THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

Case No. 2010-CP-22-1233

Appellate Case No. 2012-213524

First South Bank,

Respondent,

v.

South Causeway, LLC,

Appellant,

APPELLANT'S FINAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other:

STATEMENT OF ISSUES ON APPEAL

1. DID THE COURT ERR BY GRANTING A DIRECTED VERDICT AGAINST SOUTH CAUSEWAY ON THE CLAIM OF TORTIOUS INTERFERENCE WITH PROSPECTIVE CONTRACT?

II. DID THE COURT ERR BY REFUSING TO ADMIT EMAILS BETWEEN LINCOLN HARRIS AND FIRST SOUTH ON THE BASIS OF HEARSAY WHEN THE DOCUMENTS WERE BEING OFFERED TO PROVE MOTIVE AND NOTICE, AND WERE NOT BEING OFFERED FOR THE TRUTH OF THE MATTER ASSERTED?

III. DID THE COURT ERR BY NOT GRANTING SOUTH CAUSEWAY'S MOTION FOR JNOV OR IN THE ALTERNATIVE FOR A NEW TRIAL ON THE BREACH OF CONTRACT CLAIMS?

STATEMENT OF THE CASE

This is a commercial foreclosure action filed by First South relating to a mortgage it holds on property owned by South Causeway. The Summons and Complaint were filed with the Court on August 5, 2010. (R. 39-81) On September 3, 2010, South Causeway filed its Answer to the Complaint. (R. 82-83) Thereafter, on October 4, 2010, South Causeway filed an Amended Answer and Counterclaims. (R. 84-107) In its Amended Answer, South Causeway demanded a jury trial. South Causeway interposes numerous affirmative defenses in its Amended Answer and generally challenges the validity and enforceability of the loan documents at issue in this case. A number of the affirmative defenses to the foreclosure action assert legal counterclaims. The Amended Answer and Counterclaims alleges various instances of misconduct on the part of First South's banking officers relating to the initial loan, a subsequent amendment of the loan agreement, as well as alleged interference with South Causeway's attempts to market and sell the property. Similarly, the counterclaims asserted by South Causeway relate to the alleged conduct of individual banking officers in purportedly forcing South Causeway to sign a second loan agreement, allegations that First South

misrepresented its intentions in entering the loan agreements, and First South's alleged interference with South Causeway's attempts to sell the property. The counterclaims asserted by South Causeway include the following: breach of contract, breach of contract accompanied by fraud, violation of the South Carolina Unfair Trade Practices Act, breach of fiduciary duty, fraud/misrepresentation, tortious interference with contract, and tortious interference with prospective contract. [Id]

On May 26, 2011, First South filed a Motion to Dismiss Jury Trial Demand and supporting Memorandum of Law. First South also filed a Motion for Summary Judgment on South Causeway's counterclaims. (R. 108-387) On November 17, 2011 Judge Steven H. John denied both motions. (R. 1-2) Plaintiff thereafter filed a motion to reconsider the order denying the motion to dismiss the demand for jury trial. After Judge John denied the reconsideration motion, First South then filed a notice of appeal which was later voluntarily dismissed. (R. 9)

The case was tried in Georgetown County from September 18-25, 2012 before the Honorable Thomas Russo. Judge Russo bifurcated the trial by first submitting First South's counterclaims to the jury and then ruling upon the foreclosure action after the jury was discharged. Judge Russo also directed a verdict at the conclusion of South Causeway's evidence on the following counterclaims: breach of contract accompanied by fraudulent act, fraud, breach of fiduciary duty, negligent misrepresentation, and tortious interference with prospective contract. (R. 1411-1450, 1551-1607) The causes of action for breach of contract, tortious interference with contract and violation of the South Carolina Unfair Trade Practices Act were submitted to the jury. The jury returned a verdict for First South on all of these causes of action. (R. 1737, 1738) The Court thereafter entered judgment against South Causeway on the foreclosure action. (R. 10-18)

On October 5, 2012 South Causeway filed a motion for judgment notwithstanding the verdict under Rule 50(b) SCRCP and an alternative request for a new trial. South Causeway also sought an amendment of the judgment of foreclosure under Rule 59 (a) SCRCP. (R. 454-467) On November 2, 2012 the Court denied South Causeway's post-trial motions and entered a Supplemental Judgment of Foreclosure in the amount of $5,694,334.89. (R. 27-28) The Court had previously entered a Judgment of Foreclosure and Order for Sale on November 1, 2012. (R. 10-18) On November 30, 2013 South Causeway timely filed a Notice of Appeal from the order denying its post-trial motions, the judgment of foreclosure and order for sale and the supplemental foreclosure. (R. 622-654)

STATEMENT OF FACTS

South Causeway is a South Carolina single member limited liability company owned by Mrs. Peggy Wheeler-Cribb, a widow and retired pre-school teacher. (Ms. Peggy) (R. 1040, 1335) South Causeway owned an undeveloped 19 acre tract of commercial property located in Georgetown County. (R. 1758) Prior to 2007, First Palmetto Bank had a first mortgage on this tract. The banker with whom Mrs. Peggy dealt was Mr. Lovelace. (R. 983) In 2007, Mr. Lovelace left First Palmetto and joined First South Bank. [Id] Soon after joining First South, Mr. Lovelace contacted Ms. Peggy about financing the development of the 19 acre tract. (R. 984, 1855) Ms. Peggy would only agree to move her financing to First South if First South would agree to limit its collateral to this tract, and not require any additional collateral to be posted for the loan. (R. 1000, 1865) Mr. Lovelace, and the First South's President Mr. Lylerly agreed. (R. 1340-1343)

However, upon receipt of the bank's commitment letter, Ms. Peggy learned that First South was in fact requesting to use an undeveloped beach lot as additional collateral for the development loan. She questioned Mr. Lovelace who advised her that this condition would be

removed prior to closing. (R. 1343) At closing though Mrs. Peggy was provided a letter outlining the conditions under which the additional collateral would be released and was assured by Mr. Lovelace that this was a mere formality.(R. 1344-1346)

Also, according to the terms of the loan, First South was required to deposit a total of $850,000 into an interest reserve account to pay the interest on the note until the tract was developed and sold or leased. (R. 1758-1770, 1771-1795, 1857-1864, 1268-1269) At closing, First South deposited $300,000. The additional $550,000 was due the earliest of six months from the date of closing or when the infrastructure was completed. First South never deposited the additional $550,000 into the interest escrow account. (R. 1269)

Approximately one month after the loan closing, First South provided notice that it would not advance any additional funds under the development loan, beyond what was dispersed at closing. (R. 1008-1012) As a result, South Causeway was required to secure additional sources of funding for development. South Causeway entered into a financing agreement with another lender. However, this lender required that the undeveloped beach lot be used as collateral. First South would not release the beach lot without receiving payment of $500,000. First South subsequently modified the terms of release by reducing the payment to $300,000 and accelerating the terms of the loan by one year. However, had First South funded the additional $550,000 in the interest escrow account, the additional $300,000 would not have been needed. South Causeway borrowed additional funds from the third party lender and paid First South $300,000 for release of the undeveloped beach front lot. (R. 1025-1031, 1349-1354)

Ms. Peggy continued efforts to market the 19 acre tract for sale, either as one parcel or subdivided parcels. Then, in 2010 with the expiration of the loan approaching, Ms. Peggy decided to divide the 19 acre tract into 4 parcels and auction each parcel off for sale. (R. 1354-1356) Eighteen days prior to the scheduled auction, Mr. Lovelace contacted the auctioneer and

informed him that First South was calling the loan and that the bank would not release any subdivided parcel from its mortgage without being paid $4.8 million, which was the outstanding loan balance. The auctioneer testified that he had never received an unsolicited call such as this from a bank in his career. (R. 1852, 1853, 947, 953-957) Furthermore, a banking expert testified that the information disclosed by Mr. Lovelace to the auctioneer was confidential and that disclosing it violated industry standards. (R. 1274-1275) As a result of the bank's position, the auction company changed the pricing of each lot, requiring that each parcel be sold for not less than $4.8 million, for a total sales price of all four lots of more than 19 million. The auction took place on June 1, 2010. No one bid on any parcel at the auction. (R. 958-963)

Unbeknownst to Mrs. Peggy, while she was trying to auction the property, First South was negotiating with Lincoln Harris, a prospective purchaser of the parcel, to sell its note and mortgage on the 19 acre tract. (R. 1043-1044, 1050-1054, 1362) In 2008 Lincoln Harris had previously entered into a letter of intent with South Causeway to purchase the 19 acre tract for $12 million. (R. 1868, 1058-1062) First South was aware of this prior letter of intent and offer from Lincoln Harris, because Ms. Peggy sent the letter of intent to First South at the time. (R. 1868) Even though First South was aware that Lincoln Harris had previously made an offer to purchase the land and maintained an interest in purchasing the land, First South allowed representatives of Lincoln Harris to examine the South Causeway loan files, learning of the $4.8 million payoff. Lincoln Harris then leveraged this information and offered to purchase the property from South Causeway for $4 million, approximately $8 million less than its previous offer. (R. 1202-1203, 1362, 1367-1368) First South then initiated the foreclosure action.

At trial South Causeway's banking expert testified that First South violated the industry standards by sharing confidential loan information with Lincoln Harris, who First South knew to be a prospective purchaser of the tract. The expert also testified that First South's disclosure to

First Causeway's real estate auction company of the loan pay off balance, maturity date and the fact that First South was going to call the loan on July 5, 2010 also violated industry standards. (R. 1274-1283)

ARGUMENT

I. The Court Erred By Granting A Directed Verdict Against South Causeway On The Claim of Tortious Interference With Prospective Contract

In ruling on motions for directed verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt. *Steinke v. S. Carolina Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999).

"To recover on a cause of action for intentional interference with prospective contractual relations, the plaintiff must prove: (1) the defendant intentionally interfered with the plaintiff's potential contractual relations; (2) for an improper purpose or by improper methods; (3) causing injury to the plaintiff. *See Leigh Furniture and Carpet Co. v. Isom,* 657 P.2d 293 (Utah 1982); *see also Blake v. Levy,* 191 Conn. 257, 464 A.2d 52 (1983); *Straube v. Larson,* 287 Or. 357, 600 P.2d 371 (1979); Restatement (Second) of Torts § 766B and 767 (1977). If a defendant acts for more than one purpose, his improper purpose must predominate in order to create liability. *See Harsha v. State Savings Bank,* 346 N.W.2d 791 (Iowa 1984); *Leigh Furniture, supra.* As an alternative to establishing an improper purpose, the plaintiff may prove the defendant's method of interference was improper under the circumstances." *Crandall Corp. v. Navistar Int'l Transp. Corp.*, 302 S.C. 265, 266, 395 S.E.2d 179, 180 (1990)

Here a reasonable jury could find based upon the evidence that First South intentionally interfered with South Causeway's efforts to sell the 19 acre tract to Lincoln Harris, and to

prospective purchasers who attended the auction. First, there is sufficient evidence to establish that First South was aware that Lincoln Harris was interested in purchasing the property and in fact knew that Lincoln Harris had previously entered a letter of intent to buy this land for $12 million. Nevertheless, First South disclosed to Lincoln Harris confidential documents and information regarding its loan to Lincoln Harris, allowing Lincoln Harris to leverage this information and providing a cash offer of $8 million less than the 2008 letter of intent, and $800,000 less than the loan payoff. South Causeway's expert testified that First South's disclosure to Lincoln Harris violated industry standards and was improper. Thus, there is evidence from which a jury could conclude that First South's "method of interference was improper under the circumstance."

In addition, South Causeway's expert testified that First South's disclosure of confidential loan information to the auction company violated industry standards. The auctioneer testified that because of First South's actions, the auction had to begin with an attempt to sell the whole 19 acre parcel for $7 million, which was not the prefer method. Once there were no bidders at $7 million, then each of the four parcels had a $4.8 million reserve which adversely affected how the auction was conducted. A jury could conclude that as a result of First South's improper actions, South Causeway's efforts to auction the property were interfered with to the detriment of and injury to South Causeway.

II. The Court Erred By Refusing To Admit Emails Between Lincoln Harris and First South On The Basis of Hearsay When The Documents Were Being Offered to Prove Motive and Notice, and Were Not Being Offered for the Truth of the Matter Asserted

South Causeway sought to introduce into evidence a thread of emails from Lincoln Harris' Greg Currie to First South's President Chip Lyerly discussing Lincoln Harris' interest in purchasing the 19 acre tract. (R. 1749-1757) The thread begins on March 27, 2010 with an email

from Currie expressing an interest in buying the South Causeway note from First South, arranging for an inspection of the loan documents at First South's headquarters in Spartanburg and exchanging a confidentiality agreement. [Id.] In addition, another thread of email communications beginning on May 21, 2010 from Currie to Lyerly contains an offer from Lincoln Harris to purchase the note and follow up discussion regarding reasons that the offer was not for the par value of the note. First South lodged a hearsay objection to these emails. The lower court sustained the objection. (R. 1132, 1140-1148) The Court erred.

First, these communications were not being offered for the truth of the matter asserted, but rather as evidence of notice of Lincoln Harris' interest in the property and First South's motive for interfering with the auction. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. "Conversely, statements offered not for the truth of the matter asserted, but rather as evidence of notice, do not constitute hearsay." *Thomas v. Dootson*, 377 S.C. 293, 298, 659 S.E.2d 253, 256 (2008)(citing *Player v. Thompson*, 259 S.C. 600, 610, 193 S.E.2d 531, 535 (1972)); Rule 801(d)(B) (A statement offered against a party and is "a statement of which the party has manifested an adoption or belief in its truth" is not hearsay.) *and* Editors Notes thereto (citing *Coleman & Lipscomb v. Frazier*, 38 S.C.L. (4 Rich.) 146 (1850) (where a party received a statement and acted on it as true, statement admissible)).

Player v. Thompson, 259 S.C. 600, 610, 193 S.E.2d 531, 535 (1972), is instructive in the instant case and adherence to the analysis of the South Carolina Supreme Court results in the admission of the emails the Defendant sought to introduce. In *Player*, the plaintiff sought testimony from a third party that while with the defendant, a filling station attendant told the defendant she had slick tires prior to the accident. *Id.* at 610, 193 S.E.2d at 535. The Court, over the Defendant's objection to the evidence as hearsay, admitted the testimony as evidence relevant

to proving the defendant's notice of the slick tires; "the fact of slick tires being proved by other evidence." *Id.*; *see Thomas*, 377 S.C. at 298-99, 659 S.E.2d at 256 (admitting testimony that doctor had been warned the drill was hot prior to the injury as evidence of notice).

In addition, the emails were admissible under Rule 803(6), the business records exception. The emails were produced by First South in discovery, came from their computer systems and were maintained by First South in the ordinary course of business. See, *DirecTV, Inc. v. Murray*, 307 F. Supp. 2d 764, 772 (D.S.C. 2004)(email communications kept in the ordinary course of business meet the business records exception).

As a result, the lower court erred by not admitting these emails into evidence. This excluded evidence prejudiced South Causeway's affirmative defenses and counterclaims for breach of contract, intentional interference with contract and intentional interference with prospective contracts. This Court should therefore order a new trial on these causes of action.

III. The Court Erred By Not Granting South Causeway's Motion for JNOV or in the Alternative For A New Trial On The Breach of Contract Claim

The lower court erred by not granting South Causeway judgment notwithstanding the verdict ("JNOV") pursuant to Rule 50(b), SCRCP, on its breach of contract cause of action. A trial court must grant a JNOV motion when no reasonable jury could have reached the disputed verdict. *Burns v. Universal Health Servs.*, 361 S.C. 221, 232, 603 S.E.2d 605, 611 (Ct. App. 2004). When no evidence supports the jury's verdict, the granting of a JNOV motion is proper. *id.*

Here, First South Bank's commitment letter to Peggy Wheeler-Cribb and Will Darwin Wheeler dated May 30, 2008, states that "$550,000 of the proceeds of the Loan shall be disbursed by Bank into the Interest Reserve Account to fund monthly interest payments due upon the Loan upon *the earlier to occur* of completion of the Infrastructure and

six (6) months from the date of Loan closing." It is undisputed that the $550,000 was never deposited into the Interest Reserve Account. First South Bank, however, contended that the phrase, "the earlier to occur of completion of the Infrastructure and six (6) months from the date of Loan closing," means that the infrastructure must be completed *and* six months must pass before those funds were required to be deposited. (R. 1758-1770)

This reading ignores the words "the earlier to occur of." Construed properly, this provision clearly requires that only one of the two conditions had to occur before the interest reserve funds were due for deposit. Even if the Court disagrees with South Causeway's interpretation, though, the wording in this provision must be considered to be ambiguous. Any ambiguity in a contract "should be construed most strongly against the drafters." *Myrtle Beach Lumber Co. v. Willoughby,* 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981). Although this provision was included in the commitment letter and not the loan agreement itself, the commitment letter stated that its terms were to "survive the loan closing" and to be incorporated into the loan agreement by reference. Thus, this clause was part of the loan contract, and the jury's decision not to return a verdict for South Causeway on the breach of contract counterclaim evinces the jury's failure to construe the ambiguity against First South Bank and in favor of South Causeway.

The evidence at trial also established that First South Bank breached the loan agreement by terminating the loan --- that is, by reducing the amount of available principal. This violated the express terms of the contract. Further, First South Bank breached the implied duty of good faith and fair dealing that is present in every contract by disclosing confidential information to Christie's Auction Company and to Lincoln Harris. All of these actions constituted breaches of contract.

In sum, no reasonable jury could have returned a verdict in favor of First South Bank on South Causeway's breach of contract counterclaim. The only reasonable inferences to be drawn from the evidence were that First South Bank committed multiple breaches of contract, as outlined above. Thus, the Court should overturn the trial court's ruling and grant JNOV in South Causeway's favor as to this counterclaim.

Alternatively, South Causeway is entitled to a new trial on its breach of contract counterclaim pursuant to the thirteenth juror doctrine because the jury's verdict is not justified by the evidence. "South Carolina's thirteenth juror doctrine is well established as the standard for granting a new trial in state law actions." *Norton v. Norfolk S. Ry. Co.,* 350 S.C. 473, 477,567 S.E.2d 851, 854 (2002). "South Carolina's thirteenth juror doctrine is so named because it entitles the trial judge to sit, in essence, as the thirteenth juror when he finds the evidence does not justify the verdict, and then to grant a new trial based solely upon the facts." *Id.* at 478, 567 S.E.2d at 854 (internal quotation marks omitted). "The effect is the same as if the jury failed to reach a verdict. The judge as the thirteenth juror 'hangs' the jury. When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome." *Folkens v. Hunt,* 300 S.C. 251, 254, 387 S.E.2d 265,267 (1990).

CONCLUSION

The lower court erred by entering judgment against South Causeway on the Plaintiff's foreclosure action. For the reasons argued above, South Causeway was entitled to judgment as a matter of law on the breach of contract affirmative defense and counterclaim (alternatively, this Court should reverse the lower court's refusal to order a new trial on the breach of contract claim and order a new trial). In addition, the lower Court erred by directing a verdict on the affirmative defense and counterclaim of intentional interference with prospective contract. The Court also

erred by excluding the email communications between Lincoln Harris and First South, resulting in reversible error on the affirmative defenses and counterclaims of breach of contract, intentional interference with contract, and intentional interference with prospective contracts.

South Causeway respectfully requests that this Court vacate the foreclosure judgment, remand the case with instructions to enter judgment in favor of South Causeway on its claim for breach of contract and order a new trial on the claims for intentional interference of breach of contract and intentional interference with prospective contract.

Respectfully submitted.

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December 6, 2013

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that Appellant's Final Brief complies with Rule 211(b) SCACR, and the August 13, 2007, Order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Identifiers and Other Sensitive Information in the Appellate Court Filings."

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PROOF OR SERVICE

I, Jaime Harmon, the undersigned employee of Lewis Babcock & Griffin L.L.P, attorney for Appellant South Causeway, LLC, do hereby certify that I have served a copy of **Appellant's Final Brief** on December 6, 2013, by causing a copy of same to be deposited in the U.S. Mail, proper postage prepaid addressed as follows:

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