

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Master in Equity

73115

Case No. 2007-CP-46-4305

SunTrust Mortgage, Inc., Respondent,

v.

Mark Ostendorff, Appellant.

MOTION TO DISMISS

Brian S. Tatum, Esquire
Tatum Law Firm, PLLC
P.O. Box 11250
Charlotte, North Carolina 28220
Phone: (704) 307-4197
Fax: (704) 754-4140
BSTatum@tatumlegal.com
Attorney for Respondent

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AUG 06 2014

SC Court of Appeals

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
MEMORANDUM OF LAW AND ARGUMENT.....	3
I. Should this Court reverse the Lower Court order for foreclosure due to Appellant’s excusable neglect in not appearing at the hearing?.	3
II. Should this Court reverse the Lower Court order for foreclosure where the Lower Court entered an order granting Respondent’s motion for summary judgment and finding that Appellant owed the debt to Respondent was in default and where this Court has already affirmed that prior decision?	4
CONCLUSION	5

TABLE OF CASES AND AUTHORITIES

CASES:

<u>Sundown Operating Co. v. Intedge Indus., Inc.</u> , 383 S.C. 601, 608, 681 S.E.2d 885, 888 (2009)	3
<u>Micronics, Inc. v. S.C. Dep't of Revenue</u> , 345 S.C. 506, 510-11, 548 S.E.2d 223, 226 (Ct.App.2001)	3
<u>Bowers v. Bowers</u> , 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct.App.1991)	3
<u>State v. Nichols</u> , 325 S.C. 111, 120-21, 481 S.E.2d 118, 123 (1997)	4
<u>Riedman Corp. v. Greenville Steel Structures, Inc.</u> , 308 S.C. 467, 419 S.E.2d 217 (1992)	5
<u>Crestwood Golf Club, Inc. v. Potter</u> , 328 S.C. 201, 216, 493 S.E.2d 826, 835 (S.C., 1997) citing <u>Pedrina v. Chun</u> , 906 F.Supp. 1377 (D.Hawai'i 1995)	5

STATUTES AND RULES:

Rule 60, SCRPC	3
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MOTION TO DISMISS

COMES NOW SunTrust Mortgage, Inc. ("Respondent"), by and through its counsel, and hereby files its Motion to Dismiss this appeal and shows this honorable court in support thereof as follows:

STATEMENT OF THE CASE

Respondent SunTrust instituted foreclosure proceedings against the Appellant Ostendorff under the terms of its construction loan's promissory note and mortgage. On November 30, 2007, Respondent SunTrust filed its foreclosure Complaint, and on December 4, 2007, a private process server personally served Mark Ostendorff ("Appellant"). On January 3, 2008, Appellant Ostendorff served his Answer and Counterclaim. The Counterclaim demanded a jury trial and asked for \$1,125,000.00 in damages because of Respondent SunTrust's alleged wrongful termination of his construction draws. On April 4, 2008, the Chief Circuit Court Judge for York County referred the matter to Judge S. Jackson Kimball, III, Master-In-Equity for York County.

On November 4, 2009, Respondent SunTrust filed its Motion for Summary Judgment regarding the Counterclaim (the "Motion"), along with the affidavit of Susan Walker, First Vice President of Respondent SunTrust. On December 4, 2009, Appellant Ostendorff served his first affidavit, and on December 7, 2009, Appellant Ostendorff served his second affidavit. On December 10, 2009, Judge S. Jackson Kimball, III, Master-In-Equity for York County, held a hearing on the Motion. On December 18, 2009, Judge Kimball entered an order granting the Motion (a true and correct copy of this order is attached hereto as Exhibit A per Rule 240(c)(3), SCACR). On January 7, 2010, Appellant served his first notice of appeal stating that he did not receive a copy of the

order granting the Motion until January 7, 2010. This Court assigned Appellant Ostendorff's first appeal Case Tracking No.: 2010150386.

Although the Motion was made only with respect to the counterclaims, the December 18, 2009 order also addressed the underlying foreclosure. The order states in part that: "As to Plaintiffs claim for foreclosure, I find, and Defendant did not refute, that as of September 2, 2009, Defendant is indebted to SunTrust for the total amount of \$455,115.83, consisting of principal in the amount of \$393,042.10, and interest in the amount of \$62,073.73. Interest continues to accrue on the Note at \$72.68 per day." The order also states that: "there is no genuine issue of fact concerning Plaintiff's assertion of Defendant's default under the note and mortgage." Because the order also addressed the underlying foreclosure, Judge Kimball stayed the foreclosure proceeding pending the outcome on appeal (a true and correct copy of this order is attached hereto as **Exhibit B** per Rule 240(c)(3), SCACR).

On November 14, 2012, this Court affirmed the decision of Judge Kimball in granting SunTrust's motion for summary judgment (a true and correct copy of this Court's decision is attached hereto as **Exhibit C** per Rule 240(c)(3), SCACR). On or about January 17, 2013, Defendant filed his Petition for Writ of Certiorari to the South Carolina Supreme Court (the "Petition"), which has not yet reached a decision regarding the Petition. Because of this Court's affirmation, on August 2, 2013, Judge Kimball entered an order lifting his stay of the foreclosure proceeding (a true and correct copy of this order is attached hereto as **Exhibit D** per Rule 240(c)(3), SCACR). On October 9, 2013, Judge Kimball entered an order allowing the foreclosure sale (a true and correct copy of this order is attached hereto as **Exhibit E** per Rule 240(c)(3), SCACR). On November 1,

2013, Appellant Ostendorff served his second notice of appeal regarding the same foreclosure matter.

MEMORANDUM OF LAW AND ARGUMENT

In his Initial Brief, Appellant Ostendorff finds thirteen errors Lower Court's findings that Respondent SunTrust was entitled to an order allowing it to foreclose its mortgage. However, the crux of the issues on appeal can be summarized with the two questions below.

I. Should this Court reverse the Lower Court order for foreclosure due to Appellant's excusable neglect in not appearing at the hearing?

Issues 1, 4, 6, 10 and 11, in Appellant's Initial Brief all have to do with Appellant allegedly not receiving notice of the final foreclosure hearing. A party seeking to be relieved from a court's judgment based on default or failing to appear must do so under Rule 60(b), SCRCP. Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 608, 681 S.E.2d 885, 888 (2009). Rule 60(b) requires a showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party. Rule 60(b), SCRCP. In determining whether to grant a motion under Rule 60(b), the court should consider: (1) the promptness with which relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party. Micronics, Inc. v. S.C. Dep't of Revenue, 345 S.C. 506, 510-11, 548 S.E.2d 223, 226 (Ct.App.2001). "The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle him to relief." Bowers v. Bowers, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct.App.1991).

Appellant, however, has preserved his right to appeal on the issue of him not receiving notice of the hearing by filing a Rule 60 motion to set aside the trial court's order based on Appellant's alleged excusable neglect. "An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review." State v. Nichols, 325 S.C. 111, 120-21, 481 S.E.2d 118, 123 (1997) (citation omitted). Thus, Appellant should not be allowed to raise this issue for the first time on appeal.

Even if Appellant had filed a Rule 60 motion in the trial court, he would not have been able to show a meritorious defense. As stated in Section II below, the entry of the order for foreclosure was a mere formality to finalize the trial court's prior decision that Appellant owned the debt and was in default, and the prior decision was affirmed by this Court.

II. Should this Court reverse the Lower Court order for foreclosure where the Lower Court entered an order granting Respondent's motion for summary judgment and finding that Appellant owed the debt to Respondent was in default and where this Court has already affirmed that prior decision?

Issues 2, 3, 5, 7, 8, 9, 12 and 13 in Appellant's Initial Brief all have to do with whether or not it was proper for the court to find that Respondent could foreclose; however, this Court has already affirmed the trial court's findings that Appellant owned the debt to Respondent and was in default. The entry of the order for foreclosure merely a formality to finalize the trial court's prior decision. Thus, Appellant should be barred by

the doctrine of res judicata, and more specifically issue preclusion, from raising the issues of whether or not he owed and debt and is in default in a second appeal.

In order for res judicata to operate as a bar to James's lawsuit for waste, the following elements needed to be proven: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. Riedman Corp. v. Greenville Steel Structures, Inc., 308 S.C. 467, 419 S.E.2d 217 (1992). The term res judicata encompasses two types of preclusion: claim preclusion and issue preclusion. Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 216, 493 S.E.2d 826, 835 (S.C., 1997) citing Pedrina v. Chun, 906 F.Supp. 1377 (D.Hawai'i 1995). "Issue preclusion and claim preclusion have historically been called collateral estoppel and bar or merger respectively." Id. Issue preclusion bars re-litigation of particular issues actually litigated and decided in the prior suit." Id.

In the present case, the first two elements of res judicata have clearly been satisfied because we have a second appeal from the same foreclosure proceeding. As for the identity of the issues raised in both appeals, Appellant makes no reference to any factual findings or issues other than the validity of the debt and default that would invalidate the trial court's order to allow the foreclosure sale.

CONCLUSION

For the reasons stated above, this Court should dismiss the appeal and find no error in the judgment below.

August 5, 2014.

Respectfully Submitted,

TATUM LAW FIRM, PLLC



Brian Steed Tatum (S.C. Bar No. 73975)

Attorney for Respondent

P.O. Box 11250, Charlotte, NC 28220

Telephone: (704) 307-4197

Facsimile: (704) 754-4140

STATE OF SOUTH CAROLINA

COUNTY OF YORK

SunTrust Mortgage, Inc.,

Plaintiff(s)

vs.

Mark Ostendorff

Defendant(s).

IN THE COURT OF COMMON PLEAS

CASE NO.: 2007CP4604305

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DAVID HAMILTON
C.S.C.P. & GS
YORK COUNTY, SC

ORDER FOR SUMMARY JUDGMENT

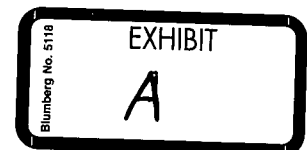
This matter came before me on December 10, 2009, upon Plaintiff's Motion for Summary Judgment as to Defendant's counterclaim. Present and representing the parties at the hearing were: Brian Tatum for Plaintiff; and, Mark Ostendorff appearing *pro se*. Based on the record before the Court, the applicable law, and the arguments presented, I find and conclude as follows.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct.App.1999); Rule 56(c), S.C.R.C.P. In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 504 S.E.2d 117 (1998); *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct.App. 1997). In ruling on summary judgment, the Court should consider the pleadings, depositions, interrogatory answers, admissions, and affidavits in determining whether there is a genuine issue of fact for trial. *See Thomas v. Waters*, 315 S.C. 524, 526, 445 S.E.2d 659 (Ct.App. 1994). "If the evidence favoring the nonmoving party is merely colorable . . . or is not significantly probative, . . . summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S., 242, 249-250 (1986).

Summary judgment is appropriate when facts exist on which reasonable minds cannot differ, and it is not appropriate where further inquiry into the facts is desirable to clarify the application of law. It is not, however, sufficient that the nonmoving party seeks to create an inference that is not reasonable, or an issue of fact that is not genuine, in order to avoid summary

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judgment. *Rothrock v. Copeland*, 305 S.C. 402, 409 S.E.2d 366 (1991). The purpose of summary judgment is to expedite disposition of cases that do not require the services of a fact finder. In that way, “[a] motion for summary judgment is akin to a motion for a directed verdict” because “[i]n each instance, one party must lose as a matter of law.” *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001); *Main v. Corley*, 281 S.C. 525, 526, 316 S.E.2d 406, 407 (1984); *see, also, Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991).

FINDINGS OF FACT

Taking into consideration the standard for viewing the evidence recited above, I find and conclude that there is no genuine issue of fact as to the facts hereinafter recited.

Plaintiff and Defendant entered into a construction loan agreement for Defendant to build a house. In furtherance of their agreement, Defendant executed a note and mortgage in favor of Plaintiff. Both parties admit that Plaintiff was to disburse money based on construction loan draw requests from Defendant as construction on the property progressed. However, Defendant went in to default by failing to make timely payments under the parties’ agreement. Ultimately, Plaintiff refused to honor Defendant’s construction draw requests based on Defendant’s default, and notified Defendant that it was accelerating the debt. It thereafter initiated this foreclosure action.

Defendant answered and counterclaimed, denying default and alleging breach of contract by Plaintiff. The fundamental act of breach asserted by Defendant and articulated at the motion hearing was the failure of Plaintiff to continue to disburse loan proceeds when requested. Defendant admitted at the hearing that he owed suppliers and subcontractors for work performed on the house, and estimated that it would take \$50,000 to complete the house. There was less than \$7,000 remaining in the construction loan when Plaintiff declared a default, plainly not enough to complete the house. Defendant’s explanations of how he would complete the house under these circumstances were not consistent with the facts, and essentially assumed that his creditors would be paid when the house was sold.

As to Plaintiff’s claim for foreclosure, I find, and Defendant did not refute, that as of September 2, 2009, Defendant is indebted to SunTrust for the total amount of \$455,115.83, consisting of principal in the amount of \$393,042.10, and interest in the amount of \$62,073.73. Interest continues to accrue on the Note at \$72.68 per day.

CONCLUSIONS OF LAW

Plaintiff has presented a prima facie case showing that Defendant defaulted under the Note

M
A 2

and the Mortgage. Under the parties' agreement, Plaintiff was entitled to stop construction draws as a matter of law, and I conclude that it properly did so.

Under the standard for considering summary judgment, Defendant was required to come forward with factual evidence that supported his counterclaim that Plaintiff wrongfully withheld draws, causing Defendant damage. I conclude that he has not presented any such rebuttal evidence that would create an issue of fact on that sole basis for his counterclaim.

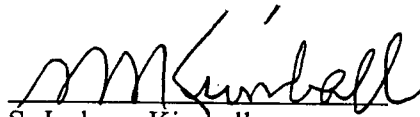
Thus, there is no genuine issue of fact concerning Plaintiff's assertion of Defendant's default under the note and mortgage. Nor is there any genuine issue of fact to sustain Defendant's claim that Plaintiff is liable to him due to its denying him construction draws. For this reason, Plaintiff is entitled to summary judgment on Defendant's counterclaim. Plaintiff is further entitled to proceed with foreclosure of its mortgage. The foreclosure will be based on the amounts established to be due as set forth in the findings of fact herein.

ORDER

Therefore, based on the findings and conclusions herein, it is ordered that Plaintiff's motion for summary judgment as to Defendant's counterclaim be granted, and Defendant's counterclaim is dismissed with prejudice. It is further ordered that Plaintiff's foreclosure action is no longer stayed pending disposition of Defendant's counterclaim, and Plaintiff may proceed with a hearing to complete its foreclosure action at the earliest practicable time.

AND IT IS SO ORDERED.

December 18, 2009


S. Jackson Kimball
Special Circuit Judge
York County

43

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2007CP4604305

Sun Trust Mortgage Inc vs. Mark Ostendorff

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a),
SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other:
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy:
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other: _____

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

Order For Summary Judgment

Dated at York, South Carolina, this 18th day of December, 2009.

Court Reporter:

s/S. Jackson Kimball

PRESIDING JUDGE - S. JACKSON KIMBALL

This judgment was entered on the 7th day of January, 2010, and a copy mailed first class this 7th day of January, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

Brian Steed Tatum Johnson & Freedman, LLC
2101 Rexford Road, Suite 165W Charlotte, NC
28211

Mark Ostendorff PO Box 14846 Greenville,
SC 29610

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

David Hamilton - Clerk of Court

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS

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DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

JUDGMENT IN A CIVIL CASE

CASE NO: 2007CP4604305

Sun Trust Mortgage Inc vs. Mark Ostendorff

CHECK ONE:

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):
 - Rule 12(b), SCRPC;
 - Rule 41(a),
 - SCRPC (Vol. Nonsuit);
 - Rule 43(k), SCRPC (Settled);
 - Other:
- ACTION STRICKEN (CHECK REASON):
 - Rule 40(j) SCRPC;
 - Bankruptcy;
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 - Other: _____

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

The above entitled action is automatically stayed pending appeal.

Dated at York, South Carolina, this 25th day of June, 2010.

Court Reporter:

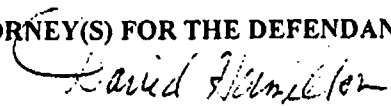

S. JACKSON KIMBALL, SPECIAL CIRCUIT COURT JUDGE

This judgment was entered on the June 30, 2010 and a copy mailed first class this June 30, 2010 to attorneys of record or to parties (when appearing pro se) as follows:

Jay G Anderson Morris Schneider & Prior LLC
1587 Northeast Expressway Atlanta, GA 30329
Brian Steed Tatum Johnson & Freedman, LLC
2101 Rexford Road, Suite 165W Charlotte, NC 28211
Tiffany H Wolf Johnson & Freeman Llc 1587
Northeast Expressway Atlanta, GA 30329

Mark Ostendorff PO Box 14846 Greenville, SC 29610

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)


David Hamilton - Clerk of Court



**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

SunTrust Mortgage, Inc., Respondent,

v.

Mark Ostendorff, Appellant.

Appellate Case No. 2010-150386

Appeal From York County
S. Jackson Kimball, Special Circuit Judge

Unpublished Opinion No. 2012-UP-608
Heard October 30, 2012 – Filed November 14, 2012

AFFIRMED

Mark Ostendorff, Appellant pro se.

Brian Steed Tatum, of Tatum Law Firm, PLLC, of
Charlotte, North Carolina, for Respondent SunTrust
Mortgage Inc.

PER CURIAM: In this mortgage foreclosure case, Appellant Mark Ostendorff seeks review of the circuit court's order granting summary judgment to Respondent SunTrust Mortgage, Inc. on Ostendorff's counterclaim for breach of contract. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:



1. As to the circuit court's conclusion that SunTrust was entitled to suspend construction draws as a matter of law: Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); *Hardee v. Hardee*, 355 S.C. 382, 387, 585 S.E.2d 501, 503 (2003) ("The judicial function of a court of law is to enforce a contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous."); *Charles v. Canal Ins. Co.*, 238 S.C. 600, 608, 121 S.E.2d 200, 205 (1961) ("[T]he function of courts is to adjudge and enforce contracts as they are written and entered into by the parties.").
2. As to whether the issues of fact asserted by Ostendorff precluded summary judgment: Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); Rule 56(c), SCRCP (providing that summary judgment shall be granted when "the pleadings, depositions, 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" (emphasis added)); *In re Walter M.*, 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009) ("Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review.").
3. As to whether SunTrust's failure to provide Ostendorff with certain discovery responses precluded summary judgment: *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) ("[T]he nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence.").
4. As to Ostendorff's challenge to the jurisdiction of the special circuit judge: *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review."); *State v. Colf*, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App. 1998), *aff'd as modified*, 337 S.C. 622, 525 S.E.2d 246 (2000) ("An issue is also deemed abandoned if the argument in the brief is merely conclusory.").

AFFIRMED.

HUFF, THOMAS, and GEATHERS, JJ., concur.

STATE OF SOUTH CAROLINA
COUNTY OF YORK

SunTrust Mortgage, Inc.,

Plaintiff,

vs.

Mark Ostendorff,

Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2007-CP-46-4305

ORDER TO LIFT STAY

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YORK COUNTY, SOUTH CAROLINA

This matter came before me on July 18, 2013, upon Plaintiff's motion to lift the stay of proceedings in this action, which was entered by order dated June 23, 2010. Plaintiff was represented by Brian S. Tatum, and the Defendant appeared *pro se*. Based on the record presented, I make the following findings and conclusions.

On December 18, 2009, I granted Plaintiff's motion for summary judgment with respect to Defendant's counterclaims. On January 17, 2009, Defendant filed a notice of appeal of the order granting summary judgment, and soon after, I stayed the foreclosure proceeding by order, pending the outcome of Defendant's appeal. On November 14, 2012, the Court of Appeals affirmed the decision granting Plaintiff's motion for summary judgment. On January 17, 2013, Defendant filed his Petition for Writ of Certiorari to the South Carolina Supreme Court (the "Petition"), which is still pending.

Plaintiff is not automatically precluded by statute or court rule from foreclosing its Mortgage during the pendency of Defendant's appeal. Defendant's appeal has resulted in a decision adverse to him, and has affirmed the grant of summary judgment in favor of Plaintiff, dismissing Defendant's counterclaims. While Defendant's petition for writ of certiorari to the Supreme Court could result in a reversal of the Court of Appeals, and consequent reinstatement of Defendant's counterclaims, I find and conclude that under the facts and circumstances of this case, Plaintiff should be permitted to proceed now with foreclosure of its mortgage, unless further stayed by action of the Supreme Court.

Thus, I find and conclude that the stay entered in the circuit court should be removed, and that Plaintiff be permitted to proceed with its mortgage foreclosure action in the normal course of such proceedings.

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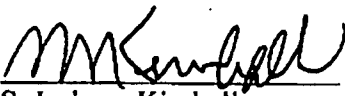


Therefore, it is ordered as follows:

1. Plaintiff's Motion to Lift Stay in this action is hereby granted.
2. Plaintiff is hereby authorized to proceed with the foreclosure of its mortgage on the property described in the Mortgage recorded in Book 7985, at Page 302, in the office of the Clerk of Court for York County.
3. Plaintiff shall schedule a hearing on the foreclosure in this court at the earliest practicable date.

AND IT IS SO ORDERED.

July 25, 2013


S. Jackson Kimball
Master-in-Equity for York County

JK

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF YORK
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2007CP4604305

Sun Trust Mortgage Inc

Mark Ostendorff

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____ Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: **ORDER TO LIFT STAY**

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

s/ S. Jackson Kimball
 Master-in-Equity for York County

3063
 Judge Code

7/25/2013
 Date

For Clerk of Court Office Use Only

This judgment was entered on August 2, 2013, and a copy mailed first class or placed in the appropriate attorney's box on August 2, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Brian Steed Tatum PO Box 11250 Charlotte, NC 28220

Mark Ostendorff PO Box 14846 Greenville, SC 29610

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA
COUNTY OF YORK
SunTrust Mortgage, Inc.,

Plaintiff(s)

vs.

Mark Ostendorff,

Defendant(s).

FILED - IN THE COURT OF COMMON PLEAS
2013 OCT - 9 AM CASE NO.: 2007-CP-46-4305

DAVID H. HILTON
C.C.C.P. & G.S.
YORK COUNTY, SC

**ORDER AND JUDGMENT OF
FORECLOSURE AND SALE
Deficiency Demanded**

Appearances: Brian S. Tatum, Plaintiff's Attorney
Rich Willits, VP at SunTrust Mortgage, Inc.
Mark Ostendorff, Defendant pro se

Pursuant to Rules 53 and 71 of the South Carolina Rules of Civil Procedure (hereinafter "SCRCP"), this matter was referred to me to make appropriate findings of fact and conclusions of law, with authority to enter a final judgment in the cause. Any appeal from this Report of Judgment of Foreclosure and Sale shall be directly to the South Carolina Court of Appeals.

Hearing was held, attended by attorneys of record and testimony was taken, which is reported herewith. From the testimony and evidence I conclude as follows:

FINDINGS OF FACT

1. The Amended *Lis Pendens* was filed on November 30, 2007.
2. The Amended Summons and Complaint was filed on November 30, 2007.
3. Service was made upon the Defendants named in this Report as shown by the Affidavits of Service filed herein.
4. All Defendants were notified of the time, date, and place of hearing in this matter, as evidenced by the Affidavits of Service filed herein.



5. For value received, Mark Ostendorff (hereinafter referred to as the "Mortgagor(s)") made, executed and delivered a Note, dated March 29, 2006, promising to pay to the order of SunTrust Mortgage, Inc. the sum of \$400,000.00, with interest at the rate of 6.74% per annum.

6. To better secure repayment of the Note the Mortgagor(s) made, executed, and delivered to SunTrust Mortgage, Inc. a Mortgage dated March 29, 2006, covering real property which is located in York County. The Mortgage was recorded on August 28, 2007 in the Office of the Register of Deeds/Clerk of Court for York County in Book 07985 at Page 00302.

7. The recorded Mortgage constitutes, and is, a First lien on the subject property.

8. The title holders of record of the subject property as of the filing of the *Lis Pendens* in this action were Mark Ostendorff, the original mortgagors.

9. The Note and Mortgage contain the following terms and conditions:

a. The Plaintiff shall be entitled to receive on the first day of each and every month installment payments which are amortized over the period of time which is set forth therein and in the event of a default in payment of any monthly installment the Plaintiff is entitled, after first giving thirty (30) days prior notice, to accelerate the entire indebtedness and to demand payment thereof without further notice.

b. The Plaintiff shall be entitled to receive late charges for any monthly installment payment which is overdue.

c. The Mortgagor(s) shall be required to provide insurance to protect against loss to the property and certain minimal escrow funds shall be established and maintained with the Plaintiff for the purpose of paying for such insurance.

d. The Mortgagor(s) shall be required to pay for all costs of property taxes assessed by governmental authorities and certain minimal escrow funds shall be established and maintained with the Plaintiff for the purpose of paying such taxes.

e. The Mortgagor(s) shall, at the Plaintiff's option, be required to provide mortgage insurance to protect the Plaintiff's interest in securing repayment of the mortgage loan and certain minimal escrow funds shall be established and maintained with the Plaintiff for the purpose of paying for such insurance.

f. The Plaintiff is entitled to be reimbursed for all expenses which it shall incur in pursuing the remedies to which it is entitled in the event of a default by the Mortgagor(s), including reimbursement of its reasonable attorney's fees and costs of title evidence.

g. The Mortgage is NOT owned, securitized or guaranteed by Fannie Mae, Freddie Mac or by a servicer participating in the Home Affordable Modification Program (HMP), and is not subject to modification under the HMP for the following reason(s): The property is vacant.

10. Payment due on the Mortgage Note has not been made, the Plaintiff's prospects for repayment have been significantly impaired and the Plaintiff has elected to accelerate payment of the entire indebtedness and has placed the Note and Mortgage in the hands of its attorney of record herein for collection.

11. Having considered the nature, extent and difficulty of the services rendered (the field of mortgage foreclosures being a unique area of practice); the time involved in reviewing the various loan documents; performing the title search; preparing the pleadings; and preparing for, and attending, hearings; the professional standing of Plaintiff's attorney; the fee customarily charged in this jurisdiction for similar services; and the beneficial results obtained for the

Plaintiff, I find that the sum of \$13,420.00 is a reasonable attorney's fee for the Plaintiff's attorney for services performed and anticipated to be performed until final adjudication of the within action. Services anticipated to be performed until final adjudication contemplates completion of this matter within a reasonable time and does not include exceptional, unanticipated circumstances delaying conclusion beyond a reasonable time. In such event the Plaintiff may apply to this Court for such additional expenses of collection and attorney's fees as may be reasonable under the circumstances.

12. The amount due and owing on the note and mortgage, with interest at a rate provided in the note, and other costs and expenses of collection, including attorney's fees, secured by the note and mortgage, is as follows:

Payoff good through 10/01/2013:

Principal	393,042.10
Interest	170,302.99
Taxes	17,390.72
BPO	975.00
Atty fees	13,420.00
Total	\$595,130.81

Reinstatement good thru 10/01/2013:

Interest	170,302.99
Taxes	17,390.72
BPO	975.00
Atty fees	13,420.00
Total	\$202,088.71

13. If the amount of interest which is set forth in paragraph 12 (b) above is not calculated through the date of this judgment, the Plaintiff is entitled to such additional interest as shall accrue on the principal indebtedness at the rate of 6.75% per annum from the date to which it is calculated in this judgment order up through the date of this judgment order and shall be

added to the above stated "**Total Indebtedness**" to comprise the amount of judgment indebtedness determined and entered herein.

14. Interest after the date of Judgment shall accrue at the legal rate.

15. The Plaintiff reserves the right to a personal or deficiency judgment pursuant to S. C. Code Ann. Section 29-3-660 (1976).

16. The hereinafter named Defendant(s) may have some interest in or lien upon the premises covered by the Mortgage set herein, or some part thereof, but Plaintiff alleges that such interests or liens are junior or subordinate to the lien of the Plaintiff's Mortgage, or do not attach to the property which is the subject of this action, or have been paid in full and not satisfied of record. Said liens or interests are of record in the Register of Deeds or Clerk of Court and are described as follows:

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, I conclude the following:

1. The Plaintiff should have judgment of foreclosure of its mortgage; and the mortgaged property should be ordered sold at public auction after due advertisement.

2. There is due to the Plaintiff on its note and mortgage the sum of \$ **595,130.81**, representing the Total Indebtedness which is due to the Plaintiff as set forth in paragraph 12 of the Findings of Fact, together with interest thereon at the rate provided in the Note to the date hereof as set forth in paragraph 13 of the Findings of Fact, which shall, and hereby does, constitute the total judgment debt due to the Plaintiff. Interest after the date of judgment shall accrue at the legal rate.

3. The Defendant(s) liable for the aforesaid mortgage debt shall, prior to the date and time of sale of the subject property, hereinafter described, pay to Plaintiff, or the Plaintiff's

attorney, the amount of the Plaintiff's debt as aforesaid, together with the costs and disbursements of this action.

4. On default of payment by the Defendant(s) liable for the Mortgage debt prior to the date and time of the sale, the mortgaged premises, hereinafter described, shall be sold by the undersigned at public auction, at the York County Courthouse, in the City of York, County and State aforesaid, on some convenient sales day hereafter, on the following terms:

A. FOR CASH: The undersigned shall require a deposit of 5% on the amount of the bid (in cash or equivalent) the same to be applied on the purchase price only upon compliance with the bid, but in the case of non-compliance within thirty (30) days the same to be forfeited and applied to the costs and then to the Plaintiff's debt.

B. Interest on the balance of the bid shall be paid to the date of compliance at the legal rate.

C. The sale shall be subject to taxes and assessments, existing easements and restrictions of record and the following senior encumbrances and liens:

D. The purchaser to pay for the deed and the cost of recording the deed.

5. If the Plaintiff is the successful bidder at the said sale, for a sum not exceeding the amount of costs, expenses and the indebtedness of the Plaintiff in full, the Plaintiff may pay the undersigned only the amount of the costs and expenses, crediting the balance of the bid against the Plaintiff's indebtedness.

6. Plaintiff is entitled to a deficiency judgment as set forth herein in the event the proceeds of the sale are insufficient to satisfy the indebtedness.

7. The undersigned shall, by advertisement according to law, give notice of the time and place of sale and the terms thereof; and shall execute to the purchaser, or purchasers, a deed to the premises sold.

8. The Plaintiff, or any other party to this action, or any other person may become a purchaser at such sale.

9. Upon such sale being made, should the successful bidder, or his assignee, fail to comply with the terms thereof within thirty (30) days after the date of sale, then the undersigned may re-advertise the premises for sale on the next, or some subsequent, sales day, at the risk of the highest bidder, and so from time to time thereafter until full compliance shall be secured.

10. If the Plaintiff, or a representative of the Plaintiff, shall not be present at the sale, this Court shall postpone the sale to the next available sale date.

11. The undersigned shall apply the proceeds of the sale as follows:

FIRST: To the payment of the amount of the costs and expenses of this action, including any *Guardian Ad Litem* fees or fees of attorneys appointed under Order of Court; and

NEXT: To the payment of the Plaintiff, or the Plaintiff's attorney, of the amount of the Plaintiff's indebtedness or so much thereof as the purchase money will pay against the same;

NEXT: Any surplus will be held pending further Order of this Court pursuant to Rule 71(c), SCRPC.

12. Each Defendant named herein, and all persons whomsoever claiming under such Defendant(s), shall be, and are, forever barred and foreclosed of all right, title, interest and equity of redemption in the said mortgaged premises so sold, or any part thereof.

13. The deed of conveyance made pursuant to this judgment and said sale shall contain the names of only the Plaintiff, the Defendant(s) who was/were the title holder of the mortgaged property at the time of the filing of the *Lis Pendens*, and the Grantee and the Register of Deeds and/or the Clerk of Court is hereby authorized to omit from the indices pertaining to such conveyance the names of all parties not contained in said deed.

14. The undersigned hereby retains jurisdiction to do all necessary acts incident to this foreclosure action, including, but not limited to, the issuance of a Writ of Assistance and the disposition of any surplus funds pursuant to Rule 71(c), SCRCF.

15. After the Order Confirming Sale and Disbursements has been issued and filed, the undersigned shall direct the Register of Deeds and/or the Clerk of Court to release of record the mortgage liens being foreclosed.

16. Pursuant to Rule 77 (d), SCRCF, the Clerk of Court shall serve a notice of entry of this judgment upon all parties who are not in default for failure to appear herein.

17. In the event the successful bidder is other than the Defendant(s) in possession herein, the Sheriff of York County upon receipt of a Writ of Assistance or other order of ejectment is authorized and directed to eject and remove from the premises the occupant(s) of the property sold, together with any and all personal property located thereon, and to put the successful bidder, or his assigns, in full, quiet, and peaceable possession without delay, and to keep the successful bidder or his assigns in such peaceable possession.

18. In the event the successful bidder is other than the Defendant(s) herein and the occupants have voluntarily vacated the premises or have been ejected from the premises leaving furnishings, fixtures and items not subject to the Plaintiff's mortgage, the Plaintiff is authorized to remove therefrom all furnishings, fixtures and items not subject to the lien of the Plaintiff's

mortgage, which personal property shall be deemed abandoned and shall be removed by the Plaintiff or its agents from the subject property by placing said personal property on the public street or highway or by any other means.

19. The following is a description of the premises herein ordered to be sold:

All that certain piece, parcel or lot of land with the improvements thereon, if any, situate, lying and being in the County of York, Sate of South Carolina, being shown and delineated as Lot 86 on a plat of Oxford Subdivision, Phase V, drawn by Precision Surveying, Inc., dated April 23, 2001 and recorded in the Office of the R.M.C. for York County in Plat Book B-229, Page 6 reference being made to the same for a more complete and accurate description; all measurements being a little more or less.

Being the same property conveyed to Mark Douglas Ostendorff by Deed from Penton Group, Inc., dated September 27, 2001, recorded October 2, 2001 in Book 3890, Page 190, York County, South Carolina Records.

1207 Cabin Creek Court, Fort Mill, SC 29715

TAX MAP NUMBER: 776-00-00-107

AND IT IS SO ORDERED, ADJUDGED AND DECREED.

York, South Carolina

10/11, 2013.

S/S JACKSON KIMBALL

S. Jackson Kimball
Master In Equity for York County

ATTORNEY FOR THE PLAINTIFF:

Brian S. Tatum
S.C. Bar No.: 73975
P.O. Box 11250
Charlotte, NC 28220
(704) 307-4197
0720934sc

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Master in Equity

Case No. 2007-CP-46-4305

SunTrust Mortgage, Inc., Respondent,

v.

Mark Ostendorff, Petitioner.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the MOTION TO DISMISS was served upon the parties listed below by placing a copy of the same with the United States Postal Service, first-class postage prepaid, addressed as follows:

Mark Ostendorff, 135 Cedar Creek Circle, Central, SC 29630

August 6, 2014.

TATUM LAW FIRM, PLLC



Brian Steed Tatum
Attorney for Respondent

RECEIVED

AUG 06 2014

SC Court of Appeals



TATUM LAW FIRM
PLLC

BRIAN STEED TATUM
Direct Dial: (704) 307-4197
Direct Fax: (704) 754-4140
BSTatum@tatumlegal.com

Tuesday, August 05, 2014

VIA OVERNIGHT MAIL

Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

**RE: SunTrust Mortgage, Inc. vs. Mark Ostendorff
Case Tracking No.: 2013-002432**

Dear Clerk:

Enclosed you will find an original and seven (7) copies of our (i) Motion to Dismiss, and (ii) Certificate of Service. Please file the originals and return the extra file-stamped copies to our office in the enclosed self-addressed, stamped envelope. Your prompt attention to this matter would be greatly appreciated. In the meantime, if you have any questions or comments, or if we may assist you further, please do not hesitate to contact us at any time.

Sincerely yours,

Brian S. Tatum

:bst
Enclosures

RECEIVED

AUG 06 2014

SC Court of Appeals

Mailing Address:
P.O. Box 11250
Charlotte, NC 28220

Phone: (704) 307-4350
Fax: (704) 754-4140
www.tatumlegal.com

Conferences Address:
5970 Fairview Rd., Ste. 712
Charlotte, NC 28210