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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Charles B. Simmons, Jr., Master-In-Equity

Case No. 2010-CP-23-3860
Appellate Case No. 2013-00915

Independence National Bank, ... Petitioner,

v.

Buncombe Professional Park, LLC; and David DeCarlis, s/a David D. DeCarlis, ... Respondents.

REPLY BRIEF OF PETITIONER INDEPENDENCE NATIONAL BANK

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Introduction

This Court should reverse the court of appeals' opinion in this matter. Respondent David DeCarlis ("DeCarlis") should not be permitted to have his personal mortgage take priority over Petitioner Independence National Bank's ("Independence Bank") mortgage lien. Independence Bank would not have entered the subject transaction without a first-priority mortgage lien. (App. 131-133.)

DeCarlis, acting for himself and as the sole member of Buncombe Professional Park, LLC ("Buncombe") (collectively referred to with DeCarlis as "Respondents") signed a loan commitment letter through which he and Buncombe contracted to provide Independence Bank with a first-priority mortgage lien. (App. 23-27.) DeCarlis and Buncombe committed to providing Independence Bank a "title insured first real estate mortgage in the Property" as a condition precedent to the loan "insuring the mortgage as a first lien on the Property." (App. 24-25.) DeCarlis was the only person that could have made good on this promise because, as was revealed after the transaction, DeCarlis had a prior, "Second Mortgage" from Buncombe.[1] The loan commitment letter further provided that "[u]nless Independence agrees otherwise in writing, completion of all documents is a condition of closing." (App. 25.)

Significantly, DeCarlis failed to personally appear before the Master-in-Equity at the foreclosure hearing in this action. (App. 7-8.) Thus, the only evidence admitted before the Master-in-Equity was through Independence Bank's witnesses and through the closing attorney, Tommy Dugas ("Dugas"). All the evidence indicated that

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[1] This document entitled "Second Mortgage of Real Estate" is in the Record before the Court. (App. 162-164.) As supported by the Record, this mortgage was to remain a second mortgage as indicated by its title.

Independence Bank was to have a first-priority mortgage lien on the subject property. No evidence to the contrary was provided by Respondents.

Based on the transactional documents, Independence Bank sought to have the Master-in-Equity equitably subrogate the prior DeCarlis mortgage or reform the transaction to provide the bank with the priority lien it bargained for as if a subordination agreement had been executed. (App. 58-65.) The Master-in-Equity ruled in favor of the bank and provided for both forms of relief, alternatively, based on the evidence.

The court of appeals reversed on the basis that: 1) DeCarlis was not a party to the mortgage and, therefore, the court could not reform the mortgage; and 2) the bank had actual knowledge of the prior DeCarlis mortgage through the closing attorney. These rulings are unsupported by this Record and the law for a number of reasons as detailed herein and in Independence Bank's opening brief. Reversal is necessary because, among other reasons, knowledge imputed through an agent is constructive knowledge—not actual knowledge. Further, courts can reform transactions to conform to the intent of the parties—intent that is undisputed in this case.

Argument

I. Respondents did not raise any issue regarding equitable subrogation before the Master-in-Equity.

The Master-in-Equity, in ruling on the parties' motions to alter or amend, made the following findings and conclusions:

- Independence Bank was entitled to equitable subrogation and it "did not have actual notice" of the prior mortgage in favor of DeCarlis; and
- The parties had a "clear and uncontroverted understanding" that DeCarlis "intended his prior mortgage to be junior" to Independence Bank's lien.

(App. 15.) Respondents did not challenge any of the above findings and conclusions.

A matter may not be raised for the first time on appeal, but must have been both raised to and ruled upon by the trial court in order for the issue to be preserved. *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998). Further, in order for an appellate court to rule on an issue, the record must contain some evidence or documentation that the issue was raised to and ruled on by the lower court. *See Coggeshall v. Reprod. Endocrine Assocs.*, 376 S.C. 12, 655 S.E.2d 476 (2007) (noting that while the briefing referred to a motion to amend which might have raised an issue, the record did not contain the motion and it could not be concluded that the trial court considered the issue purportedly raised).

Here, the Master-in-Equity granted Independence Bank's motion to alter or amend and denied Respondents' motion. (App. 14-16.) Respondents did not challenge the Master-in-Equity's findings and conclusions concerning Independence Bank's request for an amended order ruling on its equitable subrogation claim, or otherwise make an argument of record to the Master-in-Equity as to why Independence Bank is not entitled to equitable subrogation. After entertaining the parties' motions to alter or amend, the Master-in-Equity issued his findings and conclusions in his second order in this matter. It was incumbent upon Respondents to file a subsequent motion to alter or amend to challenge the Master-in-Equity's new rulings addressing equitable subrogation. Respondents failed to file such a motion and thus all appellate arguments they make and have made respecting the Master-in Equity's equitable subrogation ruling are unpreserved.

For this reason alone, it was error for the court of appeals to reverse the Master-in-Equity's ruling on equitable subrogation. This Court should thus reverse the court of appeals' decision in favor of Independence Bank.

II. The court of appeals erred in holding that Independence Bank was not entitled to equitable subrogation.

First, Independence Bank did not have actual notice of DeCarlis's prior lien. Any notice through the closing attorney, Dugas, was only ***constructive notice***. Constructive notice does not prevent a party from receiving relief via equitable subrogation. Second, the court of appeals improperly imputed the acts of a dual agent to only one party to the transaction. Dugas acted for both sides and his withholding of information from one principal to the benefit of another is impermissible.

A. The court of appeals erred in determining that Independence Bank had actual notice of DeCarlis's lien because actual notice may not be imputed from the closing attorney.

The court of appeals held that Independence Bank met every element of its cause of action for equitable subrogation save one—the absence of actual knowledge of the prior mortgage. (App. 230-232.) The court of appeals concluded that, because "there was an agent-principal relationship between Dugas and Independence, [] actual notice to Dugas was actual notice to Independence," and as a result, Independence was not entitled to equitable subrogation. (App. 232.)

Under South Carolina law, only constructive notice, not actual notice, may be imputed from an agent to a principal, and constructive notice is not a bar to equitable subrogation. *Crystal Ice Co. of Columbia v. First Colonial Corp.*, 273 S.C. 306, 309, 257 S.E.2d 496, 497 (1979); *Pee Dee State Bank v. Prosser*, 295 S.C. 229, 237, 367 S.E.2d 708, 713 (Ct. App. 1988), *overruled on other grounds by United Carolina Bank v.*

Caroprop, Ltd., 316 S.C. 1, 446 S.E.2d 415 (1994). Accordingly, the court of appeals erred in determining that Independence Bank had actual knowledge and was not entitled to equitable subrogation.

For equitable subrogation to be available, a mortgagor must show that:

> (1) the party claiming subrogation has paid the debt; (2) the party was not a volunteer, but had a direct interest in the discharge of the debt or lien; (3) the party was secondarily liable for the debt or for the discharge of the lien; (4) no injustice will be done to the other party by the allowance of equitable subrogation; and (5) the party asserting the doctrine did not have ***actual notice*** of the prior mortgage.

Matrix Fin. Servs. Corp. v. Frazer, 394 S.C. 134, 137, 714 S.E.2d 532, 533 (2011) (emphasis added). A party is only barred from seeking equitable subrogation where it has actual notice; "constructive notice is not a bar." *Pee Dee State Bank v. Prosser*, 295 S.C. 229 at 367 S.E.2d at 713 (Ct. App. 1988), *overruled on other grounds by United Carolina Bank v. Caroprop, Ltd.*, 316 S.C. 1, 446 S.E.2d 415 (1994) (citing *Enter. Bank v. Fed. Land Bank of Columbia*, 139 S.C. 397, 138 S.E. 146 (1927)).

This Court recognizes that a party has actual notice only when it "either knows of the existence of the particular facts in question or is conscious of having the means of knowing it, even though such means may not be employed by him." *Spence v. Spence*, 368 S.C. 106, 118, 628 S.E.2d 869, 875 (2006). "Actual notice means all the facts are disclosed and there is nothing left to investigate," *Strother v. Lexington Cnty. Recreation Comm'n*, 332 S.C. 54, 64, 504 S.E.2d 117, 122 (1998), and is "synonymous with knowledge." *Spence* at 118, 628 S.E.2d at 785.

On the other hand, constructive notice is a "legal inference" which is imputed to a party "whose knowledge of facts is sufficient to put him on inquiry; if these facts were

pursued with due diligence, they would lead to other undisclosed facts." *Id.* at 119, 628 S.E.2d at 876. Thus, "[i]t is well established that a principal is affected with ***constructive knowledge*** of all material facts of which his agent receives notice while acting within the scope of his authority." *Crystal Ice Co. of Columbia v. First Colonial Corp.*, 273 S.C. at 309, 257 S.E.2d at 497 (emphasis added). In contrast, this Court has expressly held that South Carolina law does not support "implied actual notice" and has declined to allow actual notice to be imputed. *Strother* at 64, 504 S.E.2d at 123.

Dugas did have actual knowledge of DeCarlis's lien. (App. 232.) However, under this Court's jurisprudence, Dugas's actual knowledge as Independence Bank's agent may only be imputed to the bank as constructive knowledge, not implied actual knowledge. *Crystal Ice Co.*, 273 at 309, 257 S.E.2d at 497; *Strother* at 64, 504 S.E.2d at 123. Accordingly, Independence Bank cannot be presumed to have express actual notice such as to bar equitable subrogation. Additionally, the proper recordation of a prior lien gives inquiry notice of its existence to the world, *Spence v. Spence*, 368 S.C. 106, 119, 628 S.E.2d 869, 876 (2006), so Independence Bank had constructive notice regardless of whether Dugas's knowledge is imputed. However, the court of appeals properly determined that Independence Bank did ***not*** have independent ***actual notice*** of DeCarlis's lien. (App. 232.) Only actual notice, not constructive notice, is a bar to equitable subrogation, and Independence Bank never had actual notice, either independently or imputed through Dugas. *See Pee Dee State Bank* and *Strother*, *supra*. Accordingly, the court of appeals erred in determining that Independence Bank is not entitled to equitable subrogation. Reversal of the court of appeals is thus necessary.

B. If the Court determines constructive notice is now sufficient to defeat an equitable subrogation claim, Dugas was a dual agent for both parties and his knowledge must be imputed to both sides.

Respondents admit that Dugas was a dual agent. (Resp. Br. at p. 2.) Should this Court find Respondents' arguments on equitable subrogation preserved and conclude that constructive notice is now sufficient to bar a party from gaining relief for equitable subrogation, this Court should find that the court of appeals erred in failing to impute the knowledge of Dugas concerning DeCarlis's prior mortgage to Respondents.

"The duty of an agent to inform his principal of all material facts is a duty which the law conclusively presumes that the agent has performed, and ***a principal is therefore affected with knowledge of all material facts*** of which the agent receives notice or acquires knowledge while acting in the course of his employment and within the scope of his authority. . ." *Bank of Johnsonville v. Sovereign Camp, W. O. W.*, 130 S.C. 444, __, 126 S.E. 332, 335 (1925) (emphasis added) (internal citations omitted).

This requirement, in the context of equitable subrogation, dictates that the parties to this transaction should be placed in the same position had the error by Dugas not occurred.[2] Equitable subrogation is founded upon the premise that the law should place the parties in the same position they would have been in had the transaction properly closed "in the light of the actions and relationship of the parties." *Calvert Fire Ins. Co. v. James*, 236 S.C. 431, 435, 114 S.E.2d 832, 834 (1960). Based on this rule of law, this

[2] To the extent the Court properly imputes the knowledge and failure of Dugas to gain the subordination agreement to both parties, the error becomes the mutual mistake of both sides to this transaction thereby permitting the Court to reform the contract to conform to the intent of the parties to this transaction. *See Shaw v. Aetna Cas & Surety Ins. Co.*, 274 S.C. 281, 285, 262 S.E.2d 903, 905 (1980) (holding that our courts will reform written contracts to conform to the intent of the parties when a mutual mistake exists in a transaction preventing performance of the obligation as intended). Reformation is more fully briefed herein in Section III, *infra*.

Court has expressly recognized that a party is not entitled to an unintended priority when the closing attorney is aware of the intent of the parties but the closing attorney's actions result in incorrect priority positions. *Crystal Ice Co.*, 273 S.C. at 311, 257 S.E.2d at 498.

Independence Bank expected to have a first-priority mortgage lien. (App. 131-133.) The bank was innocent in the failure of Mr. Dugas to obtain the signed subordination agreement and remained unaware of this failure until three years after the closing. Dugas was also the agent of DeCarlis. The Court cannot favor one party in a dual agency setting. The *Crystal Ice Co.* court held "[t]here was never an instant when [the intended first lienholder] relinquished a hold on it; and [the first lienholder] would never have parted with it at all except upon the belief and faith that if his buyer defaulted he could either recapture his property or get paid out of it." *Crystal Ice Co.*, at 311, 257 S.E.2d at 498.

Before the Master-in-Equity, Independence Bank offered undisputed testimony of this precise point before the Master-in-Equity. It would have never loaned the money to Buncombe without a first mortgage. (App. 131-133.) Independence Bank does not enter commercial loans as a second lienholder on unconstructed lots. (App. 113-114.)

Dugas testified that he was the agent for all parties to this transaction and he knew of the existence of the prior DeCarlis mortgage. (App. 125-128.) If Dugas's knowledge is properly imputed to both sides, the constructive knowledge imputed to DeCarlis necessitates placing his prior lien as junior to the bank's. Dugas testified that he did not inform Independence of the prior mortgage. (App. 126-127.) Dugas knew Independence was intended to have a first mortgage. (App. 120; 126-127.) Dugas tried to get the

subordination agreement signed by DeCarlis three years after closing because he knew Independence was to be the first lienholder. (App. 125-128.)

Despite this knowledge from the admitted dual agent, the court of appeals did not impute Dugas's knowledge that "the agreement between the parties was that Independence National Bank would be a title insured first mortgage, and in order for that to take place the mortgage to First National Bank of Spartanburg needed to be satisfied and the second mortgage to Mr. DeCarlis needed to be satisfied, released, or subordinated." (App. 120.) However, the law of this state expressly requires imputation of all facts known to the dual agent. Based on this omission by the court of appeals, Independence Bank is entitled to equitable subrogation. Without a priority mortgage lien, the transaction would not have occurred. Accordingly, the court of appeals' decision should be reversed.

III. DeCarlis is a party to this real estate mortgage transaction and the transaction should be reformed to provide Independence Bank with a first-priority mortgage lien.

Respondents desire to proceed as if DeCarlis is not a party to this transaction. The Record before the Court reveals this to be untrue. DeCarlis is the sole member of Buncombe identified in this transaction. DeCarlis signed every loan document either for Buncombe or for himself. The contractual documents signed by DeCarlis individually and as the sole member of Buncombe cross-reference and incorporate other documents or contracts in this single transaction. To contend that the courts are not empowered to reform this transaction to provide Independence Bank with a first-priority mortgage lien over DeCarlis's personal mortgage strains credulity.

A. Independence Bank provided clear and convincing, uncontroverted evidence that the parties agreed that Independence Bank would have a first-priority mortgage lien.

Respondents now claim that clear and convincing evidence was not presented to establish a meeting of the minds. In reality, Independence Bank provided unchallenged evidence that DeCarlis agreed and intended to give Independence Bank a first lien on the subject property. DeCarlis failed to personally appear at the hearing before the Master-in-Equity. (App. 7-8.) Thus, DeCarlis presented ***no evidence*** as to his intent. Further, DeCarlis did not deny signing the documents making up the entirety of this transaction. (*Id.*) The closing attorney, Dugas, testified that he knew Independence was intended to have a first mortgage. (App. 120; 126-127.) The bank also presented testimony that it would not have made the subject loan without a priority lien. (App. 131-133.)[3] Thus, the undisputed evidence is that DeCarlis, Buncombe, the bank, and the closing attorney intended Independence Bank to have a first-priority mortgage lien. This is clear and convincing evidence of the intent of the parties. *See George v. Empire Fire & Marine Ins. Co.*, 344 S.C. 582, 594, 545 S.E.2d 500, 506 (2001) (granting summary judgment based on uncontroverted evidence which the Court found to be clear and convincing as to intent and reforming the parties' contract accordingly).

[3] The personal mortgage in favor of DeCarlis is entitled "Second Mortgage of Real Estate." (App. 162-164.) This demonstrates that the prior lender required a first mortgage in making its loan to Buncombe. It further shows that DeCarlis was aware of such a requirement as a precondition to procuring a loan for Buncombe. It also literally describes the mortgage as a "Second Mortgage."

B. This Court can reform this transaction.

Respondents' entire argument against reformation is grounded on the contention that DeCarlis was not a party to the mortgage and that Independence Bank only sought reformation of the mortgage. Both of Respondents' contentions are unfounded.

1. DeCarlis is a party to the transaction.

DeCarlis individually signed the loan commitment letter and the business loan agreement, and signed the mortgage on behalf of Buncombe as the sole member of the LLC in this transaction. This loan commitment letter and the business loan agreement, both signed by DeCarlis individually, were made a part of the mortgage contract through the mortgage and the business loan agreement's "Related Documents" clauses. (App. 76.) DeCarlis personally paid interest on the loan secured by the mortgage via personal check. (App. 106.) Thus, DeCarlis is a party to the transaction by contract and by his actions. He presented no evidence to the contrary.

When contractual documents cross-reference and incorporate other documents or contracts, the related and cross-referenced materials are considered together and ***constitute one transaction***. *Mack Manuf. Co. v. Mass Bonding & Ins. Co.*, 103 S.C. 55, 68, 87 S.E. 439, 442 (1915) (emphasis added). "[I]n the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the instruments together." *Klutts Resort Realty, Inc. v. Down-'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).

Buncombe and DeCarlis executed a loan commitment letter and business loan agreement with Independence on September 25, 2007. (App. 66; 140.) The court of

appeals recognized the existence of the commitment letter and the business loan agreement. (App. 225-231.) Buncombe and DeCarlis did not dispute their existence at foreclosure. (App. 7-8.) The court of appeals noted that DeCarlis knew Independence expected a first mortgage. (App. 231.) Through the loan commitment letter, Buncombe and DeCarlis (individually) committed to providing Independence with a first priority mortgage secured by the subject property. (App. 67.) Through the business loan agreement, Buncombe and DeCarlis (individually) warranted they disclosed all encumbrances on the property securing the loan. (App. 141.) The loan commitment letter expressly provided: "[t]he Borrower [Buncombe] shall grant Independence a title insured ***first real estate mortgage in the Property*** including all improvements presently located or subsequently constructed thereon." (App. 67) (emphasis added). The loan commitment letter also made the first lien status a precondition to the loan transaction. (App. 68.)

This loan commitment letter and the business loan agreement, both signed by DeCarlis individually, were made a part of the mortgage contract through the mortgage and the business loan agreement's "Related Documents" clauses. (App. 76.) By executing the business loan agreement in his individual capacity, DeCarlis expressly agreed to be a party to the transaction. The "Related Documents" provisions in both the mortgage contract and the business loan agreement incorporated the promissory note, the loan commitment letter, the business loan agreement, and the guaranty into the mortgage to be read as a whole making DeCarlis a party to the transaction. (App. 143; 76.)

Again, DeCarlis failed to personally appear at the foreclosure hearing. (App. 7-8.) The only testimony adduced at the hearing was offered by Independence. At the

hearing, Dugas testified that DeCarlis committed to providing Independence with a first priority mortgage. (App. 116-130.) Robert M. Lowery, a loan officer at Independence similarly testified that the bank was to have first mortgage. (App. 110-115.) Fred Moore, Independence's Chief Credit Officer and Executive Vice President, also testified that the bank would not have made the loan secured only by a second mortgage. (App. 131-133.) DeCarlis paid interest on the loan by personal check. (App. 106.) Thus, all evidence shows DeCarlis was a party to this transaction through the transactional documents and through his conduct.

The court of appeals improperly isolated the mortgage contract and opined it would have to be rewritten in order to affirm the lower court. This conclusion is incorrect. The transaction only need to be reformed to reflect the intent of all the parties to the transaction as if the subordination agreement had been executed as requested in the amended complaint. (App. 63.) The court of appeals also ignored DeCarlis's conduct in personally paying interest on the Buncombe note. DeCarlis was thus a party to this transaction.

2. Independence Bank sought reformation of the transaction.

Respondents also argue, for the first time, that Independence Bank only sought to reform the mortgage (and not the entire transaction).[4] This is false.

[4] Respondents contend that the bank's argument regarding what constitutes the entire transaction is not preserved. This is directly contrary to the very relief the bank sought in its amended complaint. (App. 63-64.) Further, as the prevailing party at the trial level, the bank is entitled to raise this argument as an additional sustaining ground in any event. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("It would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review.").

Through its amended complaint, Independence Bank sought "reformation of the loan closing documents." (App. 64.) Independence Bank requested the relief because "other documents, such as a subordination, were not executed with regard to another mortgage on the same property." (App. 63.)

This Court is empowered to reform this transaction, with DeCarlis as a party to it, as if a subordination agreement was timely executed. *See Taylor v. Highland Park Corp.*, 210 S.C. 254, 260-61, 42 S.E.2d 335, 337-38 (1947) (noting that "[i]t has been held that the reformation of a contract and its enforcement as reformed constitute but one cause of action."). Accordingly, the Court should reform the transaction to provide Independence Bank with a first-priority mortgage lien as reflected by the transaction documents, the testimony of the dual agent, and the actions of DeCarlis in the course of dealings respecting the loan.

C. Respondents contractually agreed to reformation.

Respondents also agreed to reformation in the business loan agreement. Respondents also contracted to permit the bank to act as attorney-in-fact in order to fulfill the mortgagor's obligations.

First, the business loan agreement contains a provision entitled "Confirmatory Documents and Actions" stating "Borrower agrees that on Lenders' request, Borrower will do any act or execute any additional documents that are or may be required to make the terms of the Loan conform to the conditions contained in the Lenders' commitment to Borrower. Within five days of Lender's request, Borrower will furnish an estoppel certification in a form Lender approves." (App. 141.) DeCarlis and Buncombe failed to abide by this provision in refusing to sign the subordination agreement later supplied by

the closing attorney. This refusal resulted in Independence having to seek relief from the courts.

Second, in the mortgage contact, signed by DeCarlis as the sole member of Buncombe, the parties agreed that Independence Bank was appointed as Buncombe's attorney-in-fact. (App. 36.) Under this provision, should Buncombe fail to fulfill any obligation under the mortgage or the "Related Documents," the bank was permitted to fulfill the necessary act. (*Id.*) This included the execution and delivery of any "other such document as [Independence Bank] may require . . . to effectuate, complete and to perfect as well as continue to preserve . . . the lien . . . ." (App. 35-36.) This would include a subordination agreement.

Through its request for reformation of this transaction (App. 63-64), Independence Bank was seeking only to gain the same result it could have effectuated under the transaction documents, but it was required to seek court assistance in light of DeCarlis's refusal to provide the subordination agreement. Hence, this Court can utilize these contractual provision as further support for the conclusion that reformation can be had in this transaction and is warranted under these facts and the law as properly applied.

IV. One who seeks equity must do equity and fairness does not allow DeCarlis to now disclaim the promises he made in the course of this transaction.

Respondents claim that it is Independence Bank and not DeCarlis that seeks equity. Respondents' contention does not accurately represent the Record before the Court and their pleadings reveal that they too seek equity. It is a long-recognized equitable maxim that one who seeks equity must do equity. *Provident Life & Accident Ins. Co. v. Driver*, 317 S.C. 471, 479, 451 S.E.2d 924, 929 (1994).

Here, Respondents asserted unclean hands as an affirmative defense. Respondents also asserted, as affirmative defenses and as counterclaims, promissory estoppel and unjust enrichment. (App. 88-92.) Each of these defenses and/or counterclaims are indisputably equitable in nature. In this action, DeCarlis, while a party to the transaction both individually and as the sole member of Buncombe, failed to inform the bank of his prior personal mortgage to Buncombe. Hence, DeCarlis and Buncombe knew about the prior mortgage but failed to inform Independence of its existence. "It is the law of this State, and appears to be the universal rule, that reformation of a written instrument may be obtained where there is mistake on the part of the plaintiff, and inequitable conduct, deceit, concealment and imposition of fraud on the part of the defendant, inducing the plaintiff's mistake." *Aiken Petroleum Co. v. Nat'l Petroleum Underwrites,* 207 S.C. 236, 36 S.E.2d 380 (1945) (internal citations omitted).

DeCarlis did not dispute signing the documents making up the entirety of this transaction. (App. 7-8.) In addition to the loan commitment letter, DeCarlis also individually executed a business loan agreement. (App. 140.) Through the business loan agreement, DeCarlis and Buncombe warranted and represented that they "have good title to all of Obligors' assets. All encumbrances on any part of the Property were disclosed to Lender [Independence] in writing." (App. 141.) There is no evidence in the record that DeCarlis disclosed the prior mortgage in writing or otherwise to Independence Bank either individually, as a member of Buncombe or through the closing attorney (the dual agent for the parties) at the time of closing. DeCarlis's omission of this material fact provides an additional ground for reversing the court of appeals' decision in this matter. DeCarlis (both individually and as member of Buncombe) failed to disclose the prior lien

before executing the loan documents and then later refused to sign the subordination agreement. As the sole member of Buncombe present for this transaction, DeCarlis should not be permitted to proceed individually as if he is a stranger to this transaction when he individually and as the sole member of Buncombe made a commitment to provide the bank with a first-priority mortgage lien—something only DeCarlis could ensure would happen. DeCarlis promised to disclose any prior encumbrances on the property before closing. Because he did not, DeCarlis, in equity, is not entitled to profit from his failure to disclose or gain relief or a defensse in any manner in this action.

Conclusion

Hence, this Court should hold that the bank is entitled to equitable subrogation in this action based on these facts. Failing that, the Court should reform the real estate mortgage transaction to provide Independence Bank a first-priority mortgage lien over and above the personal mortgage in favor of DeCarlis.

Respectfully submitted,

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September 8, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Charles B. Simmons, Jr., Master-In-Equity

Case No. 2010-CP-23-3860
Appellate Case No. 2013-00915

Independence National Bank,..... Petitioner,

v.

Buncombe Professional Park, LLC; and David DeCarlis, s/a David D. DeCarlis, ... Respondents.

PROOF OF SERVICE

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

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Reply Brief of Petitioner Independence National Bank

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