

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

ORIGINAL

APPEAL FROM HORRY COUNTY  
William H. Seals, Jr., Circuit Court Judge

Case No. 2009-CP-26-5743

Hotel and Motel Holdings, LLC, .....Respondent

v.

BJC Enterprises, LLC, Wendy J. Bellamy, Americana, Inc.,  
a/k/a Americana Motel of Myrtle Beach, Inc., Mozingo &  
Wallace Architects, LLC, Kersi S. Shroff, and Shroff Management,  
Inc., .....Defendants

of whom

BJC Enterprises, LLC, Wendy J. Bellamy, Americana, Inc.,  
a/k/a Americana Motel of Myrtle Beach, Inc., .....Appellants

v.

First Palmetto Savings Bank, F.S.B., Jack Jones, Donald D. Godwin,  
and Bhupendra Patel, .....Respondents

APPELLANTS' FINAL BRIEF

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## STATEMENT OF ISSUES ON APPEAL

- I. Where the record before the trial court contained evidence creating genuine material factual issues and the evidence was susceptible to more than one reasonable inference as to Appellant Owners' claims against Lender for breach of contract, breach of contract accompanied by fraud and civil conspiracy in a foreclosure case, it was error to grant summary judgment to Respondent Lender.
  
- II. Where Respondent Assignee was transferred the note and mortgages at issue by Respondent Lender after Lender instituted this foreclosure action against Appellant Owners, such that Assignee was not a holder in due course of the note and mortgages, Assignee was subject to the same defenses and claims that Owners asserted against Lender for breach of contract, breach of contract with fraud, and civil conspiracy and the record before the trial court contained evidence creating genuine issues of material fact and facts susceptible to more than one reasonable inference, it was error to grant summary judgment to Respondent Assignee.
  
- III. Where the record before the trial court contained genuine material issues of fact and facts that were susceptible to more than one reasonable inference as to Appellant Owners' claims for fraud, tortious interference with contracts, conversion, unfair trade practices, and outrage against Respondent Assignee, it was error for the trial court to grant summary judgment to Assignee on those claims.

- IV. Where Appellant Owners plead special damages and facts sufficient to state claims for civil conspiracy against Respondents Jones, Godwin and Patel, it was error for the trial court to grant Respondents' Rule 12(b)(6), SCRCP. motion striking those claims.
- V. Where Appellant Owners demanded a jury trial on Plaintiff Assignee's claim and delivery cause of action, it was error for the trial court to strike the same as Owners were entitled to a jury trial as a matter of right.

## STATEMENT OF THE CASE

This foreclosure action was brought by Respondent First Palmetto Savings Bank, F.S.B against Appellants BJC, Americana, and Wendy Bellamy ("Owners") to foreclose on two hotel properties and one multi-unit rental house owned by Appellants. (R. pp.82-120) After commencement of the case, First Palmetto ("Lender") assigned the 2008 Note, three mortgages and other loan documents in issue to Respondent Hotel & Motel Holdings, LLC ("H&M"). (R. pp. 1982-2000, R. pp. 2003-2017) H&M was a newly formed limited liability company whose sole member was Respondent Jack Jones ("Jones"). (R. pp. 1949-1952) Respondent Donald Godwin ("Godwin") helped form and was the registered agent for H&M. (R. p. 1145, line 17-p. 1147, line 25) Godwin subsequently became a 50% member of H&M. (R. p. 2041, R. p. 1150, line 20-p. 1152, line 24) Respondent Bhupendra Patel ("Patel"), a long time business associate of Jones and Godwin, managed the hotel properties for the three months prior to Lender bringing this foreclosure and for almost a year thereafter. (R. pp. 1551-1555, R. p. 1138, line 21-p. 1139, line 4, R. p. 1140, line 16-p. 1142, line 12, R. pp. 2044-2046)

This action was started when Lender filed a Lis Pendens on Owners' hotels on June 4, 2009 in Horry County. On June 11, 2009, Lender filed its Summons and Complaint stating separate claims for the foreclosure of the three different mortgages, one claim and delivery cause of action, and three separate claims for the appointment of a receiver based on a default under a 2008 Note. (R. pp. 82-120) The debt represented by the 2008 Note of \$5,573,146.62 was part of the \$6,300,000 price paid by BJC for the Emerald Shores in 2005. (R. pp. 1495-1496, R. pp. 1452-1454) Lender sought to foreclose on the three properties given to secure the 2008 Note and to sell personal property at the Emerald Shores owned by BJC pursuant to its Security Agreement. (R. pp. 1455-1485) The three mortgages covered hotel properties owned by Appellants BJC Enterprises, LLC ("BJC"), Americana Motel of Myrtle Beach, Inc.

("Americana") and Wendy J. Bellamy ("Wendy") located in Myrtle Beach. BJC was a three-member limited liability company whose members were Wendy Jones Bellamy, her brother Harvey Jones ("Harvey"), and family friend, Henry "Tripp" Coan ("Coan"). (R. p. 1246, lines 4-25)

On June 30, 2009, after filing this foreclosure action, Lender assigned the BJC 2008 Note, three mortgages, security agreement, and personal guarantees of Wendy, Harvey, and Coan to a newly formed limited liability company, Respondent H&M ("Assignee"). (R. pp. 1949-1952, R. pp. 1982-2000, R. pp. 2006-2017, R. pp. 1511-1512, R. p. 1178, lines 3-14) Assignee was a single member limited liability company, that member being Wendy and Harvey's paternal uncle, Respondent Jones. (R. pp. 1949-1952, R. p. 1159, lines 13-24, R. p. 1268, lines 7-25) Thereafter, a motion was filed on July 9, 2009 to substitute Assignee as Plaintiff. (R. pp. 359-362) On September 11, 2009, Assignee was substituted as Plaintiff and Lender was dismissed. (R. pp. 7-9) Assignee's Amended Complaint was filed on September 23, 2009 alleging the same seven causes of action as in the original complaint. (R. pp. 121-268) At that time, Assignee also filed a motion to appoint Respondent Patel as receiver for the hotel properties. (R. p. 363) Patel had been managing all the properties for three months prior to the failure of BJC to make a \$150,000 payment due on May 31, 2009 which served as Lender's basis for filing the foreclosure on June 4, 2009. (R. pp. 1551-1557, R. p. 1353, lines 14-16) Owners opposed the appointment of Patel as receiver, and the trial court refused to appoint him by order dated December 8, 2009 and filed December 10, 2009. (R. pp. 19-20) On April 20, 2010, the lower court appointed a receiver of the three properties who has been in possession and control of the same since April 21, 2010.

Owners answered Assignee's Amended Complaint on November 4, 2009 and asserted various defenses and counterclaims of civil conspiracy, conversion, and tortious interference

with banking relationship. (R. pp. 269-276) Owners filed a motion to amend their Answer which was allowed; and on June 9, 2010, Owners' Amended Answer, Counterclaims and Third-Party Complaint was filed. (R. pp. 277-306) The Amended Answer alleged defenses of denial, that H&M as assignee was not a holder in due course of the 2008 Note and mortgages, lack of adequate consideration, fraud, lack of notice, failure of conditions precedent, lack of damages, impossibility, waiver, estoppel, and unclean hands. Owners asserted additional defenses and counterclaims seeking set off against any debt due H&M based on breach of contract, breach of contract accompanied by fraud, civil conspiracy, fraud, conversion, unfair trade practices, interference with contracts and outrage/emotional distress. Owners sought the remedy of set off as to each of these claims. Owners brought third-party claims against First Palmetto for breach of contract, breach of contract accompanied by fraud, civil conspiracy, fraud, conversion, unfair trade practices, and outrage/emotional distress and third-party claims against Respondents Jones, Godwin and Patel for civil conspiracy and other claims and breach of fiduciary duty against Jones. On July 2, 2010, H&M replied to the counterclaims; on July 16, 2010 Jones and Godwin filed a motion to dismiss Owners' third-party claims; on July 23, 2010 Lender filed its answer to the third-party complaint; and on July 14, 2010 Patel filed his Answer and Counterclaims to Owners Third-Party Complaint. (R. pp. 307-319, R. pp. 364-372, R. pp. 320-328, R. pp. 340-358)

On July 16, 2010, Jones and Godwin filed a motion to dismiss Owner's third-party claims and on August 19, 2010 Patel filed a motion to dismiss. (R. pp. 364-372, R. pp. 373-379) The two motions were based in part on Respondents' contention that the third-party claims were not derivative and thus were not proper under Rule 14, SCRCF. and Rule 12(b)(6), SCRCF. The hearing on these motions was held on September 23, 2010 and Judge Steven John issued an order dismissing all third-party claims against Jones, Godwin and Patel except for the civil

conspiracy claims. (R. pp. 10-18, R. pp. 1015-1033) Judge John did not rule on Jones, Godwin, or Patels' Rule 12(b)(6) motion to dismiss the Owners' civil conspiracy claim, but left that for later consideration. (R. p. 18)

On November 15, 2010, Jones and Godwin filed their answers to Owner's civil conspiracy claim. (R. pp. 329-339) On April 14, 2011, Judge Seals heard the Rule 12(b)(6) motion to dismiss Owners' civil conspiracy claims filed by Jones, Godwin and Patel and granted the motions on July 21, 2011. (R. pp. 380-385, R. pp. 21-28) Appellant Owners filed a motion to reconsider that Order on May 5, 2011, which was heard on June 1, 2011 and denied by Judge Seals by Order filed November 30, 2011. (R. pp. 386-397, R. pp. 1034-1057, R. pp. 29-38) These are two of the seven orders that are the subject of this consolidated appeal.

On April 18, 2011, Assignee H&M filed a motion for summary judgment as to Owners' counterclaims. (R. pp. 398-399) On May 2, 2011, a motion for summary judgment was filed by Third-Party Lender as to Owners' third-party complaint. (R. pp. 456-457) The hearing on these two summary judgment motions was held on May 12, 2011 before Judge Seals. (R. pp. 1058-1120, R. pp. 402-455, R. pp. 458-486, R. pp. 487-858) He also heard that day Assignee H&M's motion for summary judgment as to its complaint which was denied by Order filed June 6, 2011. (R. pp. 400-401, R. pp. 39-41)

Judge Seals granted Assignee H&M summary judgment on Owners' defenses/claims of breach of contract, breach of contract accompanied by fraud, civil conspiracy, unfair trade practices, fraud, conversion, interference with contracts, and outrage in the appealed Order filed June 6, 2011. (R. pp. 42-48) Third-Party Lender's motion for summary judgment as to Owner's causes of action of breach of contract, breach of contract accompanied by fraud and civil conspiracy was also granted by separate appealed Order filed June 6, 2011. (R. pp. 49-53) On June 20, 2011, Owners' filed and served motions to reconsider the orders granting summary

judgment to Assignee and Lender, which Judge Seals denied, without a hearing. (R. pp. 859-868, R. pp. 879-897, R. pp. 869-878) The Order denying reconsideration of the granting of summary judgment to Assignee was filed on July 27, 2011, but not received by Owners' counsel until September 29, 2011. (R. pp. 54-65) The appealed Order denying Owners' motion for reconsideration as to the claims against Lender was filed on July 28, 2011 and received by Owners' counsel on August 3, 2011. (R. pp. 66-75) These appealed Orders are four of the seven that are the subject of this consolidated appeal.

On June 3, 2011, Assignee H&M filed a motion to strike Owners' demand for a jury trial. (R. pp. 1007-1009) Owners opposed the motion as to the claim and delivery action to which Owners had demanded a jury trial. (R. pp. 1121-1132) Judge Seals heard that motion on August 24, 2011 and granted the motion by Order filed on September 29, 2011 and received by Owners' counsel on October 17, 2011. (R. pp. 76-81) This is the seventh order that is the subject of this consolidated appeal.

On August 29, 2011, Appellant Owners' filed their Notice of Appeal of six of the seven Orders set out above. On October 27, 2011, Appellant Owners filed their Notice Of Appeal of the order striking their request for a jury trial. Owners moved the South Carolina Court of Appeals to allow consolidation of these appeals on November 18, 2011, which was granted by Order filed January 3, 2012. Thereafter, this appeal was stayed due to the Chapter 13 pro se bankruptcy filing of Appellant Wendy J. Bellamy on December 28, 2011. The S.C. Court of Appeals held the appeal in abeyance pending resolution of the bankruptcy proceedings by Order filed March 16, 2012. The bankruptcy proceedings have concluded and the stay of the appeal was lifted pursuant to the Order of the South Carolina Court of Appeals filed September 11, 2013 and received by Appellant Owners' counsel on September 16, 2013.

## Statement of Facts

This is a complex foreclosure action concerning several ocean front and second and third row hotel properties in Myrtle Beach, located east of Highway US-17 Business between 4<sup>th</sup> Avenue and 5<sup>th</sup> Avenue North. (Maps) (R. pp. 1450-1451) The owners of the properties are BJC owning Emerald Shores Hotel; Americana owning Rainbow Court; and Wendy Bellamy, owning a multi-unit rental house. The lender for BJC's acquisition of the ocean front hotel known as Emerald Shores in January, 2005 was First Palmetto Savings Bank, F.S.B. BJC's purchase price for Emerald Shores was \$6,300,000 paid by cash from Owners and \$5,580,000 in loan proceeds from Lender. (Purchase Contract) (R. pp. 1452-1454) The 2005 Note was for \$5,580,000.00 for a two-year term with payments of interest only and a balloon of principal due in mid-January, 2007 (2005 Note). (R. pp. 1453-1454) The borrower was BJC, whose members were Wendy, Harvey (brother and sister), and Tripp Coan. As collateral for the loan, BJC, Americana, and Wendy gave Lender mortgages on the Emerald Shores, on separate family hotel property, Rainbow Court, owned by Americana since the 1950's whose shareholders are Wendy and Harvey, and on a rental house owned by Wendy. (Mortgages) (R. pp. 1455-1483, R. pp. 1247, lines 9-14) Coan posted a \$500,000 CD with Lender as additional collateral and Wendy, Harvey and Coan each gave Lender personal guaranties. (CD documents and 3 Guarantees) (R. p. 1247, lines 4-6, R. pp. 1527-1529) On January 12, 2007, the 2005 loan was renegotiated and a new 2007 Note was executed by BJC for \$5,573,146.62 for 1 year with only interest due monthly and principal due in mid-January, 2008. (2007 Note) (R. pp. 1487-1488) The 2007 loan proceeds were used to pay off the 2005 Note and mortgage modifications and new guaranties were executed. (Mortgage Modifications) (R. pp. 1489-1494) On January 17, 2008, a new loan in the amount of \$5,573,146.62 was made by Lender and the proceeds were used to pay off the 2007

Note. The term of the 2008 Note was for 1 year with principal and interest payable monthly and a maturity date of January 17, 2009. It is the 2008 Note that is the subject of this action. New guarantees and mortgage modifications were executed (2008 Note, Mortgage Modifications and Guarantees) (R. pp. 1495-1496, pp. 1497-1510)

In mid October, 2008, Owners and Lender began negotiations for a new loan to pay off the 2008 Note which was to mature in January, 2009. At first Lender advised that it was not going to renew the loan, but would instead require \$5,509,352.46 to pay off of the 2008 Note when it matured in 2009. (R. p. 1265, line 20-p. 1268, line 7) Due to stress caused by these events, Wendy, who was the managing member of BJC and majority shareholder of Americana, attempted suicide on November 3, 2008 so her \$5,500,000.00 life insurance policy proceeds would be available to pay off First Palmetto and save her family's properties. (R. p. 1264, line 10-p. 1268, line 7, R. p. 1307, line 19-p.1308, line 20) Wendy was hospitalized from November 3, 2008 until her release in late November, 2008 and was thereafter under psychiatric care. (R. p. 1271, line 15-p. 1273, line 12, R. p. 1202, line 25-p. 1203, line 11, R. pp. 1513-1516) After Wendy's suicide attempt, she was no longer involved with the management of Emerald Shores, Rainbow Court, rental properties or discussions with Lender to renegotiate or extend the 2008 Note. (R. p. 1278, lines 15-23, R. p. 1310, line 25-p. 1311, line 25, R. p. 1226, line 22-p. 1228, line 14)

Lender was aware of Wendy's attempted suicide. (R. p. 1226, line 22-p. 1228, line 14) The remaining members of BJC made payments to Lender in late November, 2008 bringing the 2008 Note current with the agreement from Lender that it would continue negotiations for renewal of the 2008 loan. (R. p. 1518, R. pp. 1558-1563) In late November, 2008, Lender wrote a letter to BJC offering to extend the 2008 loan for one year, reduce the interest rate from

8.25% to 7%, and require only interest payments, not principal and interest payments, as it had required in 2008. (November, 2008 Hutto letter) (R. p. 1517) This letter was never received by Wendy, Harvey, BJC, or Americana, because it was mailed to The Rainbow Court property during the time when Wendy was incapacitated, Rainbow Court was closed for the season,<sup>1</sup> and at a time when Wendy's uncle, Jack Jones, had taken over all BJC, Americana and personal matters from Wendy. (R. p. 1309, line 4-p. 1312, line 19, R. p. 1318, lines 1-24, R. p. 1268, line 17 - p. 1270, line 18, R. p. 1277, line 15-p. 1278, line 23, R. pp. 1519-1526, R. pp. 861-867, R. pp. 869-877, R. pp. 885-888)

On December 9, 2008, after constant urging from Jones and due to her unstable mental and emotional condition, not knowing that BJC had brought the 2008 Note current in November, or that Lender had written a letter to extend the loan on favorable terms, Wendy signed a Durable Power of Attorney in favor of Jones. (12/9/08 Power of Attorney) (R. pp. 1519-1526, R. pp. 1513-1516, R. p. 1269, line 15-p. 1278, line 22, R. p. 1225, lines 1-24) Neither Jones or Lender ever advised Wendy, Harvey, BJC or Americana of the November, 2008 offer after Jones became involved. As of December 9, 2008, all negotiations concerning the BJC loan were taken over by Jones to the exclusion of Harvey, Wendy, Americana and BJC. (R. p. 1280, line 5-p. 1281, line 16, R. pp. 1306, lines 3-20, R. p. 1308, line 21-p. 1312, line 21, R. p. 1318, line 1-p. 1321, line 25) In fact, Jones had a copy of the Power of Attorney in his favor sent to the Lender's corporate headquarters in Camden before it was even recorded in Horry County on December 12, 2008. (R. p. 483, lines 4-25, R. p. 1226, line 18-p. 1228, line 25, R. pp. 1519-1526)

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<sup>1</sup> Both properties, Rainbow Court and Emerald Shores, are seasonal "Mom & Pop" hotels and open generally from Memorial Day to Labor Day. The Bank was aware the Emerald Shores and Rainbow Court properties were closed for the season when the November 2008 letter was sent.

Unbeknownst to Owners, Jones began having regular contact with First Palmetto, and specifically First Palmetto Bank President and CEO, Sammy Small, Sr. ("Small"). (Small Sr. Cell Phone Records and Summary of Cell Records) (R. pp. 1564-1628, R. p. 1242, line 7-16) Jones and Lender shut Wendy, Harvey, and Tripp Coan off from all communications and activity with First Palmetto and with the hotel properties, which were closed at the time from January, 2009 through May, 2009. (Hutto Email) (R. p. 1547, R. p. 1887, lines 1-5, R. p. 1202, lines 2-24, R. pp. 1564-1628) Jones and Small led BJC, Americana, Wendy and Harvey to believe that they were negotiating in good faith to achieve a restructuring, renewal, or workout of the 2008 Note on BJC's behalf and to prevent foreclosure on the properties. (2/3/09 Bank Documents) (R. p. 1275, line 10-p. 1276, line 25, R. p. 1282, line 2-p. 1284, line 24, R. p. 1285, line 6-p. 1286, line 20, R. p. 1288, lines 1-19, R. p. 1292, line 17-p. 1293, line 20, R. p. 1299, lines 10-20, R. p. 1311, lines 13-22, R. p. 1319, line 6-p. 1321, line 18, R. pp. 1548-1550, R. pp. 1531-1546)

After discovery began in this case, Owners learned of multiple phone conversations and private meetings between Jones and Small. (R. pp. 1564-1628) The evidence suggested that these discussions centered on a plan between Lender and Jones for Jones to acquire the BJC 2008 Note, three mortgages, three guaranties, and other loan documents from Lender, for the sole benefit of Jones, after Jones and Lender collaborated in installing Jones's long time business associate, Patel, to take control of the hotels and funds generated by the properties when they reopened in March, 2009 and cause a default by not making a required May 31, 2009 payment of \$150,000 so the Lender could foreclose. The facts suggest that to carry out this plot, Jones and Lender in March, 2009 installed as "manager" of the hotel properties Bhupendra Patel to control all the money and facilitate the May default enabling Lender to file this foreclosure action on June 4, 2009, then sell the 2008 Note, mortgages and guarantees for \$250,000 to H&M, a limited

liability company created by Jones and Godwin on June 12, 2009, and then substitute H&M as Plaintiff in this foreclosure in September, 2009. (R. p. 1291, line 1-p. 1293, line 20, R. p. 1350, lines 1-10, R. p. 1352, lines 2-14) Wendy, Harvey, Coan, BJC, and Americana were not aware of Jones and Lender's ulterior motives and scheme which constitutes the factual basis of Owners' defenses and claims in recoupment against Lender, H&M, Jones, Godwin and Patel. (Answers and Amended Answer, Counterclaims and Third-Party Complaint) (R. pp. 269-272, R. pp. 273-276, R. pp. 277-306, R. p. 1204, line 22-p. 1205, line 4, R. p. 1210, lines 4-9, R. p. 1212, lines 9-24, R. p. 1213, line 18-p.1214, line 13) Small, on behalf of Lender, and Jones continued to advise Owners that they were negotiating a workout of the BJC loan for Owners benefit and to keep the property from foreclosure right up to the filing of this case. (R. p. 1288, line 8-p. 1290, line 25)

**EVIDENCE IN THE RECORD SUPPORTING FACTUAL ISSUES AS TO  
RESPONDENTS' SCHEME**

The evidence in the record before the trial court showed Jones attended a meeting at Lender's headquarters in Camden on January 22, 2009 representing Wendy, as the managing member of BJC, the majority shareholder in Americana, and personally. Wendy did not attend. (R. pp. 1519-1526, R. p. 1226, line 22-p. 1228, line 25, R. p. 1319, lines 6-25) Tripp Coan and Harvey Jones were also at the meeting along with Small and other Lender employees. At that meeting, the group collectively discussed potential loan restructuring. Small advised he was liquidating Coan's \$500,000 Certificate of Deposit and applying it to principal repayment of the 2008 Note. (Bank CD Records and BJC Loan History) (R. p. 1372, line 11-p. 1373, line 9, R. pp. 1527-1529, R. pp. 1558-1563) During that meeting, Small and Jones left the room to speak privately, not including the other Owners, and never disclosed the substance of their private

conversation. Later in January 2009, Jones and his nephew, Harvey, went to Camden again to meet with Small to discuss a workout of the 2008 Note. Harvey was left in a room alone while Jones and Small again met privately. (R. p. 1202, lines 2-11, R. p. 1320, lines 9-25) Jones told Harvey after that meeting that Lender would continue to negotiate through Jack towards a loan renewal if certain things were done. The evidence suggests that these private meetings between Jones and Small and no less than 115 phone conversations to or from Small on his cell phone to or from Jack Jones between January 22, 2009 and June 30, 2009 were had to discuss plans for Jones to acquire the BJC loan and mortgages from First Palmetto. (Small Phone Records) (R. pp. 1564-1628) By the end of March the hotels would be open for the 2009 summer season and Jones would get the benefit of the 2009 summer income during any foreclosure suit to be filed by Lender.

Not knowing anything about Jones and Lender's scheme BJC, Wendy, Harvey and Americana continued to pour money and blood, sweat, and tears into the properties to get the hotels ready to open in March, 2009. Lender, after meeting privately with Jones at least twice in January and numerous private phone calls, insisted in late January that the 2008 real estate taxes be paid on the properties and that Lender be paid all interest then due under the 2008 Note as of February 3, 2009. (R. p. 1282, line 1-p. 1284, line 25, R. p. 1313, line 23-p. 1314, line 20, R. p. 1530, R. pp. 1531-1546) To meet Lender's requirement to continue working with BJC and keep Lender from foreclosing on the family property, Wendy sold her mother's jewelry to a friend obtaining \$190,000 and drove to Camden with Harvey on February 3, 2009 as instructed by her uncle, Jones. (R. p. 997, lines 5-12, R. p. 1530, R. pp. 1531-1546, R. p. 1550) Wendy hand delivered to Small a certified check for \$95,000 on February 3, 2009.<sup>2</sup> (Check and 2/4/09 Bank

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<sup>2</sup> Application of 2/3/09 \$95,000.00 payment to Lender was \$89,584.28 to interest, \$1,426.22 to late charges, and \$3,989.50 to principal on the BJC loan.

Documents) (R. p. 1530, R. pp. 1548-1549) The same day, Harvey paid the 2008 real estate taxes of \$91,503.87 on the mortgaged property in Horry County and sent proof of the same to Small. (Tax Receipts/Fax) (R. pp. 1531-1546) As of February 3, 2009, BJC was current with all payments due under the loan as required by Lender's President and CEO Small. These payments enhanced Jones' takeover of the property in June, 2009 after First Palmetto instituted the foreclosure and "sold" H&M the loan as of June 30, 2009 for \$250,000.

The record creates factual issues as to Jones and Small hatching a scheme for Patel, a Myrtle Beach hotelier who had borrowed and repaid with interest more than Four Million Dollars from Jones over their 20 year relationship, to "manage" the hotel properties when they reopened for the season in March, 2009. (Patel Management Agreement and Small Cell Phone Records) (R. pp. 1551-1553, R. pp. 1554-1555, R. pp. 1564-1628, R. p. 1193, line 9-p. 1194, line3, R. p. 1325, lines 19-25, R. p. 1326, line 5-p.1327, line 17, R. p. 1328, line 1-p. 1329, line 25) Jones led Owners to believe this was to enhance the operation of the hotels, to bring in additional income due to Patel's "expertise", and was a major selling point with First Palmetto in order to get the loan renegotiated as Patel himself was a First Palmetto customer. (R. p. 1279, line 20- p. 1280, line 4, R. p. 1320, lines 2-25, R. pp. 819-820, R. p. 1550) Jones took Patel and Wendy to Camden in March, 2009 to meet with Small. This was but one more part of the scheme among Jones, Patel, and Lender to facilitate their plan for Jones to obtain the 2008 Note and mortgages from Lender after Patel and Jones cause a May 31, 2009 payment of \$150,000 to be missed allowing Lender to bring this foreclosure action on June 4, 2009. It was at this March, 2009 meeting that Small advised Wendy and Patel that Lender would continue working with them on the loan as long as Lender was paid \$150,000 by May 31, 2009. (R. p. 1183, line 1-p. 1186, line 25, R. p. 1285, line 6-p. 1286, line 20, R. p. 1347, line 16-p. 1349, line 10)

It was after this March meeting that Patel was installed as manager over the hotel properties securing the 2008 loan and also a separate property, known as Rainbow Court Annex, which was not security for the First Palmetto loan. (R. p. 997, line 1-p. 998, line 21) Patel was in charge of the collection of all revenue and paying all bills. Patel opened two checking accounts at First Palmetto, one for Emerald Shores and one for Rainbow Court, and Patel was the only signatory on the accounts.<sup>3</sup> (R. pp. 1556-1577, R. p. 914, line 15-p. 915, line 15, R. pp. 916-921, R. p. 1195, line 2-p. 1198, line 15, R. p. 1331, line 22-p. 1336, line 11, R.p. 1339, lines 2-19, R. p. 1344, line 23-p. 1346, line 25) The evidence suggest that Patel was controlled by Jones who directed what bills were to be paid, specifically the \$150,000 payment due to Lender on May 31, 2009. Patel never made any payments, principal or interest, to Lender while he was the manager of the properties from March, 2009 until the receiver was appointed on April 21, 2010. He did, however, make payments to Jack Jones of \$20,000, and to Wilbur Jones, Jack Jones's brother, of \$50,000 at the time the Lender was due the \$150,000 payment and paid himself \$30,000. (R. pp. 1629-1636, R. p. 1201, lines 1-13, R. p. 1291, line 9-p. 1293, line 20, R. p. 1295, line 1-p. 1296, line 23, R. p. 1337, line 24-p.1338, line 12, R. p. 1353, line 17-p. 1355, line 5) None of this was disclosed by Lender, Jones, or Patel to Owners. Owners were unaware that Jones was actually conspiring with Lender and using Patel to make it impossible for BJC to make the \$150,000 May 31, 2009 payment to Lender and to facilitate Jones's purchase of the loan for \$250,000, after the Bank instituted this foreclosure action without giving written notice of default or an opportunity to cure to Owners. (R. p. 1204, line 16-p. 1205, line 14, R. p. 1207, line 19-p. 1208, line 3, R. p. 1210, line 22-p. 1212, line 24, R. p. 1287, line 17-p. 1289, line 5, R. p. 1306, lines 3-24, R. p. 1317, lines 3-25, R. p. 1349, line 18-p. 1351, line 2, R. p. 1352, lines 2-15)

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<sup>3</sup> Patel's brother, Nick, was also a signatory on the account in case Patel was out of the country.

Further evidence in the record of this scheme appears as early as March 26, 2009, when Lender hired the Haynsworth Law Firm to draft the documents necessary to "paper the deal" to sell the BJC loan documents to Jones and/or the entity that he was to create after the loan was in foreclosure. (Lender's Priviledge Log, Owners Chronological Summary of Log, Loan Sales Agreement and Addendum) (R. p. 672-676, R. pp. 1953-1981, R. pp. 1982-1996, R. pp. 1997-2000, R. pp. 2001-2040) Additionally, Lender already had current appraisals of the Rainbow Court and Emerald Shores by June 1 and 5, 2009 respectively. (Appraisals of Emerald Shores, Rainbow Court and Americana) (R. pp. 1704-1772, R. pp. 1773-1858, R. pp. 1859-1948)

Further evidence of this scheme is that Lender filed its Lis Pendens dated June 2, 2009 on June 4, 2009, only two days after the 5/31/09 default. (R. pp. 82-89) Lender filed its foreclosure complaint dated June 9, 2009 on June 11, 2009. (R. pp. 90-120) One day later, on June 12, 2009, Jones and Godwin formed Hotel and Motel Holdings, LLC with Jack as its sole member to "buy" the BJC 2008 Note, three mortgages, and three Guarantees from Lender for \$250,000.00 and a 5 year interest only loan made by Lender to H&M for \$4,750,000.00 at 5% interest. (H&M Articles of Incorporation and H&M Note) (R. pp. 1949-1952, R. p. 2040, R. pp. 2001-2002)

Drafts of the Loan Sales Agreement were being prepared as early as March 26, 2009 by counsel hired by Lender. (Privilege Log and Chronological Summary) (R. pp. 672-676, R. p. 1380, line 1-p. 1381, line 19, R. p. 1388, line 17-p. 1389, line 3, R. p. 1390, lines 1-10) H&M registered with the South Carolina Secretary of State on June 15, 2009. On June 24, 2009, H&M, with Jack Jones as its sole member, executed the final Loan Sales Agreement with Lender to purchase the BJC loan. (Loan Sales Agreement) (R. pp. 1997-2000) On June 30, 2009, Bank assigned its interests in the 2008 BJC Note, the mortgages, and other loan documents to H&M. (Closing Documents) (R. pp. 2006-2007) The terms of Loan Sales Agreement itself, which was being drafted in March, 2009 two months prior to BJC not making the May 31, 2009 payment, in light

of the other evidence in the record is evidence of the conspiracy between Lender, Jones, Patel and Godwin. (Loan Sales Agreement, Addendum and Other H&M Closing Documents) (R. pp. 672-676, R. pp. 1953-1981, R. pp. 1982-1996, R. pp. 1997-2000, R. pp. 2003-2005, R. pp. 2018-2040, R. p. 1155, line 20-p. 1157, line 17, R. pp. 1158, lines 18-21, R. p. 1210, line 22-p. 1213, line 17) H&M was then substituted as Plaintiff in this case with the Lender paying all of H&M's attorney fees from June, 2009 to the present. (R. pp. 7-9, R. p. 1175, line 5-p. 1176, line 11, R. p. 1177, lines 16-21, R. p. 1179, lines 1-11, R. p. 1414, line 21-p. 1415, line 21)

## ARGUMENTS

### STANDARD OF REVIEW

In reviewing the grant of summary judgment the appellate court is to apply the same standard of review as the trial court. *Baughman v. Am. Tel. and Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 545 (1991). Summary judgment is appropriate when "the pleadings, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC. A fact is deemed material if proof of its existence or nonexistence would affect the disposition of the case under the applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "An issue of material fact is 'genuine' if the evidence so offered is such that a reasonable jury might return a verdict for the non-movant" *Id.* at 257. In determining if any triable issues of fact exist, the Court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party, here Appellant Owners. *Simmons v. Toumey Regional Medical Center*, 341 S.C. 32, 533 S. E.2d 312 (2000); *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997).

The moving party carries the burden of providing the basis for the motion and showing that there is no issue as to any material fact. *Strother v. Lexington Co. Recreation Comm'n*, 332 S.C. 54, 504 S.E.2d 117 (1998). "The non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 236, 330, 673 S.E.2d 801, 803, (S.C. 2009) (Emphasis added). In claims requiring a heightened burden of proof, the party opposing summary judgment must submit more than a mere scintilla of evidence to withstand the motion. *Id.* Summary Judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Brockband v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000). Summary Judgment is a drastic remedy, which should be cautiously involved so that no person will be improperly deprived of a trial of disputed factual issues. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991).

Here, the record is replete with a multitude of factual issues and conclusions to be drawn from the facts far exceeding a "mere scintilla" standard which required the lower court to deny Lender and Assignee's motions for summary judgment.

Whether a party is entitled to a jury trial is a question of law. As such, the appellate court may decide questions of law with no particular deference to the lower court. *Wachovia Bank, National Association v. Blackburn*, 394 S.C. 579, 584, 716 S.E.2d 454, 457 (Ct. App. 2011) (quoting *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E. 2d 771, 772 (2010)).

#### **ISSUES ON APPEAL**

**I. Where the record before the trial court contained evidence creating genuine material factual issues and the evidence was susceptible to more than one reasonable inference as to Appellant Owners claims against Lender for breach of contract, breach of contract accompanied by fraud, unfair trade practices and civil conspiracy in a foreclosure case, it was error to grant summary judgment to Respondent Lender.**

**A. Breach of Contract**

The evidence in the record before the trial court cited above present issues of fact and conclusions to be drawn from those facts meeting and exceeding the "mere scintilla" of evidence standard entitling the Appellant Owners to a jury trial on its claims for breach of contract, breach of contract with fraud and civil conspiracy against Lender. The claims are also Plead as defenses and claims in recoupment seeking set off from any debt owed as contained in the Amended Answer. (Amended Answer) (R. pp. 277-360) The elements of breach of contract are: 1) a binding contract between the parties; 2) breach or unjustifiable failure to perform by a party; and 3) damage suffered as a proximate result of the breach. *Fuller v. Eastern Fire & Casualty Insurance Co.*, 240 S.C. 75, 124 S.E.2d 602, 610 (1962). Every contract contains an implied duty of good faith between the contracting parties. *Tharpe v. G.E. Moore Co.*, 254 S.C. 196, 174 S.E.2d 397 (1970).

Here there is no dispute that there was a contractual relationship between Lender and Owners that included requirements that the Lender deal with Owners in good faith and deal with them fairly. A jury could conclude from the evidence that from November, 2008 through the end of June of 2009, Lender was not living up to those obligations, but was instead intentionally failing to disclose its ongoing negotiations and plans to sell the BJC loan to Jack Jones for his benefit and to the detriment of its own customer, BJC. At a time when Owners had brought their

payments current in late November, 2008 and with knowledge that Wendy had attempted suicide to have her life insurance pay off the 2008 Note and save her family's property, and knowing the hotels were closed, Lender sent a letter regarding renegotiated terms of loan renewal to an address where it was never received by Wendy, Harvey or BJC, or Americana. At around the same time, Lender began dealing only with Jones, who had his niece's Power of Attorney. (R. pp. 1519-1526, R. p. 1547, R. p. 483, lines 4-20, R. p. 1423, lines 3-10) Lender and Jones represented they would work with Owners on a renegotiation, while at the same time and without disclosing to Owners, met privately and had secret contacts including, but not limited to 115 phone calls between January 2009 and June 2009 to cut a deal to "sell" the loan to Jones for \$250,000 which included mortgages on properties, that according to the Lenders appraisal in June 2009 were worth \$6,465,000 when the 2008 Note balance was \$5,022,308,41. (See June, 2009 Appraisals and BJC Loan History) (R. pp. 1564-1628, R. pp. 1704-1772, R. pp. 1773-1858, R. pp. 1859-1948, R. pp. 1558-1563) The failure to disclose to the Owners and guarantors of the BJC loan this deal with Jones at a time when Lender required BJC in February, 2009 to bring the loan current to the tune of \$95,000 and payment of 2008 Real Estate Taxes to the tune of \$91,500 allegedly part of a workout of the BJC loan, but which could be found by a jury as a way to carry out Lender's plot with Jones is a great deal more than a scintilla of evidence that Lender breached its duty of good faith and fair dealing.

#### B. Breach of Contract Accompanied By Fraud

Likewise, from the Statement of Facts and argument above, the record before the trial court was replete with factual issues concerning Owners' claim against Lender for breach of contract accompanied by fraud. There is evidence that Lender was aware that Jones was acting in his own self-interest in negotiating to buy the BJC loan from Lender's CEO and President. Small admitted in his deposition that he negotiated to sell the loan to Jack. (R. p. 1234, lines 11-

18) The evidence also includes records of the 115 phone calls to or from Small's cell phone from January to June, 2009 with Jones and could be found by a jury to constitute fraud on the Lenders part while representing to Owners it would continue with restructuring the BJC loan and not foreclose on the property. (R. pp. 1564-1628) The evidence also reflects that as early as March 26, 2009, Lender had hired its high powered law firm to draft the legal document to "sell" the BJC loan to Jones in June. (R. pp. 672-676, R. pp. 1953-1981, R. pp. 1982-1996, R. pp. 1997-2000) Owners next payment of \$150,000 was not even due until May 31, 2009. A jury could clearly infer that Lender spent money hiring lawyers to "paper a deal" with Jones in March only after Lender and Jones accomplish putting in their puppet, Patel, to take control of the money and property and be assured the funds would not be available for the May 31, 2009 payment. (R. pp. 1551-1557) Thus a jury could find that Lender, Jones, and Patel caused the default in May forming the basis to allow Lender to bring the foreclosure in June and carry out the rest of their conspiracy.

The elements of breach of contract accompanied by fraud are a breach of contract, fraudulent intent relative to the breach, and a fraudulent act accompanying the breach. *Harper v. Ethridge*, 290 S.C. 112, 348 S.E.2d 347 (Ct. App. 1986). The claim is one in contract not tort. *Id.* The fraudulent act is one shown by dishonesty in fact and unfair dealing. The record has evidence from which a jury could determine that when Lender represented to Owners in February and March that if certain payments were made reworking the loan would continue but hid the fact that Lender was at the same time negotiating to sell Jones the loan, put Patel in control of the property, money, and assets insuring that it was impossible to make the May 31 payment, and then sell the loan to Jones, those acts and omissions were fraudulent.

### C. Civil Conspiracy

The facts, circumstances, and inferences in the record constitute material factual issue that a jury could find constituted conspiracy by Lender. Civil conspiracy is a combination of two or more people for the purpose of injuring or causing damage to another. *LaMotte v. Punchline of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711 (1988). In a conspiracy action, only evidence of proof of the fact of damage is required, not certainty of amount. *Gynecological Clinic, Inc., v. Cloer.*, 334 S.C. 555, 514 S.E.2d 592 (1999); *Charles v. Texas Co.*, 199 S.C. 156, 18 S.E.2d 719 (1942).

Here the evidence is susceptible of the inference that Small, on behalf of the Lender, Jones, Patel and Godwin conspired together with a plan to cause Owners to pay Lender \$95,000 and 2008 real estate taxes of \$92,000 in February, spend their time, sweat equity, and money getting the hotel properties up and running for the summer of 2009, opening the properties in March with Patel and Jones in control of the revenue and spending the revenue for costs other than the \$150,000 payment due to Lender in May, including payments to Jones of \$20,000, Jones brother of \$50,000 and Patel of \$30,000 knowing this would result in a default and institution of this foreclosure in early June allowing Jones, Patel and Godwin to pocket all the proceeds from summer of 2009 plus all the proceeds from operation of the Rainbow Court Annex, which was not encumbered by or collateral for the 2008 BJC loan, all causing special damage to Owners. (Summer photos) (R. pp. 1550, R. pp. 1637-1703)

There is evidence in the record that when Jones hired Patel to manage the hotels, Wendy expected that Jones and Patel would ensure that the loan would be current by payment of the \$150,000 by May 31, 2009 from the operating revenue generated by the hotels. (R. pp. 1285 line 8- p. 1289, line 5, R. p. 1290, line 18-p. 1291, line 25) However, Jones installed a manager over the mortgaged properties whom he hand-selected and to whom he lent an exorbitant sum of

money to in the past and who was already performing illegal acts for Jones's family.<sup>4</sup> (R. pp. 851-853, R. pp. 916-921, R. p. 1328, line 1-p. 1329, line 25, R. p. 1340, line 12-p. 1344, line 15, R. p. 1360, line 1-4, R. p. 490-492, R. p. 498-499) BJC did not know that Patel was under the control of Jones and that Patel would not pay the Lender from the operating revenue of the hotels on May 31, 2009. Instead, payments were made to Patel for management of \$30,000, payments to Jones of \$20,000, and payments to Jones' brother of \$50,000.

Last, Lender has gone so far as to pay all of H&M's attorney fees in this foreclosure litigation and in the three separate guaranty actions, failed to perform any due diligence on Jack Jones or H&M before lending \$4,750,000 of the \$5,000,000 "purchase price" for the BJC loan, required no personal guarantees for the debt, required no loan application, tax returns, or financial statements of Jones or H&M prior to loaning this newly formed LLC with no source of income \$4,750,000 to purportedly "buy" the BJC loan. (R. p. 1236, line 7-p. 1239, line 21, R. p. 1392, line 11- p. 1394, line 19, R. p. 1405, lines 4-17, R. p. 1425, lines 5-25, R. p. 1443, line 8-p. 1446, line 23, R. p. 1447, line 24-p. 1448, line 11, R. p. 1172, lines 7-25, R. p. 1175, line 5-p. 1176, line 14, R. p. 1180, line 22-p. 1182, line 17, R. p. 1214, line 24-p. 1216, line 15)

The record before the trial court was replete with evidence, much greater than the scintilla, sufficient to withstand Lender's motion for summary judgment even with the heightened burden of proof necessary for breach of contract with fraud and civil conspiracy. Appellants ask this Court to reverse and remand for trial of these claims.

## **II. Where Respondent Assignee was transferred the note and mortgages at issue by Respondent Lender after Lender instituted this foreclosure action against Appellant**

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<sup>4</sup> Patel testified that he listed Jones' daughter as an employee of the hotel Patel owned even though Jones' daughter did not work for him to provide her health insurance from his employee plan and Jones paid Patel for her premiums. (R. p. 1360, line 1-4) (Patel Deposition Transcript)

**Owners, such that Assignee was not a holder in due course of the note and mortgages, Assignee was subject to the same defenses and claims that Owners asserted against Lender for breach of contract, breach of contract with fraud, and civil conspiracy and the record before the trial court contained evidence creating genuine issues of material fact and facts susceptible to more than one reasonable inference, it was error to grant summary judgment to Respondent Assignee.**

H&M, who is not a holder in due course, took the 2008 Note subject to the defenses and claims in recoupment that Owners had against First Palmetto. BJC was current under the negotiated extension of the loan as of February 3, 2009 and had until May 31, 2009 to make its next payment of \$150,000. Based on the evidence in the record there are material issues of fact as to whether Lender breached its duty of good faith and fair dealing when it participated in the actions taken by Jones, Godwin, and Patel. At a minimum, Owners have raised material issues of fact constituting much more than a mere scintilla of evidence that must be decided by a jury with regard to Lender's breach of the duty of good faith and fair dealing. Upon purchase of the loan by H&M, whose principal was the driving force in this misconduct, H&M is likewise subject to these claims as it is not a holder in due course of the 2008 Note. *S.C. Code Ann. §36-3-305(a)(2) and (3)*.

In order for Assignee H&M to avoid the defenses and claims Owners have against Lender, H&M must show it is a holder in due course of the note. Assignee has admitted that it is not a holder of the note in due course. Thus, according to S.C. Code Ann. § 36-3-302(a)(2) entitled "Holder in due course" and §36-3-305(a)(2) and (3) entitled "Defense and claims in recoupment" Assignee is subject to the same defenses and claims that Owners have against First Palmetto. *Rosemond v. Campbell, 288 S.C. 516, 343 S.E.2d 641 (Ct. App. 1986)* In essence, Assignee H&M stands in the shoes of First Palmetto as to the defenses and claims of breach of

contract, breach of contract accompanied by fraud, and civil conspiracy which are plead as defenses and claims seeking set off from the 2008 debt in Owners Amended Answer.

Even though H&M argues it was not in existence when the facts set forth above as to Lender occurred, that is of no consequence. All the facts set out above and the consequences of those acts and omissions are placed on H&M as a result of its purchase of the Note after it had become due and after Lender brought the foreclosure. *S.C. Code Ann. §36-3-302(a)(2) and §36-3-305(a)(2) and (3)* An assignee of a debt or negotiable instrument takes the obligation subject to all claims and defenses the obligor may have against the assignor if the assignee is not a holder in due course. The assignee's right can be no greater than those of the assignor, *Rosemond v. Campbell*, 288 S.C. 516, 522-523, 343 S.E.2d 641, 645 (Ct. App. 1986) The same issues of fact as are set forth above as to Lender are imposed on Assignee. Thus the granting of summary judgment to H&M on the breach of contract, breach of contract with fraud, and civil conspiracy by the lower court was error and should be reversed and remanded for trial.

**III. Where the record before the trial court contained genuine material issues of fact and facts that were susceptible to more than one reasonable inference as to Appellant Owners' claims for fraud, tortious interference with contracts, conversion, unfair trade practices, and outrage against Respondent Assignee, it was error for the trial court to grant summary judgment to Assignee on those claims.**

Owners' Answer and Counterclaims allege interference with the First Palmetto loan relationship and performance of loan obligations by H&M through the actions of Jones. After Jones became Attorney in Fact for Bellamy on December 9, 2008, he engaged in non-stop conversations with Small. These conversations involved the loan and were purportedly on behalf of Owners. (Small Phone Log) (R. pp. 1564-1628) In actuality, Jones was not using his role as Attorney in Fact to negotiate a workout for Owners, but was negotiating an acquisition of the

loan documents for his benefit, after forcing BJC into foreclosure, which clearly was to the detriment of Owners. (R. p. 1212, lines 14-24, R. p. 1213, lines 3-17) Jones began negotiating his purchase of the loan from First Palmetto as early as January, 2009. All the while, BJC, Americana, Wendy and Harvey were being told that Jones was negotiating on their behalf. There are facts from which a jury could conclude that Jones was acting in his and H&M own self-interest and was doing everything in his power to make compliance with the Lender's May 31, 2009 requirement by BJC impossible. The evidence clearly shows that H&M is nothing more than a shell corporation or alter ego for Jones and Godwin. Jones and Godwin admit that they have only put in \$5,000 each since H&M was formed. Each admit that H&M has no source of income. (Godwin Ownership Grant) (R. p. 2041, R. pp. 2042-2043, R. p. 1158, lines 18-21, R. p. 1173, lines 1-6, R. pp. 856-858)

H&M, as an assignee of the 2008 Note and three mortgages who is not a holder in due course, takes the loan documents subject to whatever infirmities those documents have in the hands of First Palmetto, the original obligee. *Rosemond v. Campbell*, 288 S.C. 516, 522-523, 343 S.E.2d 641, 645 (Ct. App. 1986) Therefore all of the facts set forth above as to the acts and omissions of Lender from November, 2008 through the substitution of H&M as Plaintiff in this case are imputed to H&M. Lender's participation in the secret and undisclosed plan to "sell" the BJC loan to Jones for \$250,000, install Patel as manager over the properties and revenue to assure a default in the May 31 \$150,000 payment, drafting of the Loan Sale Agreement beginning in March, 2009, and giving Owners no written notice of default and opportunity to cure prior to filing the Lis Pendens on June 4, 2009 and the Complaint on June 11, 2009 are facts imputed to H&M from which a jury could find fraud and conversion of the income generated by the Rainbow Court Annex property which was not collateral for the 2008 debt, and other income of BJC, but which proceeds should have been used by Patel and Jones to make the May payment.

Likewise, Lenders intentional and bad faith failure to disclose its negotiations and agreement to sell the loan to Jones while representing to Owners that it was working to renegotiate the debt for the benefit of Owners and not place the hotels in foreclosure along with the mountain of other evidence in the record could be found by a jury to constitute the elements of unfair trade practices by Lender, imputed to H&M, amounting to a claim in recoupment setting off the debt owed by Owners. There are a multitude of facts in the record from which a jury could determine that the conduct of Lender was outrageous and outside the bounds expected to be tolerated so as to offset any amount due on the Owners' debt and thus not support the foreclosure of the mortgaged properties. Again, since H&M took this debt as assignee aware of all the acts and omissions of Lender after the debt was due such that H&M is not a holder in due course, it is subject to all claims in recoupment and defenses Owners have against Lender. *S.C. Code Ann §36-3-302 (a), S.C. Code Ann §36-3-305(a)(2) and (a)(3).*

Further H&M is a sham corporation being used by its principal, Jack Jones, in an attempt to escape liability for Jones' bad acts set out ad nauseum above. This shell corporation carried on no business, had no assets, no means of revenue production other than being funded by Jones and later Godwin in an attempt to distance itself from the pre-incorporation activities of its members. The evidence present material issues of fact from which a jury could determine that H&M is nothing but a fiction and alter ego of Jones. As such, all the acts and omissions of Jones in the scheme with Lender and Patel at the time he had a fiduciary duty to Wendy holding her power of attorney including his interference with Owners' contractual relationship with First Palmetto are imputed to H&M. This is evidence for a jury to consider forming Owners' basis for the counterclaims of fraud, conversion, interference with contract and unfair trade practices which Owners ask the damages offset any amount due H&M, as assignee of the 2008 Note. The Owner's pleadings allege and the record is replete with evidence that Lender participated in fraud

and unfair trade practices with H&M in assisting with H&M's procuring the 2008 Note, mortgages, guarantees and security agreement. Based on the multitude of factual issues in the record far exceeding a scintilla of evidence, it was error for the lower court to grant summary judgment to Assignee H&M on Owners' claims of fraud, conversion, unfair trade practices, tortious interference with contract and outrage. Owners request that this Court reverse the grant of summary judgment and remand these claims for trial before a jury.

**IV. Where Appellant Owners plead special damages and facts sufficient to state claims for civil conspiracy against Respondents Jones, Godwin and Patel, it was error for the trial court to grant Respondents' Rule 12(b)(6), SCRC motion striking those claims.**

Owners asserted claims for civil conspiracy against Jones, Godwin and Patel, individually. At the time Respondents filed and the lower court had heard the Rule 12(b)(6) motions to dismiss, the civil conspiracy claims were the only claims asserted against them. While Owners' Amended Answer, Counterclaims and Third-Party Complaint did incorporate the prior plead facts and allegations, these are not merely reasserted claims as to Jones, Godwin and Patel. They are the only claims asserted individually against these Third-Party Defendants. Likewise, Owners plead special damages for conspiracy against these individual defendants separate and independent of the damages sustained by Owners as a result of claims asserted against H&M and Lender. In a conspiracy action, specific pleadings of the amount of damages is not required, only pleading facts supporting proof of the fact of damages. *Gynecological Clinic, Inc., 514 S.E.2d 592 (1992)*

The same facts and circumstances that constitute causes of action for breach of contract, fraud, breach of contract with fraud, unfair trade practices and the like against H&M and Lender,

constitute evidence of conspiracy by Patel, Jones and Godwin in their individual capacity. *Kuznik v. Bees Ferry Associates*, 342 S.C. 579, 538 S.E.2d 15, 31 (S.C. App. 2000); *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 511 S.E.2d 372 (Ct. App. 1998). The trial court failed to distinguish between pleading the same group of facts applicable to all parties from pleading different causes of action brought against different parties based on those same facts. One example of the special damages alleged by Owners resulting from the individuals' conspiracy the stealing of hotel revenue and was a proximate cause of the default in payment of the \$150,000 May payment. The parties admit the payment by Patel of funds from the operation of the hotels to Jack Jones, Wilber Jones, and Patel. Owners also plead that the individuals conspired to dispossess them of possession of their real estate and revenue generated by those properties which constitute special damages occasioned by the individuals. The elements which go to make up special damages depend on the nature of the facts and acts of the conspirators and the injury sustained. *Gynecological Clinic, Inc., Id.* Owners were advised by Jones he was negotiating with the Lender on their behalf, which creates the unique circumstances supporting a conspiracy cause of action, which has been properly pled, and which has resulted in special damages.

In considering a Rule 12(b)(6) motion to dismiss, all allegations plead by the Owners must be taken as true. The pleadings must be viewed in the light most favorable to the Plaintiff and with every reasonable doubt resolved in favor of Plaintiff. *McCormick v. England*, 328 S.C. 627, 633, 494 S.E.2d 431, 433-434 (Ct. App. 1997). The Amended Answer, Counterclaims and Third-Party Complaint contain well plead allegations setting forth the acts done by Patel, Jones, and Godwin (combination of two or more persons) joining for the purpose causing Owners to default under their agreement with First Palmetto allowing Lender to institute this foreclosure action and remove Owners from the property so as to prevent them from being able to cure the default, and allowing H&M to buy the loan with \$250,000 from Jones and a \$4,750,000 interest

only loan from Lender and ultimately obtain the hotel properties worth more than \$6,000,000 which was less than the \$5,000,000 owed under the 2008 Note causing special damage to Owners. *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 682 S.E.2d 871 (S.C. App. 2009); *Gynecological Clinic v. Cloer*, 334 S.C. 555, 514 S.E.2d 592 (1999).

At this stage in the proceedings, Owners had plead allegations of fact and law sufficient to state a cause of action for civil conspiracy against Third-Party Defendants Patel, Jones, and Godwin. While the same facts are plead to constitute other causes of action against other parties, civil conspiracy is the only claim asserted by Owners against these parties. Therefore, the lower court erred in dismissing the conspiracy claims and the case should be remanded for a jury trial on the merits on those claims.

**V. Where Appellant Owners demanded a jury trial on Plaintiff Assignee's claim and delivery cause of action, it was error for the trial court to strike the same as Owners were entitled to a jury trial as a matter of right.**

Assignee brought claims for foreclosure based on three mortgages and a claim and delivery action based on a security agreement covering personal property and proceeds of the Emerald Shores Motel securing the 2008 Note in their Amended Complaint. (Complaint and Amended Complaint) (R. pp. 92-119, R. pp. 121-149, R. pp. 220-224) Owners timely demanded a jury trial in their Answer and in their Amended Answer, Counterclaims and Third-Party Complaint. The foreclosure claims are equitable and the claim and delivery cause is legal. When legal and equitable claims are included in the same proceeding, the claims can be tried together with a jury rendering a verdict on the facts and legal issues and the sitting judge rendering a decision on equitable issues. *Johnson v. SCNB*, 292 S.C. 51, 54-56, 354 S.E.2d 895, 897(1987). The court is bound by a jury's findings in the decision it renders in the equity case.

Id., at 897. Alternatively, the court can grant separate trials of the legal claim and equitable claims, but the legal claims must be tried first. *Id.*; *C&S Real Estate Servs., Ins. V. Massengale*, 290 S.C. 299, 350 S.E.2d 191 (1986) Claim and delivery is a legal claim. *First Palmetto State Bank and Trust Co. v. Boyles*, 302 S.C. 136, 394 S.E.2d 313 (1990). Pursuant to Rules 38 (a) and (b) and 53(b) SCRCP., Owners' demand for a jury trial entitles them to the same as a matter of right on the claim and delivery action as it is for the recovery of specific personal property. *Id.* (SC Supreme Court held it was error for the Court to refer to the Master a claim and delivery action.)

In this case, the claim and delivery matter was never dismissed by Respondent Assignee. (8/24/11 Hearing Transcript) (R. pp. 1123-1132) Assignee argued that the claim and delivery action was a moot issue once the receiver was appointed in April, 2010. However, while the prejudgment possession of the personal property and proceeds may have been accomplished once the receiver was appointed, the ultimate determination of Assignees right to ownership of the personalty was not decided and Assignee never gave up the remedy it sought of ownership and sale of the personalty to be applied to the debt. The claim was not moot. Last, the Court's finding that the claim and delivery cause of action was really seeking the "foreclosure of a chattle mortgage" making it an equitable claim is without factual support. The Lender in filing this action in June 2009 brought the action as a claim and delivery, seeking not only prejudgment possession of the property, which was accomplished through the receiver, but ultimately seeking the relief of ownership of the personal property. The exact same claim was plead by Assignee in its Amended Complaint in September, 2009. Additionally, Assignee's Counsel throughout the course of this case, from June, 2009 and even after Judge Seals' Order striking the jury trial represented to the court and filed pleadings, motions, memorandum and trial briefs acknowledging this as a claim and delivery cause of action. (9/23/10 Transcript, 4/14/11

Transcript, Plaintiff's Memorandum in Support of Summary Judgment) (R. pp. 1010-1033, R. pp. 1034-1057, R. pp.402-455) A party is bound by the representations of its counsel. *Motley v. Williams*, 374 S.C. 107, 112, 647 S.E.2d 244, 247(Ct. App. 2007).

Based on the foregoing, it was error for the lower court to strike Owners' demand for a jury trial on the claim and delivery cause of action. Owners were entitled to have that claim adjudicated prior to the equitable foreclosure claims with the Court being bound by the factual findings of the jury, or were entitled to, in one trial, have the jury determine the facts in issue and render a verdict on the legal claim and have the court render a verdict on the equitable claims based on the factual findings of the jury. Owners ask this Court to reverse the striking of the jury trial, remand the case to the trial court requiring that the claim and delivery action be tried by a jury, and the foreclosure claims be tried thereafter or contemporaneously by the court but being bound by the jury's determination of the common factual issues.

### **Conclusion**

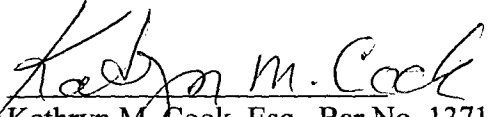
As set out above, there are a multitude of genuine disputes about the material facts and inferences to be drawn from the evidence in the record precluding the granting of summary judgment to First Palmetto on Owners' claims against it for breach of contract, breach of contract accompanied by fraud and civil conspiracy. H&M, taking assignment of the 2008 Note and the loan documents after the debt was due and with its sole member, Jack Jones' actual knowledge and participation in the acts and omissions causing the default, is not a holder in due course of the 2008 Note underlying this foreclosure action. Thus, H&M is subject to the same defenses and claims Owners would have against First Palmetto. The lower court erred in granting H&M summary judgment as to Owners' defenses and claims in recoupment for set off asserted for breach of contract, breach of contract accompanied by fraud, civil conspiracy, fraud, conversion, unfair trade practices, and emotional distress/outrage. Additionally, H&M, as the alter ego of

Jack Jones and as a shell corporation, undertook acts and omissions of which there are many factual issues and conclusions or inferences that can be drawn that would constitute findings of tortious interference with contracts, outrage, fraud and conversion sufficient to withstand summary judgment. Owners met their burden of producing a great deal more than a mere scintilla of evidence in the record to support these claims entitling Owners to a jury decision on the merits of these claims against First Palmetto and H&M.

It was error for the trial court to strike Owners' claims against Patel, Jones and Godwin based on civil conspiracy. This was the only cause of action plead against those individuals and the allegations in the third party complaint must be taken as true for purposes of a Rule 12(b)(6) motion. While the same facts were plead as to First Palmetto and H&M, those were as to different causes of action not in the Third-Party Complaint against Patel, Godwin and Jones. Thus there are sufficient facts and special damages plead to preclude the dismissal of the conspiracy claims. Owners request this Court to reverse the dismissal of the conspiracy claims as to Jones, Godwin and Patel and remand the case for a jury trial on these claims.

Last, the trial court erred in striking Owners' demand for a jury trial as to H&M's claim and delivery cause of action. The claim was never dismissed and was represented numerous times by counsel for H&M to be a claim and delivery action, which is an action at law. Accordingly, Owners are entitled to a jury trial on that claim which must be tried before or contemporaneously with the equitable foreclosure claims, but with the trial court being bound by the findings of the jury on the factual issues. Therefore, Owners request that this Court reverse the striking of the jury trial on the claim and delivery cause, order that a jury trial be had on that claim with the trial court being bound by the common factual findings of the jury being applied to the equitable foreclosure claims.

Respectfully Submitted.



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IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM HORRY COUNTY  
William H. Seals, Jr., Circuit Court Judge

Case No. 2009-CP-26-5743

Hotel and Motel Holdings, LLC, .....Respondent

v.

BJC Enterprises, LLC, Wendy J. Bellamy, Americana, Inc.,  
a/k/a Americana Motel of Myrtle Beach, Inc., Mozingo &  
Wallace Architects, LLC, Kersi S. Shroff, and Shroff Management,  
Inc., .....Defendants

of whom

BJC Enterprises, LLC, Wendy J. Bellamy, Americana, Inc.,  
a/k/a Americana Motel of Myrtle Beach, Inc., .....Appellants

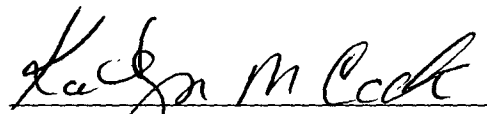
v.

First Palmetto Savings Bank, F.S.B., Jack Jones, Donald D. Godwin,  
and Bhupendra Patel, .....Respondents

CERTIFICATE OF COMPLIANCE

I certify that the Final Brief of Appellants in this matter complies with Rule 211(b), SCACR and the August 13, 2007 Order of the South Carolina Supreme Court relating to personal data identifiers.

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PROOF OF SERVICE

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I hereby certify I have served the Final Brief of Respondent and Certificate of Compliance,  
by depositing a copy of it via U.S. Mail on January 6, 2014, to all counsel of record at the following  
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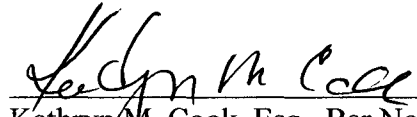
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January 6, 2014