

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER
First Citizens Bank and Trust Company, Inc.,
Plaintiff,
vs.
Charles T. Brooks, III and the South Carolina
Department of Revenue,
Defendant(s).

(File No. 4026.00709)

RILEY POPE & LANEY, LLC
Attorneys for Plaintiff

RECORDED
IN THE COURT OF COMMON PLEAS
2013 JAN 29 4:03 PM

C/A NO.: 2009-CP-43-2538
CLERK OF COURT
SUMTER COUNTY, S.C.

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

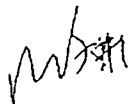
Andrew S. Radeker, Esq.
Attorney for Charles T. Brooks, III

Ronald W. Urban, Esq.
Attorney for South Carolina Department of
Revenue

This matter came before the court on November 19, 2012, for a hearing on the Plaintiff's Motion for Summary Judgment. Present representing the Plaintiff was Damon C. Wlodarczyk of Columbia. Andrew S. Radeker appeared on behalf of the Defendant Brooks, who was also present.

The action commenced with the filing of a Lis Pendens, Summons and Complaint. The Defendant was personally served with the Summons and Complaint and timely filed and served an Answer. The Plaintiff filed and served a Motion for Summary Judgment.

Summary Judgment is warranted only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRPC. "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party." Bloom v. Ravoir, 339 S.C. 417, 529 S.E.2d 710 (2000). The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact. However, once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent must come forward with specific facts showing there is a genuine issue for trial." Garvin v. Bi-Lo, Inc., 337 S.C. 436, 523 S.E.2d 481



(Ct. App. 1999). The opponent cannot merely rely upon the pleadings, but must submit some additional evidence creating a genuine issue of material fact.

In support the Motion for Summary Judgment, the Plaintiff submitted an Affidavit and counter-Affidavit of a business records custodian for the Plaintiff. The Defendant Brooks also filed and timely served an Affidavit in opposition to the Plaintiff's motion.

The Plaintiff argued at the hearing that the affidavits it filed established the debt amount owing and that Defendant Brooks is in default of the note, mortgage, and forbearance agreement (which are described below). The Plaintiff argued that, coupled with an affidavit of attorneys' fees and costs that Plaintiff's counsel stated he was ready to submit, these materials showed that the Plaintiff was entitled to judgment as a matter of law. The Plaintiff argued that Defendant Brooks' affidavit failed to show the existence of a genuine issue of material fact because, even taking the statements in that affidavit as true, Defendant Brooks was still in default of the written terms of the forbearance agreement. Defendant Brooks argued that the Plaintiff's continued acceptance for some months of payments less than the balance due under the written terms of the forbearance agreement (the balance of the loan) constituted either a modification of the terms of the note, mortgage, and/or forbearance agreement through a course of dealing and conduct between the parties, an estoppel or laches of the Plaintiff's right to declare a default under the terms of the forbearance agreement as written, or a waiver of any such default. Defendant Brooks maintained that the evidence showed at least an issue of material fact as to these matters. He provided the Court and Plaintiff's counsel with copies of Rakestraw v. Dozier Assocs., Inc., 285 S.C. 358, 329 S.E.2d 437 (1985), and King v. PYA/Monarch, Inc., 317 S.C. 385, 453 S.E.2d 885 (1995), and argued that these cases support his argument. The Plaintiff countered with an argument that the parol evidence rule precluded Defendant Brooks' arguments because the forbearance agreement was an integrated writing. Defendant Brooks countered by stating that a contract may be modified by means other than writing even if it states that modifications must be in writing and that, since the conduct at issue occurred after the execution of the forbearance agreement, it did not fall within the ambit of the parol evidence rule. Defendant Brooks contended that all ambiguities in the operative documents should be construed against the Plaintiff. The Plaintiff acknowledged that it drafted the documents at issue but denied that there are any material ambiguities in them. Defendant Brooks contended that, under the requirements of equity and the operative terms between the parties as affected by the conduct between them,

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the Plaintiff could not treat the loan as matured and was required to let Defendant Brooks reinstate by bringing current the amount that would have been paid had he continued making \$1500.00 monthly payments to the present day, that the Plaintiff had refused to let him do that, and that the course of conduct between the parties created a fact issue as to whether he has a right to reinstate, a fact issue as to what the debt amount owed to the Plaintiff is, and a fact issue as to whether the Plaintiff is entitled to foreclosure. The Plaintiff argued that there was no genuine issue of material fact because the affidavits on file showed that Defendant Brooks was in default of the terms of the note, the terms of the mortgage, and the terms of the forbearance agreement.

After reviewing and taking into consideration the pleadings and affidavits submitted in this case as well as the arguments presented at the motion hearing, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT:

- 1) The Lis Pendens was filed on July 23, 2009. An Amended Lis Pendens was filed on October 30, 2009.
- 2) The Summons and Complaint were filed on October 30, 2009.
- 3) Service was made upon the Defendants as shown by the proof of service filed herein.
- 4) The Defendants filed and timely served responsive pleadings.
- 5) The Defendants and all attorneys of record were notified of the time, date, and place of the hearing in this matter.
- 6) For value received, Charles T. Brooks III made, executed and delivered a note ("Note") dated May 12, 2005, promising thereby to pay to the order of Sumter National Bank the sum of One Hundred Twelve Thousand and 00/100 (\$112,000.00) Dollars, with interest at the rate of 7.50% per annum, with a current rate of 4.2500% per annum. Other terms and conditions are stated in the Note, which is of record herein.
- 7) To better secure the payment of the Note described above, Charles T. Brooks III made, executed, and delivered to Sumter National Bank a certain real estate mortgage ("Mortgage") in writing, dated May 12, 2005, covering real property in Sumter County, which is the same as that described in the Complaint. The Mortgage provided for the anticipation of

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future advances secured by the Mortgage subject to the maximum principal amount secured by the mortgage at any one time shall not exceed \$112,000.00.

8) The Mortgage was filed in the Office of the Register of Mesne Conveyances/Register of Deeds for Sumter County on May 12, 2005, in Book 980 at Page 770. Thereafter, on October 1, 2006, Sumter National Bank merged into and subsequently operated as part of Community Resource Bank, National Association; thereafter, on November 1, 2008, Community Resource Bank, National Association, merged into and subsequently operated as part of First Citizens Bank and Trust Company, Inc., leaving First Citizens Bank and Trust Company, Inc. as the surviving entity.

9) The Note and Mortgage matured on May 5, 2010.

10) On July 27, 2007, Charles T. Brooks III made, executed, and delivered to Community Resource Banks, National Association, a Note for a line of credit ("Line of Credit") in the amount of \$30,150.00.

11) To better secure the payment of the Line of Credit described above, Charles T. Brooks III agreed in writing that the Mortgage dated May 12, 2005, and more fully described above would also serve as additional security for the Line of Credit, but subject to the extent of the future advance clause limit expressed in the mortgage.

12) The Line of Credit matured on August 2, 2008.

13) The Mortgage evidences and secures the repayment of money advanced by the mortgagee to, or on behalf of, the mortgagors and constitutes a first mortgage lien on the mortgaged premises.

14) The Plaintiff is the real party in interest pursuant to SCRCF 17(a).

15) The titleholder of record of the subject property as of the filing of the Lis Pendens in this action is Charles T. Brooks III, who is the original mortgagor.

16) The loan evidenced by the Note and Mortgage is not owned, securitized or guaranteed by Fannie Mae or Freddie Mac, and is not serviced by a servicer participating in the Home Affordable Modification Program (HAMP). Therefore the Court finds that there are no HAMP issues to be resolved before foreclosure is ordered or the sale is commenced.

17) As stated in the Certification of Exemption from Administrative Order 2011-05-02-01 filed herein, the real property which is the subject of this action is not an "owner occupied dwelling" as defined in the Order.

W. Brooks III

18) The Defendant Brooks defaulted on the Note and Mortgage on or about March 2, 2009.

19) The Defendant Brooks defaulted on the Line of Credit, also secured by the Mortgage, on August 2, 2008 when the Line of Credit matured.

20) The Plaintiff and the Defendant Brooks entered into a release and settlement agreement dated April 7, 2010, which was a valid and binding agreement and also entered into a forbearance agreement which was a valid and binding agreement in which, among other things, Defendant Brooks agreed to pay the sum of \$1,500.00 per month toward arrearage beginning April 1, 2010 and ending March 1, 2011, at which time the remaining balance became due and payable. The forbearance agreement also provided for ongoing payment of the monthly payments due under the Note and Line of Credit proper, but was silent on the issue of the maturity of the original note and the post-maturity status of the line of credit note during the forbearance period.

21) The forbearance agreement contained default terms that provided for acceleration of all unpaid amounts under both the agreement and the loan documents.

22) The forbearance agreement contained a term that stated that acceptance of monies under the agreement was not an estoppel, prejudice or waiver of Plaintiff's right to proceed with the foreclosure action.

23) The forbearance agreement provided in part that Defendant Brooks would withdraw his answer in this matter and the Defendant breached the terms of the forbearance agreement by failing to withdraw his Answer in this matter but in any event, the Answer has not been withdrawn.

24) Defendant Brooks made monthly payments pursuant to the forbearance agreement which were accepted by Plaintiff for several months after the maturity date of the original forbearance agreement but has not paid the balance of unpaid amounts due under the forbearance agreement or the loan documents.

25) All payments made under the terms of the loan documents and after entry into the forbearance agreement are not accounted for in the affidavits submitted by the Plaintiff.

CONCLUSIONS OF LAW

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

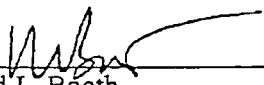
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1) That there is no genuine issue of any material fact as to the findings setting forth in paragraphs 1 through 25 above and Defendant Brooks is prohibited from further contesting those findings in future proceedings.

2) That the Court convene a non-jury trial on February 7th 2013 at 11:00 A.M. at which time the parties will present evidence as to the following remaining issues:

- a. The balance due Plaintiff after giving credit for all payments made pursuant to the loan documents and also the forbearance agreement;
- b. The intention of the parties in Defendant Brooks' payment of and Plaintiff's acceptance of monthly forbearance payments after the March 1, 2011 maturity date of the original forbearance agreement, the relevance of the language of the forbearance agreement referring to acceptance of payments, and the effect on Plaintiff's right to proceed with foreclosure;
- c. Whether or not Plaintiff made any monthly payments as they came due under the existing loan documents after entering into the settlement and forbearance agreements, and the effect of the forbearance agreement upon the post-maturity status of the line of credit note at the inception of the forbearance agreement and the maturity of the real estate note and mortgage during the forbearance period.

3) - Defendant Brooks is further ordered to file a request for protection from appearing in any court in which he is an attorney of record for the trial date above. Counsel for Plaintiff and Defendant Brooks need not file protective requests if another attorney from their respective firms will be able to attend the trial should they be required to appear before another court.



Richard L. Booth
Master in Equity, Sumter County

January 15 2013
December _____, 2012
Sumter, South Carolina