documents. The lower court properly granted judgment in favor of Capital Bank on liability based on Appellants' default.

B. Appellants' defense against the foreclosure action fails as a matter of law.

Appellants argue that although they were in default on the subject loan, Capital Bank is not entitled to foreclosure in this matter for two reasons. Initial Brief of Appellants p. 3-5. First, Appellants argue that Capital Bank was not authorized to pay the 2011 property tax for the subject property as early it did. Initial Brief of Appellants p. 3-4. Appellants next argue that they would have been able to make up their delinquency had Capital Bank not added the 2011 property tax liability to the amount demanded by Capital Bank. Initial Brief of Appellants p. 4-5. For the reasons explained below, the trial court properly found that both of these arguments fail as a matter of law.

i. Appellants' argument that Capital Bank was not authorized to pay the 2011 property taxes as early as it did fails to provide Appellants any relief from this foreclosure action as a matter of law.

Appellants argue that Capital Bank was not authorized to pay the 2011 property tax for the subject property as early it did because Appellants claim they were not in default on those taxes yet and could not have "failed to pay" the taxes until the deadline for payment and only after that time would they have been in default for the 2011 taxes. Initial Brief of Appellants p. 3-4. Specifically, they assert that Capital Bank was wrong to pay the 2011 taxes on December 19, 2011, because the due date for payment was not until January 17, 2012, after which penalties would begin to accrue and, if not ultimately paid, could result in the Property being at risk again for tax sale. (R. p. __; Capital Bank's Memorandum in Support of its Motion for Summary Judgment p. 8; R. p. __; Capital Bank's Memorandum in Support of its Motion for Summary Judgment at

Exhibit C—Lexington County 2011 Tax Bill). It is true that the 2011 taxes were paid by Capital Bank before the January 17th past-due deadline after which penalties would begin to accrue. However, this fact fails to provide Appellants any relief from this foreclosure action as a matter of law.

First, as explained above, Appellants admit that Attic Space was unable to pay the 2010 taxes as they came due in January 2011 or thereafter, causing the subject property to be at risk of being sold by Lexington County at tax sale on Monday, December 5, 2011. See supra Statement of Facts. Capital Bank was forced to pay the 2010 property taxes to avoid the sale of its collateral for Appellants' non-payment of taxes. Id. Lexington County would not accept only the 2010 tax payment and required Capital Bank to pay the 2011 taxes, along with the 2010 taxes in order to prevent the sale of the property. Id. Capital Bank paid the 2011 taxes as directed by the Lexington County tax assessors office. Id. Therefore, the trial court correctly held that Capital Bank properly paid the 2010 and 2011 property tax amounts in connection with the subject loan.

Additionally, Capital Bank's payment of the 2011 taxes prior to January 17, 2012, is factually irrelevant because, in addition to Appellants being in default at the time of this payment, the 2011 taxes were due and owing when they were paid on December 19, 2011, as the bill had already been issued by that time and, more importantly, Appellants did not plan--and could not afford--to pay the 2011 taxes themselves by January 17th:

Q. . . . So just to be clear, the 2011 tax bill, you had received that in December, by December of 2011?

A. Yes.

Q. Did you have any plans to pay that bill?

A. Yes.

Q. When were you going to pay it?

A. I believe we were going to try to make sure that was paid probably sometime in the month of March or April or before if at all possible.

Q. So you were not going to pay it by January 17th; is that right?

A. I don't believe so, no.

Q. Did you ever try to make that payment?

A. I think we were looking at our finances, but obviously, we were not in a very good position at that point.

(R. p. __; Capital Bank's Memorandum in Support of its Motion for Summary Judgment p. 8-9; R. p. __; Capital Bank's Memorandum in Support of its Motion for Summary Judgment at Exhibit A—Seguin Dep. at 69:18-70:9; R. p. __; Capital Bank's Memorandum in Support of its Motion for Summary Judgment at Exhibit A—Seguin Dep. at 74:7-21).

Therefore, it makes no difference to Appellants if the taxes were paid on December 19, 2011, or after January 17, 2012, because Appellants would not have paid the taxes by January 17th anyway by their own testimony. Furthermore, no matter when the taxes were paid, the end result would be the same--Appellants are responsible for the property tax amounts. Appellants are actually in a better position because Capital Bank paid the taxes when it did as no penalties had accrued. Because Appellants admit they would not have paid the taxes by January 17th, Appellants would have been responsible for the tax amount of \$6,170.37 plus the additional penalties for

late payment, rather than the \$6,170.37 for which Capital Bank now seeks to hold them responsible. Id.

- ii. **Appellants' argument that they would have been able to make up their delinquency had Capital Bank not added the 2011 property tax liability to the amount demanded by Capital Bank fails to provide Appellants any relief from this foreclosure action as a matter of law.**

Appellants next argue that they would have been able to make up their delinquency had Capital Bank not added the 2011 property tax liability to the amount demanded by Capital Bank. Initial Brief of Appellants p. 4-5. More specifically, Mr. Seguin testified that when he received the April 19th notice of default and acceleration, he might have been able to borrow funds from a family member to re-pay Capital Bank for the 2010 taxes:

Q. And he would have given you or loaned you the \$7,000 to make up the 2010 taxes?

A. I'm not sure he would have given it to me; I'd like to think that he probably would have.

(R. p. __; Capital Bank's Memorandum in Support of its Motion for Summary Judgment p. 6; (R. p. __; Capital Bank's Memorandum in Support of its Motion for Summary Judgment at Exhibit A—Seguin Dep. at 76:17-20).

As an initial matter, this potential ability to repay the 2010 taxes is not sufficient to show that Appellants actually had the capacity to repay the 2010 property taxes. Although Appellants argue that "there is a logical and rational inference that may be drawn from a familial relationship and potential financial support," they cite no case law to support such inference and ignore that any such inference is directly contradicted

by Appellants' own testimony that he was not sure he would have been obtain to the funds the repay the 2010 property tax amount. Initial Brief of Appellants p. 5.

More importantly, even if Appellants had tendered re-payment for the 2010 taxes, this would not have been sufficient to cure Appellants' defaults at that time, and therefore, their potential repayment of the 2010 taxes is factually irrelevant. (R. p. __; Capital Bank's Memorandum in Support of its Motion for Summary Judgment p. 7; R. p. __; Capital Bank's Memorandum in Support of its Motion for Summary Judgment at Exhibit A—Seguin Dep. at 77:6-9; R. p. __; Capital Bank's Supplemental Memorandum in Support of its Motion for Summary Judgment p. 6-7; R. p. __; Capital Bank's Supplemental Memorandum in Support of its Motion for Summary Judgment at Exhibit 1—Capital Bank's Affidavit p. 3-4). Appellants were behind on three monthly payments as of April 19th and do not assert that they could have caught up those payments at that time. (Id.). Had Appellants been able to secure the funds to re-pay the 2010 taxes, they would still be in default on the loan. (Id.) Therefore, Capital Bank was still entitled to accelerate the full balance due on the loan. See U.S. Bank Trust Nat'l Assn. v. Bell, 385 S.C. 364, 684 S.E.2d 199 (Ct. App. 2009).

Bell is instructive to the case at hand. In Bell, the borrowers entered into an agreement with their lender to reinstate their loan which required two lump sum payments and monthly payments. Id. at 368, 684 S.E.2d at 201. The lender argued that the borrowers had missed their second lump sum payment as well as two of their monthly payments. Id. at 370, 684 S.E.2d at 202. The borrowers contested the lender's foreclosure, arguing that the second lump sum payment wasn't due when the lender claimed. Id. at 374, 684 S.E.2d at 204. The court found that the missed

monthly payments established independent defaults, which entitled the lender to accelerate the balance owed and foreclose, and that the dispute over the second lump sum payment was not controlling in light of the independent defaults. Id. at 377, 684 S.E.2d at 206. Similarly, here, Capital Bank was entitled to accelerate the debt owed based on Appellants' monthly payment defaults, and the dispute over the payment of the 2011 taxes does not change the fact that Appellants were in default.

Therefore, "a tender of anything less than the *full accelerated amount* will not cure the default." Allendale Furniture Co., Inc. v. Carolina Commercial Bank, 284 S.C. 76, 79, 325 S.E.2d 530, 531 (1985) (emphasis in original); see also Bell, 385 S.C. at 377-78, 684 S.E.2d at 206 ("Once the Bells were deemed to be in default because of the missed November 2002 lump sum payment, or by virtue of the missed December 2002 and January 2003 monthly payments . . . Bank's legal right to declare the entire balance due and right to commence a foreclosure action could not be taken away or nullified by a partial tender."). Because Capital Bank was entitled to accelerate the loan, Appellants were required to tender the full accelerated amount. Even if the disputed amount for the 2011 property tax payment was excepted from the full accelerated amount, Appellants were not able to tender the remaining balance (as admitted by Appellants' own testimony), and therefore, they cannot use the payment of 2011 taxes to avoid the foreclosure. Had Capital Bank not paid those 2011 taxes, the property would have been sold at tax sale. For these reasons, this Court should affirm the trial court's holding that Appellants' affirmative defense affords them no relief from this foreclosure action as a matter of law.

II. The Master-in-Equity did not err in relying on Capital Bank's Affidavit.

Lastly, Appellants contend that the trial court should consider only those affidavits that are "on file" at the time of the motion hearing and, therefore, improperly relied on Capital Bank's Affidavit submitted after the hearing on the Motion for Summary Judgment along with Capital Bank's Supplemental Memorandum in Support of its Motion for Summary Judgment for the proposition that Lexington County required Capital Bank to pay the 2011 property taxes along with the 2010 property taxes. Initial Brief of Appellants p. 5-6.

As an initial matter, Appellants did not object to the submission of the Affidavit or file a motion to strike the Affidavit in the trial court, and therefore, this argument is not preserved for appellate review. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (stating "an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review"); Armstrong v. Collins, 366 S.C. 204, 225, 621 S.E.2d 368, 378 (Ct. App. 2005) (stating "[b]ecause this argument was not presented to the trial court . . . the matter is not preserved and we decline to address it").

Even if this argument was preserved for appellate review, it fails to necessitate a reversal of the trial court's decision. First, it is not clear that the Affidavit wasn't timely filed. Rule 56 of the South Carolina Rules of Civil Procedure specifically provides that "[t]he court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits." Here, Appellants presented an affidavit of James Michael Seguin at the hearing on Capital Bank's Motion for Summary Judgment. (R. p. __; Seguin's Affidavit; R. p. __; Transcript of Hearing

p. 18). The court had not ruled upon the motion at the time the affidavit was filed and the case was not yet closed thereby permitting the court to consider the affidavit. Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 659 S.E.2d 496 (2008) (relying on an affidavit submitted after a hearing but before an order was issued by the trial court to reverse an order granting summary judgment); MCC Financial Services, Inc. v. Duffel, 265 S.C. 519, 522, 220 S.E.2d 127, 128 (1975) (upholding the trial court's consideration of a supplemental affidavit evidencing service following a hearing but before a final order was issued); Team IA, Inc. v. Lucas, 395 S.C. 237, 717 S.E.2d 103 (Ct. App. 2011) (demonstrating the Court of Appeals relied on a supplemental affidavit filed after the summary judgment hearing but before an order issued as grounds for reversing the trial court's partial summary judgment order and stating that the trial court failed to expressly indicate whether it considered the supplemental filing because it did not rule on a motion to strike); Loftis v. S.C. Elec. & Gas Co., 361 S.C. 434, 604 S.E.2d 714 (Ct. App. 2004) (demonstrating that the trial court relied on supplemental submissions after undertaking hearing on the motion for summary judgment but before issuing an order). The trial court controls the case before it until a final order is issued. PPG Industries, Inc. v. Orangeburg Paint & Decorating Center, Inc., 297 S.C. 176, 183, 375 S.E.2d 331, 334 (Ct. App. 1988) (holding that a trial judge, until final judgment, controls the case before him). Further, a court must consider all evidence before it. See, e.g., Englert, Inc., 377 S.C. 129, 659 S.E.2d 496 (demonstrating that a court should consider all evidence before it). Therefore, the trial court was allowed to permit Capital Bank to submit the Affidavit opposing Seguin's affidavit pursuant to the Rules of Civil Procedure.

Even if the Affidavit was not timely (which it was), the trial court possesses the discretion to accept, or reject, affidavits not timely filed in accordance with Rule 56 while ruling on a motion for summary judgment. See Black v. Lexington Sch. Dist. No. 2, 327 S.C. 55, 59-60, 488 S.E.2d 327, 329 (1997) (trial court has discretion to accept or refuse an untimely affidavit); Schmidt v. Courtney, 357 S.C. 310, 321-22, 592 S.E.2d 326, 332-33 (Ct. App. 2003) (finding that a trial judge is “mandatorily required to at least evaluate and consider [an untimely] affidavit”); 25 S.C. Jur. Rules of Civil Procedure § 56.2 (2013) (“It is within the trial court’s discretion to reject an untimely affidavit.”). Appellants make no contention that the trial court abused its discretion in choosing to rely on Capital Bank’s Affidavit.

Furthermore, Appellants make no allegation that they have been prejudiced in any way by Capital Bank’s submission of the Affidavit after the motion hearing. At the motion hearing, the trial court specifically requested supplemental briefing from both parties, and although given this opportunity, Appellants did not elect to respond to Capital Bank’s supplemental briefing. (R. p. __; Transcript of Hearing p. 20-28).

Finally, even if the Affidavit were not considered, Capital Bank is still entitled to summary judgment. Particularly, even if the trial court refused to consider that Lexington County required Capital Bank to pay the 2011 property taxes along with the 2010 property taxes, Capital Bank’s payment of the 2011 property taxes prior to January 17, 2012, is irrelevant because, as explained above, Appellants did not plan--and could not afford--to pay the 2011 taxes themselves by that time and Appellants are ultimately responsible for the payment of the property taxes in any event. See supra Section I(B)(i).

CONCLUSION

For the foregoing reasons, Capital Bank respectfully requests this Court affirm the trial court's order granting it summary judgment as to Appellants' liability on its foreclosure complaint.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: Isaac C. Sullivan

Frank B. B. Knowlton, SC Bar No. 003588
E-Mail: frank.knowlton@nelsonmullins.com
A. Mattison Bogan, SC Bar No. 72629
E-Mail: matt.bogan@nelsonmullins.com
Tara C. Sullivan, SC Bar No. 79806
E-Mail: tara.sullivan@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Respondent Capital Bank successor in interest by merger to Carolina National Bank & Trust Company

Columbia, South Carolina

July 31, 2013.

RECEIVED

JUL 31 2013

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-in-Equity for Lexington County

Case No. 2012-CP-32-2757

Appellate Case No. 2013-001250

Capital Bank successor in interest by merger to Carolina
National Bank & Trust Company, Respondent,

v.

Attic Space Self Storage, LLC, James Michael Sequin
a/k/a James Michael Sequin and Christy Duffell-Sequin
a/k/a Christy Duffell-Sequin, Appellants.

PROOF OF SERVICE


I, the undersigned Paralegal of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent, do hereby certify that I have served all counsel/parties in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Initial Brief of Respondent

Counsel Served:

Drake H. Kaiser, Esquire
Reddick & Kaiser, LLC
1000-A St. Andrews Road
Columbia, South Carolina 29210


Meredith S. Keane
Paralegal

July 31, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-in-Equity for Lexington County

Case No. 2012-CP-32-2757

Appellate Case No. 2013-001250

RECORDED
JUL 31 2013
SC COURT OF APPEALS

Capital Bank successor in interest by merger to Carolina
National Bank & Trust Company, Respondent,

v.

Attic Space Self Storage, LLC, James Michael Sequin
a/k/a James Michael Sequin and Christy Duffell-Sequin
a/k/a Christy Duffell-Sequin, Appellants.

**RESPONDENT'S DESIGNATION OF MATTER
FOR THE RECORD ON APPEAL**

Pursuant to Rule 209, SCACR, Respondent Capital Bank, successor in interest by merger to Carolina National Bank & Trust Company ("Respondent"), designates the following material for inclusion in the record on appeal. Undersigned counsel certifies, pursuant to Rule 209(c), SCACR, that the designation contains no matter which is irrelevant to the appeal:

ORDERS

1. Order of the Honorable James O. Spence filed May 17, 2013, granting Respondent's Motion for Summary Judgment as to Appellants' Liability;

PLEADINGS

2. Complaint filed July 2, 2012, with Exhibits; Exhibits itemized below:

- a. Promissory Note dated January 10, 2008;
 - b. Commercial Debt Modification Agreement dated February 15, 2008;
 - c. Real Estate Mortgage dated January 10, 2008;
 - d. Assignment of Leases and Rents dated January 14, 2008;
 - e. Guaranty of James Michael Seguin dated January 10, 2008;
 - f. Guaranty of Christy Duffell-Seguin dated January 10, 2008;
3. Answer filed August 1, 2012;

MOTIONS

4. Respondent's Motion for Summary Judgment filed January 15, 2013;
5. Appellants' Reply to Respondent's Motion for Summary Judgment dated April 8, 2013;
6. Respondent's Memorandum in Support of its Motion for Summary Judgment dated April 15, 2013, with Exhibits; Exhibits itemized below:
 - a. Transcript of Attic Space Self Storage, LLC, and James Michael Seguin Deposition dated February 12, 2013 (relevant pages);
 - b. Notice of Acceleration dated April 19, 2012;
 - c. Lexington County 2011 Tax Bill for Subject Property;
7. Appellants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment dated May 2, 2013;
8. Respondent's Supplemental Memorandum in Support of its Motion for Summary Judgment dated May 3, 2013, with Exhibits; Exhibits itemized below:
 - a. Capital Bank Affidavit dated May 2, 2013;

TRANSCRIPTS

9. Transcript of Hearing of April 18, 2013;

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-in-Equity for Lexington County

Case No. 2012-CP-32-2757

Appellate Case No. 2013-001250

Capital Bank successor in interest by merger to Carolina
National Bank & Trust Company, Respondent,

v.

Attic Space Self Storage, LLC, James Michael Sequin
a/k/a James Michael Sequin and Christy Duffell-Sequin
a/k/a Christy Duffell-Sequin, Appellants.

PROOF OF SERVICE

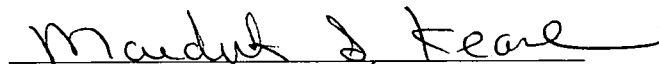
I, the undersigned Paralegal of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent, do hereby certify that I have served all counsel/parties in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Designation of Matter of Respondent

Counsel Served:

Drake H. Kaiser, Esquire
Reddick & Kaiser, LLC
1000-A St. Andrews Road
Columbia, South Carolina 29210



Meredith S. Keane
Paralegal

July 31, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-in-Equity for Lexington County

Case No. 2012-CP-32-2757

Appellate Case No. 2013-001250

Capital Bank successor in interest by merger to Carolina
National Bank & Trust Company, Respondent,

v.

Attic Space Self Storage, LLC, James Michael Sequin
a/k/a James Michael Sequin and Christy Duffell-Sequin
a/k/a Christy Duffell-Sequin, Appellants.

PROOF OF SERVICE


I, the undersigned Paralegal of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent, do hereby certify that I have served all counsel/parties in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Initial Brief of Respondent

Counsel Served:

Drake H. Kaiser, Esquire
Reddick & Kaiser, LLC
1000-A St. Andrews Road
Columbia, South Carolina 29210


Meredith S. Keane
Paralegal

July 31, 2013

EXHIBITS/DOCUMENTS

10. James Michael Seguin Affidavit dated November 5, 2012;

MISCELLANEOUS AND OTHER MOTIONS:

11. Notice of Appeal dated May 30, 2013.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: Tara C. Sullivan
Frank B. B. Knowlton, SC Bar No. 003588
E-Mail: frank.knowlton@nelsonmullins.com
A. Mattison Bogan, SC Bar No. 72629
E-Mail: matt.bogan@nelsonmullins.com
Tara C. Sullivan, SC Bar No. 79806
E-Mail: tara.sullivan@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Respondent Capital Bank successor in interest
by merger to Carolina National Bank & Trust Company

Columbia, South Carolina

July 31, 2013.