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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Roger M Young, Circuit Court Judge

Court of Common Pleas Case No 10-CP-10-6042

CAROLINA PARK ASSOCIATES, LLC, and REPUBLIC-CHARLESTON,
LLC, for itself and on behalf of Carolina Park Associates, LLC,
Plaintiffs-Appellants

v

BENEDICT T MARINO, DOUGLAS H DITTRICK, JOHN CHALSTY, MDC
OF CHARLESTON, LLC, and CDM OF CHARLESTON, LLC,
Defendants-Respondents

RECORD ON APPEAL
(Volume II of II)

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SC Court of Appeals
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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
 COUNTY OF CHARLESTON) C/A NO 2010-CP-10-6042

CAROLINA PARK ASSOCIATES, LLC,)
 And REPUBLIC-CHARLESTON, LLC,)
 for itself and on behalf of Carolina Park)
 Associates, LLC,)

Plaintiffs,)

vs)

BENEDICT T MARINO, DOUGLAS H)
 DITTRICK, JOHN CHALSTY, MDC OF)
 CHARLESTON, LLC, and CDM OF)
 CHARLESTON, LLC,)

Defendants)

DEFENDANT CDM OF CHARLESTON,
 LLC S MEMORANDUM IN OPPOSITION
 TO PLAINTIFF S MOTION FOR
 TEMPORARY RESTRAINING ORDER
 AND/OR TEMPORARY INJUNCTION

2011 APR 22 PM 1 36
 JULIE J ARMSTRONG
 CLERK OF COURT
 BY _____

FILED

This matter is before the Court on the motion of Plaintiff Republic-Charleston LLC for a temporary restraining order and/or temporary injunction to restrain Defendants from taking any action to encumber or dispose of the subject Property that Defendant CDM of Charleston, LLC, bought out of foreclosure for \$50 million Also pending before the Court is Defendant CDM s motion to cancel Plaintiff's lis pendens, which accomplishes the same thing as Plaintiff's motion for a temporary injunction, namely allowing Plaintiff to interfere in the development of a property Plaintiff lost in foreclosure nearly a year ago This memorandum is offered in opposition to the motion for a temporary injunction and also as a supplement to Defendant CDM s prior memorandum in support of cancelling the lis pendens

Plaintiff's on-going effort to claw back the Carolina Park Property following foreclosure and to interfere in Defendant CDM's efforts to develop that Property fail as a matter of law,

regardless of which procedural path Plaintiff follows. Following the foreclosure sale last year, neither Plaintiff Republic nor Carolina Park Associates, LLC, has any legal or equitable interest in the Property. S.C. Code Ann. § 15-39-870 ('any property sold at a judicial sale under a decree of a court of competent jurisdiction the proceedings under which such sale is made shall be deemed res judicata as to any and all bona fide purchasers for value without notice'), Robinson v. Estate of Harris, 378 S.C. 140, 662 S.E.2d 420 (Ct. App. 2008) aff'd, 390 S.C. 272, 701 S.E.2d 740 (2010). Since Plaintiff has no basis for claiming an interest in CDM's Property, it has no right to impose a temporary injunction, a lis pendens, or a constructive trust on that Property.

FACTS

Defendant CDM relies on the facts set forth in its Memorandum in Support of Motion to Cancel Lis Pendens ('Lis Pendens Memorandum'). In sum, Plaintiff Republic is attempting to re-assert control over Property that it lost in foreclosure. In March of 2010, Plaintiff consented to the foreclosure in writing in exchange for a 60-day delay in the foreclosure, which was then scheduled for May 18, 2010. Consent Decree of Foreclosure and Sale, Page 9, Exhibit No. 5 to Lis Pendens Memorandum. In that same Consent Order, Plaintiff also consented to Defendant CDM buying the Property out of foreclosure by credit bidding its secured debt in the Property should Plaintiff not locate a buyer by May 18, 2010. Consent Decree of Foreclosure and Sale, Page 9, Paragraph 6, Page 11, Paragraph 5(b), Exhibit No. 5 to Lis Pendens Memorandum. Further, Plaintiff released all the Defendants from all claims (other than fraud and willful misconduct) arising from the subject Property. Mutual Release, Exhibit No. 6 to Lis Pendens Memorandum.

When Plaintiff could not find a buyer for the subject Property by May 18, 2010, it reneged on its deal with CPA's creditors and Defendants and engaged in a series of frivolous litigation tactics to delay the foreclosure as long as possible. Plaintiff first put CPA into bankruptcy without authorization from its partner, MDC. The CPA Operating Agreement required the unanimous consent of the partners to declare bankruptcy, so the bankruptcy judge dismissed the bankruptcy upon motion of the primary lender due to lack of authorization. Next, Republic filed an action for injunctive relief in Federal Court and also appealed the dismissal of the bankruptcy. The Honorable David C. Norton ruled against Republic on these efforts, rejecting Republic's arguments, also made in this case, that the Mutual Release amounted to MDC's consent to the foreclosure. After Judge Norton ruled against it, Republic voluntarily dismissed its Federal actions acknowledging that they were moot. At no point did Republic or CPA appeal the foreclosure order in State Court, the only means of questioning a foreclosure. S.C. Code Ann. § 15-39-870.

After months of the delay, the foreclosure finally went through on July 12, 2010. Even though Plaintiff's litigious stall tactics bought them an additional two months, they still could not come up with a buyer. Further, even though Plaintiff is owned by a large and wealthy national developer, Plaintiff chose not to bid at the foreclosure. Instead, CDM, exercising its rights that were acknowledged by Plaintiff Republic in the Consent Foreclosure Order, bought the Property out of foreclosure for \$50 million.

CDM's new investors, represented by Grove Land, provided \$28 million in cash to buy out the first mortgage holder, and CDM credit bid its \$22 million in subordinated debt for the total purchase amount. Grove Land provided an additional \$4 million to fund a working capital reserve to pay property carrying costs. In short, Grove Land has invested \$32 million into the

Property in cash Even though Grove Land and Republic have absolutely no relationship whatsoever, through this lawsuit, lis pendens, and request for injunctive relief, Republic is actually attempting to wrest back the Property that Grove Land purchased for \$50 million, apparently for free Most incredibly, Republic is interfering with this investment and asking to have veto control over it even though Republic does not now nor has it ever had any relationship at all with Grove Land

The costs to CDM of Republic s interference in the development of the Property are enormous and growing daily Defendant CDM previously submitted the affidavit of its manager, Ed Navarro, detailing the prejudice that CDM has suffered as a result of Republic s unlawful lis pendens Navarro Affidavit Paragraphs 4-11, Exhibit No 1 to Lis Pendens Memorandum

In the few months since the Lis Pendens Memorandum was filed CDM has entered contracts and negotiated potential contracts that are jeopardized by Plaintiff s unlawful lis pendens, as outlined in a Supplemental Affidavit proffered by Mr Navarro Ed Navarro Supplemental Affidavit, Exhibit No 1 CDM has now entered a Purchase Agreement with an apartment developer worth approximately \$7 million The buyer has 90 days to conduct its due diligence If the lis pendens is still in place when the due diligence period ends on June 7, 2011, the buyer will likely back out of the deal Ed Navarro Supplemental Affidavit, Exhibit No 1

Similarly regional and national home builders continue to express aggressive interest in the Property CDM has held discussions with several home builders about purchasing around 200 residential lots and anticipates closing within the year except for the lis pendens Such a sale would represent another \$14 to \$16 million deal that is being directly hindered by the lis pendens and the proposed temporary injunction

Such direct losses are just the tip of the iceberg of the harm caused by the unlawful lis pendens. It is of crucial importance that the outside world sees that Carolina Park, a property that has already been through one bankruptcy has moved beyond its past financial problems. The best way to demonstrate this is by consummating a substantial residential deal and getting construction started. Such a deal would have a tremendous positive impact on the value of later deals. Ed Navarro Supplemental Affidavit, Exhibit No. 1. Thus, delays caused by the lis pendens or proposed temporary injunction would not only result in excess of \$20 million of direct damages to CDM, it will also result in untold indirect damages to CDM and potential future deals.

Based on the foregoing even if the Court were to consider granting a temporary injunction CDM would ask that the bond, required by Rule 65(c) be at least \$50 million the amount that CDM paid for the Property.

LEGAL ARGUMENT

An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff. Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc., 361 S.C. 117, 603 S.E.2d 905, 907 (2004). The plaintiff's complaint must allege facts sufficient to constitute a cause of action for injunction and demonstrate it is reasonably necessary to protect the legal rights of the plaintiff pending in the action. Peek v. Spartanburg Reg'l Healthcare Sys., 367 S.C. 450, 626 S.E.2d 34, 36 (Ct. App. 2005), County of Richland v. Simpkins, 348 S.C. 664, 560 S.E.2d 902, 904 (Ct. App. 2002).

Generally, for a preliminary injunction to be granted, the plaintiff must establish that (1) he would suffer irreparable harm if the injunction is not granted, (2) he will likely succeed on the merits of the litigation, and (3) there is an inadequate remedy at law. Scratch Golf Co. 603

S E 2d at 908, Peek, 626 S E 2d at 36 The purpose of an injunction is to preserve the status quo and prevent possible irreparable injury to a party pending litigation Id When a court is requested to issue a temporary injunction it may consider the merits of a case to the extent necessary to determine whether a temporary injunction is appropriate” Helsel v. City of N. Myrtle Beach, 307 S C 29, 413 S E 2d 824 826 (1992)

I **PLAINTIFF IS NOT LIKELY TO SUCCEED ON THE MERITS BECAUSE IT HAS NO INTEREST IN THE SUBJECT PROPERTY**

As argued in exhaustive detail in Defendant CDM s Memorandum in Support of its Motion to Cancel the Lis Pendens (Lis Pendens Memorandum), Plaintiff Republic has no basis to claim any interest in the Property Thus, not only is it unlikely that Plaintiff will prevail on the merits, it is a legal impossibility

Plaintiff acknowledged in its Complaint that the Property was foreclosed on and legitimately purchased by Defendant CDM Complaint, Paragraphs 57 and 58 In filings with the Federal Court, Plaintiff acknowledged that its effort to assert an interest in the Property was moot Republic Motion to Vacate, attached as Exhibit No 18 to Lis Pendens Memorandum In a letter to Hartford Fire Insurance Company, which holds various bonds on the Property, Plaintiff Republic has disowned any interest in or obligations related to the Property December 26 2010 David Peter Letter Exhibit No 2

Plaintiff Republic and CPA willingly executed a Consent Foreclosure Order that specifically states that CPA is ‘ forever barred and foreclosed of all right, title, interest and equity of redemption in the said mortgaged premises so sold ’ Consent Decree and Foreclosure Sale, Page 13, Paragraph 11, Exhibit No 5 to Lis Pendens Memorandum

The South Carolina legislature has memorialized the res judicata effect of foreclosure sales by statute, thus precluding any collateral attacks on such sales

Upon the execution and delivery by the proper officer of the court of a deed for any property sold at a judicial sale under a decree of a court of competent jurisdiction the proceedings under which such sale is made shall be deemed res judicata as to any and all bona fide purchasers for value without notice, notwithstanding such sale may not subsequently be confirmed by the court

S C Code Ann § 15-39-870 See also 27 S C Jurisprudence Mortgages § 125 (Foreclosure proceedings are res judicata as to any bona fide purchaser for value without notice) The South Carolina Supreme Court recently affirmed that foreclosure sales are not subject to collateral attack even when the plaintiff was not properly served with the foreclosure Robinson, 701 S E 2d at 740

This lawsuit, the lis pendens, and the proposed temporary injunction barring Defendant CDM from developing its own property are nothing but illegal collateral attacks on the foreclosure Indeed, Plaintiff's own counsel has acknowledged that the lawsuit is over the status and propriety of the foreclosure transfer of title to the Carolina Park lands to [Defendant CDM] March 3, 2011 Alice Paylor Email Exhibit No 3 Since, under clear South Carolina law, Plaintiff is not entitled to collaterally challenge a foreclosure, there is absolutely no likelihood of success on the merits

Of course, there are a myriad of other reasons that Plaintiff is not likely to succeed in its claims against Defendant CDM As argued extensively in CDM s Memorandum in Support of Motion to Cancel Lis Pendens

1 Plaintiff Republic as a partner in CPA, never had any interest in the Property and cannot assert any claims based on an imagined interest, Lis Pendens Memorandum Pages 16-20,

2 Plaintiff Republic does not have contractual or statutory authority to bring a claim on behalf of CPA, Lis Pendens Memorandum, Pages 20 22,

3 Plaintiff Republic, as a partner in an insolvent real estate partnership, owed fiduciary duties to CPA s creditors, including Defendant CDM, not the other way around, Lis Pendens Memorandum Pages 28 30,

4 Plaintiff Republic has not identified any valid basis for a constructive trust over the Property that Defendant CDM paid \$50 million for Lis Pendens Memorandum, Pages 28-32,

4 Defendant CDM as a lender and not a partner in CPA, was not obligated under the Non-Competition and Confidentiality provisions of the CPA Operating Agreement and, therefore, could not possibly have breached same Lis Pendens Memorandum, Pages 32 33,

5 Plaintiff Republic signed a release giving up all claims against the Defendants, Lis Pendens Memorandum, Page 33 and

6 Plaintiff Republic is not entitled to any equitable relief because of the prejudice that would result to Defendant CDM and because of Republic s unclean hands Lis Pendens Memorandum Pages 33-36

In summary, Plaintiff is not likely to succeed on the merits of this case, which strongly mitigates granting any sort of preliminary injunction

II PLAINTIFF REPUBLIC WILL NOT SUFFER IRREPARABLE HARM IF A TEMPORARY INJUNCTION IS DENIED

The only purpose of an injunction is to preserve the status quo to avoid possible irreparable injury to a party pending litigation Zabinski v Bright Acres Assocs, 346 S C 580 553 S E 2d 110, 121 (2001), MailSource, L L C v M A Bailey & Assocs, 356 S C 363, 588 S E 2d 635, 638 (Ct App 2003)

Plaintiff Republic has not identified any irreparable harm that will result to it if a temporary injunction is denied Plaintiff Republic has an entirely separable set of tort claims seeking monetary damages against Defendants that do not assert an interest in the land They

will be able to pursue those claims regardless of what happens with the Property. Since Plaintiff has no interest in the Property and cannot somehow reverse the foreclosure and reclaim the Property, anything Defendant CDM does with the Property cannot possibly result in harm to Plaintiff, much less irreparable harm.

Similarly, granting an injunction would not maintain the status quo but would effectively give Plaintiff Republic more rights in the Property than they ever enjoyed in the past. The status quo current is that Defendant CDM is the sole owner of the Property. By asserting an injunction over the land, Plaintiff is simply trying to re-assert and co-opt CPA's interest in the Property, an interest that was wiped out by last year's foreclosure. In other words, Plaintiff is attempting to use an injunction, just as it is using the *lis pendens* not as a shield to maintain the status quo, but rather as a sword to gain leverage over the Defendants. Equity should not allow this.

III PLAINTIFF REPUBLIC HAS AN ADEQUATE REMEDY AT LAW

Plaintiff Republic also has an adequate remedy at law for its grievances, namely the FOURTEEN causes of action for monetary damages. Ultimately, any recovery made by Plaintiff Republic is going to entail monetary damages. Since Plaintiff Republic has no interest in the Property, it cannot recover anything other than monetary damages.

Again, the purpose of an injunction is the preservation of the status quo. MailSource, 588 S E 2d at 638. A temporary injunction is used to preserve the subject of controversy in the condition which it is at the time of the [o]rder until opportunity is offered for full and deliberate investigation and to preserve the existing status during litigation. Id., Peek, 626 S E 2d at 37. The current condition of the Property is that it is owned solely and completely by Defendant CDM. Under clear South Carolina law, Plaintiff cannot challenge that ownership. As such, an

injunction would not maintain the status quo but would overturn it and create substantive rights for Plaintiff where none previously existed

IV IF THE COURT IS CONSIDERING IMPOSING A TEMPORARY INJUNCTION, PLAINTIFF REPUBLIC MUST PROVIDE A \$50 MILLION BOND TO COVER DEFENDANT CDM'S POTENTIAL LOSSES

Pursuant to Rule 65(c) of the South Carolina Rules of Civil Procedure, no temporary injunction shall issue "except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." As set out in the affidavits of CDM's manager, Ed Navarro, any injunction barring the disposal or transfer of the Property would result in enormous damages to CDM. CDM is already in the due diligence phase of a \$7 million purchase. Other potential buyers are considering a purchase of approximately 200 residential lots for an approximate sales price of \$14 to \$16 million. Several commercial developers are interested as well. The budgeted annual carrying cost alone on the Property is \$1.5 million.

Clearly, if Plaintiff's motion for a temporary injunction is granted, the harm to Defendant CDM would be substantial. CDM would immediately lose a \$7 million contract, would likely lose another \$14 million in residential sales, and would suffer long term indirect losses, all while still having to pay substantial carry costs on the Property. An injunction would jeopardize the entire project and CDM's \$50 million investment in that project. As such, a bond in the amount of \$50 million should be required before any injunction is placed.

CONCLUSION

All parties have acknowledged that Defendant CDM paid \$50 million to buy this Property out of foreclosure. That foreclosure went forward with Plaintiff's consent. Plaintiff

consented to Defendant CDM bidding on the Property Plaintiff consented to a mutual release with Defendant CDM Plaintiff never appealed the foreclosure order

When Plaintiff could not find a buyer for the project prior to the agreed foreclosure date, Plaintiff reneged on all of these agreements and delayed the foreclosure for months through a series of frivolous filings The Bankruptcy Court ruled that Republic improperly filed for bankruptcy The Federal District Court ruled that Republic was not entitled to injunctive relief Having struck out in Bankruptcy Court and Federal District Court and apparently unwilling to challenge the foreclosure in the only appropriate jurisdiction before the Master-in-Equity Plaintiff now seeks relief in the Court of Common Pleas

Just like Judge Norton in the District Court this Court should reject Plaintiff Republic's demand for injunctive relief Republic's proposed temporary injunction and *lis pendens* are legally and factually bankrupt Plaintiff Republic has never had an interest in the Property, and Carolina Park's interests in the Property have been irrevocably foreclosed on, both literally and figuratively Plaintiff's own attorneys have acknowledged that this lawsuit is nothing but a collateral attack on the foreclosure, something explicitly forbidden by South Carolina statute S C Code Ann § 15-39-870 As such, Plaintiff's pursuit of an injunction is nothing but a thinly disguised effort to hold CDM's Property hostage and gain leverage in this litigation

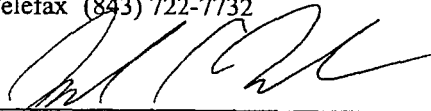
Plaintiff has failed to show that it is likely to succeed on the merits Plaintiff has failed to show that it will suffer irreparable harm if CDM is allowed to develop its Property free of Plaintiff's interference Rather than maintaining the status quo, any grant of an injunction would upset the status quo by giving Republic control over Property it never owned in the first place

If the Court is considering a temporary injunction at all, it must require an adequate bond to cover Defendant CDM's damages when it loses in excess of \$20 million in deals and suffers

untold amounts from the delay of the entire project Given the broad losses faced by CDM and the \$1 5 million a year cost in maintaining the Property, any bond must at a minimum cover CDM's \$50 million investment in the Property

Respectfully submitted,

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The Blake House
321 East Bay Street
P O Box 22437
Charleston SC 29413
Telephone (843) 722-7733
Telefax (843) 722-7732



Carl E Pierce II Esquire
Joseph C Wilson, IV, Esquire

ATTORNEYS FOR DEFENDANT CDM OF
CHARLESTON, LLC

4/22, 2011
Charleston South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by mailing or hand delivery in the manner prescribed by the applicable Rule of Civil Procedure

This 22 day of April 2011



STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 CAROLINA PARK ASSOCIATES, LLC)
 and REPUBLIC-CHARLESTON LLC, for)
 itself and on behalf of Carolina Park)
 Associates, LLC)
)
 Plaintiffs,)
)
 v)
)
 BENEDICT T MARINO, DOUGLAS H)
 DITTRICK, JOHN CHALSTY, MDC OF)
 CHARLESTON LLC and CDM OF)
 CHARLESTON, LLC,)
)
 Defendants)

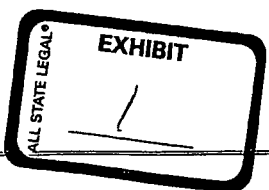
IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT
 CASE NO 2010-CP-10-6042

**SUPPLEMENTAL AFFIDAVIT OF
 EDMUND F NAVARRO**

PERSONALLY APPEARED before me, Edmund F Navarro, who, being duly sworn deposes and says

1 I am a Manager, of GLI Management LLC, the sole Manager of Defendant CDM of Charleston, LLC I submit this affidavit to supplement my prior affidavit and explain two of the more significant developments related to the Carolina Park Property in the last few months and how the lis pendens asserted by Plaintiff Republic Charleston LLC has adversely impacted the development of Carolina Park

2 On March 9 2011, Defendant CDM entered a Purchase Agreement with Carolina Park Apartments I, LLC Pursuant to this Purchase Agreement Carolina Park Apartments has agreed to purchase a significant tract of land from CDM ("Phase I) and has obtained an option on a second piece (' Phase II') We anticipate a purchase price of \$3,700,000 for Phase 1 and an additional \$3,300 000 for Phase 2 of this project



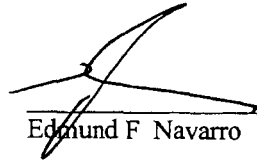
3 Pursuant to the Purchase Agreement, Carolina Park Apartments has 90 days to conduct due diligence from the date of the contract. If the lis pendens is not lifted by June 7, 2011 and CDM cannot deliver a clean title on the Property, Carolina Park Apartments can back out of the contract. I believe that they will exercise that right, and CDM will lose the deal if the lis pendens is not lifted. There are several other competitive locations in Mt. Pleasant that Carolina Park Apartments can go to if the lis pendens remains in place.

4 Also, CDM would like to have two or three home builders begin constructing homes in Carolina Park this year. We are unable to move forward on this because of the lis pendens. CDM has received very intense interest for residential lot purchases from well over a dozen national and regional builders. Some have expressed an interest in purchasing all the outstanding residential lots, which would be a multi-million dollar deal. The pursuit has been so aggressive that we have considered setting up an informal auction process. However, I cannot deliver good title to these builders with the lis pendens in place and just explaining the lis pendens to them could have an adverse impact on their interest in the Property.

5 We are currently in talks with several home builders to sell around 200 residential lots by the end of the year. We anticipate a purchase price between \$14 and \$16 million for this first round of sales. Further, in order to develop the rest of the Property, we need to get an initial sale completed and start construction. Getting this first deal off the ground will have a tremendous positive impact on the value and price of subsequent deals. As such, the lis pendens that is currently in place is not only hindering

current deals in excess of \$20 million it is having an indirect and negative impact on future deals

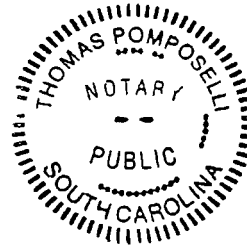
FURTHER AFFIANT SAYETH NOT


Edmund F Navarro

SWORN to before me this

20 day of APRIL 2011


NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 1/7/2015





REPUBLIC LAND DEVELOPMENT LLC

December 26 2010

Ms Maribel Luzunaris
 Bond Claim Department
 Hartford Fire Insurance Company
 1 Hartford Plaza T-4
 Hartford CT 06155

Re Claim No 564 S 46807
 Bond No 22 BSB BV5029

Dear Ms Luzunaris

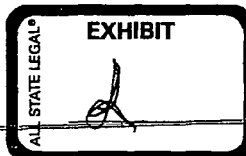
As we had previously notified our insurance agents at Willis of North Carolina when we received the original letters we believe this claim is not valid or appropriately asserted against us, or any of the guarantors. The notices from the Town of Mt Pleasant are dated August 23, 2010 however as of July 13, 2010 title to the subject property was sold pursuant to a foreclosure sale to the second lien holder CDM of Charleston, LLC. Upon that transfer of title CDM of Charleston LLC became liable for any such continuing obligations, and our surety should have been released or canceled. Accordingly Carolina Park Associates, LLC is no longer responsible for any of the underlying bonds or obligations relating to the development as of the date of the claim initiated by the Town. We will be happy to discuss this further with you. Please feel free to call me at (703) 537 3167 or Mr Stacy Hornstein at (301) 385-8041.

Very truly yours,
 CAROLINA PARK ASSOCIATES, LLC
 By Republic Charleston LLC
 Managing Member


 By David L. Peter
 its Manager

cc Jennifer Carson -- Wilhs
 Steven Grigg
 Stacy Hornstein
 Richard L. Kramer
 Alice Paylor Esq

9681-C Main Street Suite 200 Fairfax, Virginia 22031 Phone (703) 537 3160 FAX (703) 537-3179



From Alice Paylor [mailto:apaylor@rrhlawfirm.com]
Sent Thursday, March 03, 2011 10 21 AM
To Jay Claypoole
Subject Carolina Park

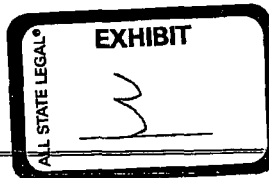
Jay -

Although we are in litigation over the status and propriety of the foreclosure transfer of title to the Carolina Park lands to your clients, and without waiving any of our claims under that litigation, we do not believe a conveyance by foreclosure removes Carolina Park Associates, LLC from its status as the Declarant under either the By Laws or the Declarations of the various associations. That said, there are a number of matters that require ongoing attention and oversight, which my client wants to ensure are appropriately managed. Among other things, tax returns and filing extensions need to be filed for each of the associations, which my clients had filed up and through 2009. To that end, Republic Charleston LLC, as Managing Member of Carolina Park Associates, LLC would propose to appoint two additional Directors of your client's choosing to each of the associations and sub associations (to complement Messrs Grigg, Marino and Peter, or three Directors if Mr Marino is no longer able to serve), with the expectation that they would in turn elect officers who are associated with your client's firm to manage the associations for the benefit of the project and that they would report regularly to us on the financial status, claims, operations, etc of the associations, for so long as the matters in litigation remain pending. We simply want to ensure that the property is appropriately managed, and that the associations follow their mandates for the Unit Owners in the project, and would acknowledge that as the present title holder, your client is best positioned to do so. Once the litigation is concluded, we would transition the duties and responsibilities accordingly.

Please let me know if your clients are in agreement with this

Alice

Alice Paylor
Attorney



ROSEN, ROSEN & HAGOOD, LLC
14 Merrimack Street, Suite 200
P.O. Box 89
Cheriton, South Carolina 29402-0089
Phone: 843-577-5757
Fax: 843-727-8030

(Certified Return Mailed)

Merrimack Street
Cheriton, South Carolina

14 Merrimack Street
Cheriton, South Carolina

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STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 CAROLINA PARK ASSOCIATES, LLC,)
 And REPUBLIC-CHARLESTON, LLC,)
 for itself and on behalf of Carolina Park)
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 Defendants)

IN THE COURT OF COMMON PLEAS
 FOR THE NINTH JUDICIAL CIRCUIT
 C/A NO 2010-CP-10-6042

DEFENDANT CDM OF CHARLESTON,
 LLC'S MEMORANDUM IN SUPPORT
 OF MOTION TO DISMISS

TO RICHARD ROSEN, ESQUIRE, ATTORNEY FOR PLAINTIFF REPUBLIC-CHARLESTON, LLC

This matter is before the Court on the motion of Defendant CDM of Charleston, LLC ("CDM") for dismissal of all claims against it asserted by Plaintiff Republic-Charleston, LLC, including claim asserted on behalf of Carolina Park Associates, LLC ("CPA") CDM's argument is simple Republic has released all claims against CDM arising out of Carolina Park other than claims for "fraud or willful misconduct" However, in order to assert a claim for fraud, Republic must show that CDM owes it some duty to disclose or fiduciary duty Since CDM was merely a subordinated lender to CPA, as acknowledged repeatedly in the Complaint, Paragraphs 17 and 57, it owed no duty to Republic Brown v C & S Real Estate Services, Inc., 314 S C 463, 445 S E 2d 463, 466 (Ct App 1994) ("Absent special circumstances, relationship between mortgagee and mortgagor is that of debtor/creditor, with no fiduciary obligations imposed on mortgagee")

Moreover, since CDM's limited role as a lender and not a partner was clearly set out in the CPA Operating Agreement,¹ Republic is charged with the knowledge contained in that Operating Agreement, and should not be allowed to plead the exact opposite of what it agreed to Burwell v South Carolina Nat'l Bank, 288 S C 34, 340 S E 2d 786, 790 (1986) ("One cannot complain of fraud and misrepresentation in the contents of a document if the truth could have been ascertained by reading it")

Finally, the only act that CDM is accused of is purchasing the subject Property out of foreclosure to protect its own standing as a secured lender. Since CPA was insolvent at the time, which Republic has acknowledged, Republic, as the manager of CPA, owed fiduciary duties to CPA's creditors, including CDM, not the other way around. Cumberland Wood Products, Inc v Bennett, 308 S C 268, 417 S E 2d 617, 619 (Ct App 1992)

Defendant CDM relies on the facts set forth in its Memorandum in Support of Motion to Cancel Lis Pendens ("Lis Pendens Memorandum") and it incorporates the relevant arguments and Exhibits from that Memorandum herein

LEGAL ARGUMENT

I PLAINTIFF REPUBLIC HAS SIGNED A MUTUAL RELEASE WITH DEFENDANTS

Plaintiff Republic has signed a Mutual Release with all Defendants releasing claims related to Carolina Park and CDM's mortgage "except for those claims arising out of the fraud or willful misconduct of any of the [Defendants]" Mutual Release, Page 2, Exhibit No 6 to Lis Pendens Memorandum

¹ Both the CPA Operating Agreement and the Mutual Release are exhibits to the Complaint and are referred to and incorporated into the Complaint. As such, they are both appropriately considered on a motion to dismiss. Rule 10(c), SCRPC (A copy of any plat, photograph, diagram, document, or other paper which is an exhibit to a pleading is a part thereof for all purposes if a copy is attached to such pleading.)

Plaintiff Republic has alleged sixteen different causes of action against all Defendants. Three of these causes of action allege breaches of contract that clearly have nothing to do with fraud or willful misconduct. Plaintiff's claims for breach of the Carolina Park Operating Agreement (Second and Fifth Causes of Action), and breach of the Mutual Release Agreement (Eighth Cause of Action) are plainly breach of contract claims that do not involve fraud or willful misconduct.

Plaintiff has apparently tried to circumvent this fact by alleging a "willful breach of contract," but it is well-settled in South Carolina that motive in a breach of contract case is irrelevant. Holland v. Spartanburg Herald-Journal Co., 166 S.C. 454, 165 S.E. 203, 205 (1932) ("There is no doubt as to the general principle that in an action for breach of contract the motives of the wrongdoer are not to be considered in estimating the amount of damages, and that he is only liable for such damages as are the natural and proximate result of the wrongful act.") Because the Mutual Release ends these claims, Plaintiff's claims for breach of the Carolina Park Operating Agreement (Second and Fifth Causes of Action), and breach of the Mutual Release Agreement (Eighth Cause of Action) should be dismissed.

II DEFENDANT CDM HAS NO DUTY TO DISCLOSE TO PLAINTIFF REPUBLIC BECAUSE THEY HAVE A CONTRATUAL LENDER-BORROWER RELATIONSHIP, NOT A FIDUCIARY RELATIONSHIP

Plaintiff Republic's other thirteen causes of action do allege some willful act but do not state a claim against Defendant CDM because the Complaint fails to allege a fiduciary relationship between CDM and Republic. Throughout its complaint, Plaintiff attempts to allege two different willful acts. First, Plaintiff complains that the Defendants failed to disclose their negotiations with Grove Land and usurped a corporate opportunity by entering an agreement with Grove Land. Complaint, Paragraphs 61-66, 83-84, 124, 145, 149, 152, 157, 164. Second,

Plaintiff claims that Defendants somehow deceived Plaintiff with regards to the Mutual Release provision that states ‘MDC agrees that it will not object to the filing of a petition in bankruptcy by CPA or otherwise contest the validity of such filing’ Mutual Release, Paragraph (1), Exhibit No 6 to Lis Pendens Memorandum Plaintiff complains that they interpreted this to mean that CDM would “consent” to bankruptcy, an argument already rejected by both Judge Waites and Judge Norton Complaint, Paragraphs 105-107, 111-112, 127-128, 134-135, 158, 164

In the first place, attempting to apply these failures to disclose to CDM is nonsensical CDM is now owned by Grove Land Because Republic has absolutely no relationship with Grove Land, there is no reason Grove Land, or the entity it now owns, has any duty to disclose to Republic negotiations Grove Land had with Republic’s partners Similarly, any provisions in the Mutual Release, or the Operating Agreement, imposing duties on MDC have nothing to do with CDM

From a legal standpoint, both of these allegations fail to state a claim against CDM because CDM does not have a legal duty of disclosure running to Republic Defendant CDM was never a member of Carolina Park and was otherwise never a partner with Plaintiff Republic The only relationship between Republic and CDM was that CDM was a secured creditor for Carolina Park and sold the property to Carolina Park, while Republic was the managing member of Carolina Park Put simply, this once removed relationship simply does not create any sort of duty to disclose or fiduciary relationship flowing from CDM to Republic “Absent special circumstances, relationship between mortgagee and mortgagor is that of debtor/creditor, with no fiduciary obligations imposed on mortgagee” Brown, 445 S E 2d at 466 (citing Burwell, 340 S E 2d at 790) Certainly, there is no fiduciary obligation flowing from a **subordinated** lender to a **member** of the borrower partnership

Republic has tried to circumvent the fact that CDM was a lender and not a partner through conclusive and entirely unsupported allegations that CDM was the alter ego of MDC Complaint, Paragraphs 4, 11, 79-84 The allegations in the Complaint, however, are directly contradicted by both the CPA Operating Agreement and in the Mutual Release, both of which are attached to and part of the Complaint In both agreements, Republic acknowledged and agreed that CDM was a lender and a separate entity from MDC

The definitions in the Operating Agreement identify MDC and Republic-Charleston as the members of CPA and CDM as the owner of the Property to be sold CPA Operating Agreement, Pages 2, 5, 7, Exhibit No 3 to Lis Pendens Memorandum The Operating Agreement recognizes that CDM's contribution of land is not a capital contribution CPA Operating Agreement, Page 11, Exhibit No 3 to Lis Pendens Memorandum The signature page identifies MDC and Republic-Charleston as the members, and acknowledges that CDM is merely signing the Agreement as the seller of the Property and only agreeing to the seller's warranties contained therein CPA Operating Agreement, Page 50, Exhibit No 3 to Lis Pendens Memorandum Exhibit A to the Agreement also lists Republic and MDC as the members of CPA CPA Operating Agreement, Exhibit A, Exhibit No 3 to Lis Pendens Memorandum

Similarly, at the end of their relationship, in 2010, Plaintiff Republic re-affirmed and agreed that its only partner in Carolina Park was MDC in the Mutual Release Mutual Release, Paragraph 1 Exhibit No 6 to Lis Pendens Memorandum Plaintiff Republic also acknowledged that CDM was a lender to CPA, that CPA was in default on that loan, and that CDM may credit bid at the foreclosure Consent Decree of Foreclosure and Sale, Pages 7-10, Exhibit No 6 to Lis Pendens Memorandum In short, at both the beginning and the end of Republic's relationship

with CDM, Republic acknowledged in writing that CDM was merely a lender and a separate entity from MDC. Both of these writings are attached to the Complaint.

As a sophisticated party, Republic's claims for fraud and misrepresentation must fail because it is bound by the express terms of the CPA Operating Agreement and the Mutual Release, both of which Republic signed. Burwell, 340 S E 2d at 790 (1986) ("One cannot complain of fraud and misrepresentation in the contents of a document if the truth could have been ascertained by reading it.") Any allegations that CDM was a fiduciary or partner to Republic are explicitly contradicted by the agreements signed by Republic. Similarly, any allegations that CDM and MDC are one and the same are also contradicted by the agreements signed by Republic. Republic simply cannot plead its way out of the clear notice it was provided and agreed to regarding the relationship between itself and CDM.

Despite their clear contractual relationship, Republic claims that CDM owes it a fiduciary duty to disclose and bases all of its claims on that duty. The existence of a duty owed is a question of law for the courts. Doe v. Batson, 345 S C 316, 323, 548 S E 2d 854, 857 (2001), Doe v. Marion, 361 S C 463, 605 S E 2d 556, 560 (Ct App 2004), aff'd, 373 S C 390, 645 S E 2d 245 (2007), Wright v. Craft, 372 S C 1, 640 S E 2d 486, 499 (Ct App 2006). "The Court must determine, as a matter of law, whether the law recognizes a particular duty." Charleston Dry Cleaners & Laundry, Inc v Zurich Am Ins Co., 355 S C 614, 586 S E 2d 586, 588 (2003), Wright, 640 S E 2d at 499.

South Carolina law simply does not recognize a duty to disclose, or other fiduciary duty, between a subordinated lender and the borrower's partner. "Absent special circumstances, relationship between mortgagee and mortgagor is that of debtor/creditor, with no fiduciary

obligations imposed on mortgagee ” Brown, 445 S E 2d at 466 (citing Burwell, 340 S E 2d at 790)

In order for one party to be a fiduciary to another party “one party [must be] in a superior position to the other and that such a position enables him to exercise influence over one who reposes special trust and confidence in him ” Burwell, 340 S E 2d at 790 ‘The facts and circumstances must indicate that the one reposing the trust has foundation for his belief that the one giving advice or presenting arguments is acting not in his own behalf, but in the interests of the other party ” Id. In Burwell, the Court found that sophisticated parties dealing in an arm’s length transaction did not rise to the heightened level of a fiduciary relationship

Furthermore, it is well established in South Carolina that “ where there is no confidential or fiduciary relationship, and an arm’s length transaction between mature, educated people is involved, there is no right to rely ” Pitts v Jackson Nat Life Ins Co, 352 S C 319, 334, 574 S E 2d 502, 509 (Ct App 2002) Accordingly, without a fiduciary duty or a right to rely, there can be no claim of fraud or misrepresentation or any of the other claims asserted by Republic relying purported willful misconduct arising from a duty to disclose

In fact, once CPA became insolvent, as Republic has acknowledged happened in 2009, Complaint, Paragraph 18, Republic, as the managing member of an insolvent entity, owed fiduciary duties to that entity’s creditors, including CDM “[W]hen a corporation becomes insolvent, or in a failing condition, the officers and directors no longer represent the stockholders, but by the fact of insolvency, become trustees for the creditors, and they then cannot by transfer of its property or payment of cash, prefer themselves or other creditors ” Federal Deposit Ins Corp v Sea Pines Co, 692 F 2d 973, 976-977 (4th Cir 1982), cert denied,

461 U.S. 928 (1982), Cumberland Wood Products, Inc. v. Bennett, 308 S.Ct. 268, 417 S.E.2d 617, 619 (Ct. App. 1992)

Republic and CDM are sophisticated parties that entered into an arm's length transaction to sell Carolina Park. The Operating Agreement clearly defined the role of CDM as a third-party lender with a junior mortgage. CPA Operating Agreement, Paragraph 6, Exhibit No. 3 to Lis Pendens Memorandum. Republic has not alleged that CDM violated any part of Paragraph 6 of the Operating Agreement.

The only thing that CDM did was purchase the Property out of foreclosure, something that it can clearly do under the Operating Agreement. Moreover, CDM disclosed its intent to credit bid its second mortgage in both the Mutual Release and the Consent Decree of Foreclosure and Sale signed by Republic. If CDM had not bought the Property in foreclosure, it would have lost \$22 million in secured debt as the junior mortgagee. The Complaint simply alleges measures taken by CDM to protect its own interests as a lender. The law does not require a lender to refrain from such exercise of prudence at the risk of becoming a fiduciary "big brother." Vercon Const., Inc. v. Highland Mortg. Co., 2005 WL 6158875 (D.S.C. July 21, 2005) aff'd, 187 F. App'x 264 (4th Cir. 2006).

Republic claims that CDM usurped a corporate opportunity by acting to protect its \$22 million investment. Since there was not a partnership or corporate relationship between CDM and Republic, CDM could not possibly have "usurped a corporate opportunity." Republic's claims are all based on the accusation that CDM owed Republic a duty to figure out a way to protect Republic and disclose everything to Republic. As a matter of law, no such duty exists. Accordingly, all the claims against CDM should be dismissed.

III REPUBLIC’S CLAIMS ON BEHALF OF CPA SHOULD BE DISMISSED BECAUSE REPUBLIC DOES NOT HAVE CONTRACTUAL OR STATUTORY STANDING TO ASSERT THOSE CLAIMS

In its memorandum in support of the motion to cancel lis pendens, Defendant CDM sets out in detail that Republic cannot assert claims on behalf of CPA. First, the CPA Operating Agreement requires both Republic and MDC to consent to any claims against “third parties.” CPA Operating Agreement, Paragraph 11(b), Exhibit No. 3 to Lis Pendens Memorandum CDM, as a lender and not a member of CPA, is plainly a third party. Lis Pendens Memorandum, Pages 20-21.

In addition, Republic has not complied with Rule 23(b) of the South Carolina Rules of Civil Procedure governing derivative actions, which requires that the party attempting to assert a derivative action set out the efforts it made to obtain consent from the other members to file said action. Lis Pendens Memorandum, Pages 21-22.

IV REPUBLIC’S CLAIMS THAT ATTEMPT TO ASSERT SOME INTEREST IN THE PROPERTY SHOULD BE DISMISSED BECAUSE NEITHER REPUBLIC NOR CPA HAVE ANY INTEREST IN THE PROPERTY

Plaintiff Republic’s First Cause of Action for Constructive Trust and Second Cause of Action for Injunctive Relief (as well as Republic’s Lis Pendens and Motion for Preliminary Injunctive Relief) are all invalid in that they seek to assert an interest in Property that Republic has no interest in. Although the issue is argued extensively in CDM’s Lis Pendens Memorandum, it can be boiled down to one inescapable argument.

Neither Republic nor CPA can collaterally attack a foreclosure by asserting a legal or equitable interest in the Property. By statute, a foreclosure is res judicata and simply not subject to collateral attacks. S.C. Code Ann. § 15-39-870, Robinson v. Estate of Harris, 378 S.C. 140, 662 S.E.2d 420 (Ct. App. 2008), aff’d, 390 S.C. 272, 701 S.E.2d 740 (2010), Lis Pendens

Memorandum, Pages 22-26 In other words, neither Republic nor CPA has any interest in the Property following a foreclosure that they consented to and never appealed

Usually, a constructive trust is imposed when a party obtains a benefit “which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty” SSI Medical Servs., Inc v Cox, 301 S C 493, 392 S E 2d 789, 793-94 (1990) Republic has acknowledged in its briefs that it has no interest in the Property following the foreclosure Further, it has not alleged that it has any interest in the funds provided by Grove Park to buy the Property in foreclosure Since Republic claims no interest in the Property or the funds that purchased the Property, it has no basis for a constructive trust over the Property Lis Pendens Memorandum, Pages 38-33 Republic can still pursue legal damages (assuming they can somehow circumvent the above arguments), but it cannot attach Property that CPA irrevocably lost in foreclosure and that was bought with third party funds

CONCLUSION

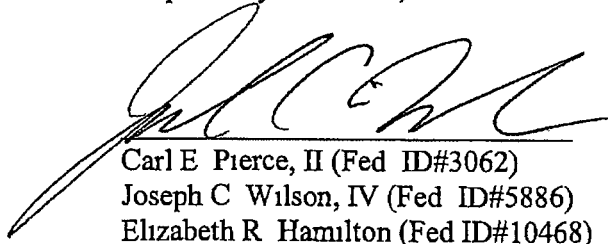
Based on the foregoing, Defendants respectfully request an order of the Court dismissing all claims against Defendant CDM on the following grounds

- 1 Republic has released all claims other than those based on willful misconduct,
- 2 Republic has not alleged any valid cause of action against CDM for willful misconduct because CDM, as the subordinated lender to CPA, owed no fiduciary duty or duty to disclose to Republic,
- 3 Republic does not have contractual or statutory standing to pursue claims on behalf of CPA, and

- 4 Republic cannot pursue claims against CDM's Property because it has no legal or equitable interest in that Property following a valid foreclosure

Respectfully submitted,

April 27, 2011
Charleston, South Carolina



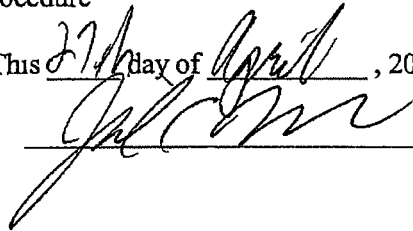
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CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by mailing or hand delivery in the manner prescribed by the applicable Rule of Civil Procedure

This 27th day of April, 2011



STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF CHARLESTON 2010-CP-10-6042

CAROLINA PARK ASSOCIATES,)
LLC, and REPUBLIC-CHARLESTON,))
LLC, for itself and on)
behalf of CAROLINA PARK)
ASSOCIATES,)

)
Plaintiffs,) TRANSCRIPT OF RECORD

)
-vs-) May 2, 2011

)
BENEDICT T MARINO, DOUGLAS) Charleston, South Carolina
DITTRICK, JOHN CHALSTY,)
MDC OF CHARLESTON, LLC,)
and CDM OF CHARLESTON, LLC,)

)
Defendants)

B E F O R E

The Honorable Roger M Young, Sr , Judge

A P P E A R A N C E S

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Attorneys for Defendants Benedict Marino,
Douglas Dittrick, John Chalsty, and MDC of
Charleston, LLC

JOSEPH WILSON, Esquire
Attorney for Defendant CDM of Charleston, LLC

1 (May 2, 2011)

2 MR ROSEN Some of these motions were
3 resolved The motions to quash subpoenas I think are
4 gone, and the motion to compel arbitration is gone

5 THE COURT Motion to quash subpoena is gone
6 And then there was a supplemental motion to quash?

7 MS PAYLOR That's pending, sir

8 THE COURT And a motion -- let's see She's
9 got written down here cancel lis pendens, to dismiss,
10 quash subpoenas, supplemental quash subpoenas, compel
11 return of privileged documents, and then motion to
12 compel So it might be a little more complicated than
13 that

14 The cancel lis pendens is still on, right?

15 MR ROSEN Right

16 THE COURT And then the one to dismiss is
17 actually -- is that the same thing? We've got motion to
18 dismiss or, in the alternative, compel arbitration, and
19 then there is motion to dismiss and cancel lis pendens
20 So the one we're dismissing or compel arbitration is
21 resolved?

22 MR WILSON Only the arbitration request

23 THE COURT All right That is resolved

24 MR WILSON Joe Wilson, for defendants CDM

25 THE COURT All right So let me go through

3

1 what I got in this notebook here First one is motion --
2 well, it's a memo, opposition to a motion to dismiss or,
3 in the alternative, compel arbitration That's gone,
4 right?

5 MR WILSON Just the arbitration part

6 THE COURT Just the arbitration part All
7 right So cancel lis pendens that's still on Compel
8 the return of privileged documents?

9 MR ROSEN Still on

10 THE COURT Compel the return of privileged
11 documents, still on I'm just looking through what the
12 notebooks were that got sent to me What else was there?

13 MR ROSEN There were a number of motions, I
14 believe, by CDM, defendant, to quash subpoenas based on
15 the arbitration motion, which has been withdrawn

16 THE COURT Okay So all those are over
17 The plaintiff has a motion to compel Plaintiff's
18 motions to compel what?

19 MR ROSEN Responses to supplemental
20 subpoena and also attorney-client issue

21 THE COURT Okay All right That's still
22 on All right Let me get straight here Who
23 represents who again?

24 MR ROSEN Your Honor, Rosen, Rosen &

25 Hagood, Richard Rosen, Alice Paylor, Elizabeth Palmer

4

1 represent the plaintiffs

2 THE COURT CPA and Republic, LLC?

3 MR ROSEN Correct, Your Honor

4 THE COURT Okay All right Joe, who do

5 you represent?

6 MR WILSON We represent CDM of Charleston,

7 defendant CDM of Charleston

8 THE COURT Okay And, Molly, how about you?

9 MS HUGHES Your Honor, I, along with

10 Trenholm, represent the remaining defendants, Benedict

11 Marino, Douglas Dittrick, John Chalsty, and then MDC of

12 Charleston, LLC, so the remaining four defendants, Your

13 Honor

14 THE COURT Marino, Dittrick, Chalsty and

15 MDC?

16 MR WALKER Correct

17 MS HUGHES And any motions filed by those

18 defendants, Your Honor, has been resolved, and you did

19 not recite any of them this morning I think Trenholm

20 had informed Mary that those had been resolved

21 THE COURT Okay All right So we got

22 everybody now?

23 MR WILSON Yes, Your Honor

24 THE COURT All right Well, why don't we go

25 ahead and start with, which is the probably the big one,

5

1 I guess, is to dismiss -- or dismiss or cancel the lis
2 pendens?

3 MR WILSON Yes, Your Honor

4 THE COURT All right Is that your motion
5 then, Joe?

6 MR WILSON Yes, Your Honor

7 THE COURT All right Go ahead

8 MR WILSON Your Honor, Joe Wilson
9 representing defendant CDM

10 As you pointed out, we're here -- from our
11 point of view, the most important motion to be heard
12 today is concerning a lis pendens that's been placed on
13 my client's entire property This is a property that my
14 client paid \$32 million in cash for, plus a credit to
15 them of another \$28 million, for \$50 million total

16 There is no question that that bid and that
17 money came from my client from a third party It has
18 nothing to do with Republic, was not acquired
19 fraudulently in any way, shape, or form, and was bought
20 at a foreclosure that the plaintiffs contented to in
21 writing, did not appeal, did not contest in any way,
22 shape, or form The plaintiffs have peddled the claims
23 in this case to Judge Waites in bankruptcy court who
24 rejected them, to Judge Norton in the federal district

25 Court, who rejected them, and have studiously avoided

6

1 going to Judge Scarborough, which is the only place they
2 could have contested this foreclosure, because they know
3 if you go to Judge Scarborough, you got to come with
4 money, and that is the one thing they decided they didn't
5 want to bring to the table, is money

6 And that's what I want to talk about in terms
7 of explaining how this development came to be, and, in
8 particular, where the money for it came from, so I have a
9 financial timeline that will follow the money here

10 This property is a very large development in
11 Mount Pleasant called Carolina Park, was originally
12 bought by Marino, Dittrick, and Chalsty back in 1998 In
13 2002 -- and this is how it looked back then There are
14 three different structures involved here First one is
15 pretty simple Marino Dittrick, and Chalsty bought this
16 property, held it in the name of CDM of Charleston Very
17 simple, members, landowner

18 In 2002, Republic approaches Marino, Chalsty
19 and Dittrick, and they decide to jointly develop this
20 property They form Carolina Park Associates, LLC, and
21 this is what the ownership structure looks like once they
22 enter that agreement, this operating agreement You have
23 two members -- well, first, let's start with the
24 landowner Landowner is Carolina Park Associates, the

25 plaintiff Republic is trying to sue on behalf of You

7

1 have two members, MDC of Charleston, which is Marino,
2 Chalsty and Ditttrick, and Republic, Republic is the
3 managing member, controls everything that goes on, and
4 you have lenders You have Palmetto Debt Holdings, an
5 entity that is not involved in this lawsuit, with the
6 primary mortgage, and CDM of Charleston, the original
7 owner, takes some cash and a mortgage, a second mortgage,
8 subordinated mortgage

9 So what happens is to get to this -- and just
10 so you understand the money, in 2004, Republic puts \$5
11 million in CPA \$3 million of that goes in cash to
12 CDM to buy the property, and then CPA gets the \$25
13 million loan from PDH, the big primary mortgage lender
14 In 2006 -- so the property is moving along, trying to be
15 developed, not a lot of sales going on They do have one
16 big sale to Roper Hospital in 2006 It's out there right
17 now \$5 million goes to PDH, \$4 million to CDM on its
18 note, and \$5 million back to Republic from that one big
19 sale

20 2009, we're in the middle of our recession,
21 property values are decreasing, and there is some serious
22 financial problems going on MDC agrees to put another
23 \$2 2 million in cash into this property to try to keep it
24 afloat Republic doesn't put anything into it at that

25 time 2009, late in 2009, Palmetto Debt Holdings, the

8

1 primary lender, initiates foreclosure proceedings, and

2 we're going to get into that in detail I'm just talking

3 about the money right now

4 2010, in the middle of the foreclosure,

5 CDM is talking with a new, entirely different third party

6 called Groveland, it's some outside investors, and reach

7 an agreement with them That agreement is if this

8 property goes into foreclosure, and only if it goes into

9 foreclosure, CDM will provide the cash -- I'm sorry,

10 Groveland will provide the cash to buy out the primary

11 lender, PDH, credit bid what CDM has, and will

12 essentially take over and become the managing partner of

13 CDM

14 They could have used another entity, but they

15 left it in the hands of CDM for tax reasons Otherwise,

16 it would have been, you know, Groveland Management

17 Property or something else, but they stick with CDM for

18 tax reasons

19 In 2010, after many, many efforts to delay

20 this, in July it goes to foreclosure The only person

21 bidding is CDM with Groveland's money, \$28 million in

22 cash to credit bid, in cash, and they credit bid the

23 second mortgage That's all the money This is how the

24 structure looks today

25 The landowner is back to being CDM The is a

9

1 controlling and managing member is a Groveland entity
2 that is completely a third party to this whole process
3 and is in the driver's chair, and Marino, Chalsty, and
4 Dittrick trusts are minority members, and they're kind of
5 sitting back in the wings

6 What this means -- I think it's important for
7 this Court to understand exactly what's going on with the
8 money, who's contributed to this project, and who has
9 not Marino, Dittrick and Chalsty, as CDM and MDC, they
10 put the land in Now, the value of this land is in
11 dispute Obviously, it's fluctuated some over the years
12 Complaint says it's worth 153 million The complaint
13 allegations there is a \$75 million offer for the land,
14 and the foreclosure values it at \$50 million

15 Marino, Dittrick, and Chalsty also took
16 \$7 million out, and in 2009 they put \$22 million back
17 in Groveland, as CDM, put \$32 million in, so their
18 combined contribution of the defendants today is they put
19 in the land, plus a net of \$27 million That's where
20 they stand

21 Republic, on the other hand, is asking for
22 help here when they put \$5 million into this project and
23 took \$5 million out That's not even counting their
24 development fees They have a total loss of zero sitting

25 here today, and that is why CDM owns this property and

10

1 not Republic, because CDM bought it in foreclosure

2 I think it's also important for the Court to
3 understand exactly what happened before that foreclosure
4 and everything that's gone on

5 In January -- there is a contention here --
6 well, first of all, back in December of 2009, PDH put it
7 into foreclosure, not CDM, not MDC, not anyone that is
8 anywhere today, but a separate lending for primary
9 mortgages In January -- everyone is scrambling around
10 to find a buyer before the foreclosure goes through

11 In January, Mr Marino e-mails Lucas Padgett,
12 who is the attorney for CPA, the plaintiff, and tells
13 him, we're talking with this third party, Groveland,
14 about buying this property out of foreclosure if you
15 can't find a buyer

16 In March, all the parties here today enter a
17 mutual release, and we would be talking about this mutual
18 release if there weren't so many other defenses, but it's
19 important for you to understand that there is a mutual
20 release entered by the parties that does two things Is
21 sets a date for the foreclosure for May 18th It's
22 basically a continuance to give Republic more time to
23 find someone, and they release all the claims against
24 each other, except for claims arising out of willful

1 So everyone thinks it's all done, and at the
2 same time -- let's see That's March They enter a
3 consent decree, a foreclosure, that sets the date of the
4 foreclosure by consent for May 18th and acknowledge the
5 right that CDM can credit bid the foreclosure And then
6 they enter the mutual release on May 13th May 17th, on
7 the eve of the foreclosure date Republic puts CPA into
8 bankruptcy without the consent of its partner, MDC, even
9 though it's very clear in the operating agreement they
10 got to have the consent

11 MDC doesn't say anything CDM doesn't say
12 anything PDH, who isn't here today, the primary lender,
13 jumps up and says, This is an improper bankruptcy, and
14 moves to dismiss it And, eventually, it is dismissed,
15 on June 17th

16 On June 30th, Republic files an action for a
17 TRO and injunctive relief, that's what they're here for
18 today, in front of Judge Norton, and that is all denied
19 on July 8 There is a motion to consider Judge Waites'
20 order There is an appeal to Judge Norton It just goes
21 on and on and on All this stuff is rejected by Judge
22 Waites and Judge Norton, and eventually, the foreclosure
23 finally does, indeed, take place on July 13th No
24 bidders except for CDM Mr Coggins, the white knight

25 that Republic is going to be touting to you, never shows

12

1 up, never has the money The only person with the money
2 is CDM

3 So that is kind of the factual background of
4 where we are, so we've got a lot of different arguments
5 I've got a whole list of them that I don't even know that
6 I'm going to really go through It's hard to pick which
7 one to talk about, but the main one, with regards to lis
8 pendens, is that this property has been through
9 foreclosure

10 The plaintiffs were foreclosed on The
11 foreclosure wasn't appealed Everything was done in the
12 world to stop it, but it went through The plaintiffs
13 agreed to the foreclosure They signed a consent order,
14 saying you can foreclose and CDM can bid on it Once
15 you've gone through that foreclosure, it is not subject
16 to collateral attack If there is anything to pull out
17 of the brief, and I apologize for the length of it, it's
18 that under South Carolina law, you cannot collaterally
19 attack a foreclosure It's not case law, it's a statute
20 15-39-80 Judicial sales shall be res judicata as to
21 innocent purchasers, even without confirmation

22 Even without notice You know, someone could
23 have an interest in the property, the foreclosure goes
24 through, that person can't undo the foreclosure It

25 might have a claim for damages, but they can't undo the

13

1 foreclosure

2 So what does this mean? Well, there is
3 another statute on that, follows right after this one,
4 15-39-880 All interest following a foreclosure, any
5 interest the debtor may have, is gone Any equitable
6 interest, any lien created by operation of law, nothing
7 can attach to this property following a public sale And
8 if there is anything that's clear about lis pendens in
9 this state is you've got to have a claim for interest in
10 the property, and you simply don't have one following a
11 foreclosure

12 You can't put a lien on it You don't have
13 an equitable interest Lis pendens and constructive
14 trust, which is all they're claiming here, they're
15 claiming an equitable interest in a property that's gone
16 It's black letter law You can look it up in CJS It's
17 in the foreclosure order All equitable rights are gone
18 A foreclosure is an equitable action, so it gets rid of
19 any equity they might have

20 And it's interesting -- I had a hard time
21 finding any case where someone is trying to assert a lis
22 pendens or a constructive trust after a foreclosure, but
23 the plaintiffs found some, and it's interesting what
24 these cases case These are cases cited -- may I

25 approach the bench?

14

f

1 THE COURT Yes

2 MR WILSON These are cases cited by the
3 plaintiff in their brief This first one is a California
4 case called Urez, and you just have to read the summary
5 at the beginning to see that this case is pretty much
6 right on point

7 It's a person, an entity, that was in a
8 partnership, and they have what the Court called a
9 defunct second trust It's defunct because there has
10 been a foreclosure, and they're trying to get a lis
11 pendens after their rights pre foreclosure, and the
12 Courts say, You can't do it This is an action for money
13 damages alone, and your equitable -- your constructive
14 trust claims are just tacked on to the end, and they
15 don't establish enough for a lis pendens

16 Another case that plaintiffs cite also
17 follows foreclosure, if I can approach the bench, this is
18 in re Brook Valley, and, again, someone from the Second
19 Circuit Court of Appeals someone is trying to assert the
20 constructive trust following a foreclosure And they
21 cite to it, and it's an interesting case because it
22 points up an important and fine distinction The
23 plaintiff in this case, in this case, someone -- it
24 involved some debtors in possession in a bankruptcy, so

25 obviously those debtors in possession owe a lot of

15

1 fiduciary duties to the bankruptcy estate, and they
2 manipulated the property and went and bought it out of
3 foreclosure at a reduced price, something you clearly
4 can't do as a debtor in possession

5 And so this points out three really important
6 facts I think this Court needs to understand First,
7 what makes it clear here is once there is a judicial
8 sale, it's done You can't go back after the property,
9 and that makes it very clear Secondly, it points out
10 all the duties that debtors in possession owe to the
11 bankruptcy estate, just like Republic, once that property
12 became insolvent, owes duties to its creditors CDM

13 So what Republic is doing here is they're
14 turning the law on its head They're saying that CDM,
15 the lender, owed them fiduciary duties when, in fact, the
16 law is very clear it's the other way around Once an
17 entity is insolvent, and if they've acknowledged in their
18 complaint that it was insolvent in 2009 and in
19 foreclosure, once that happens, the fiduciary duties flow
20 from the people who are managing that property to the
21 lenders

22 So that's also pointed out in the Brook
23 Valley case, and last but not least, and, most
24 importantly, the plaintiff has cited Brook Valley to

25 assert a constructive trust over this entire property,

16

1 but that's not what's going on in Brook Valley Even
2 when you have people breaching fiduciary duties and going
3 out and buying something after -- at a reduced price at a
4 foreclosure, the Court is not talking about imposing a
5 constructive trust over that property The Court says
6 that that would be a collateral attack on the
7 foreclosure

8 You can't do it The constructive trust
9 that's being discussed here is a constructive trust over
10 the profits that those partners might be making, and that
11 is all, not over the entire property, but over the
12 profits

13 And that is an important point here too If
14 Republic is entitled to anything -- I mean, their
15 complaint is about usurping a corporate opportunity, and
16 that is directed at the partners MDC What are they
17 entitled to if they're successful on that claim? Are
18 they entitled to take this whole property back, with all
19 the mortgages paid off, after CDM, with third party
20 money, paid \$32 million for it? No At most, they would
21 be entitled to a constructive trust over half of what
22 MDC is getting, because they were 50/50 partners At
23 most, that is what they would be entitled to

24 So there is a real distinction here between

25 trying to put a lis pendens and a constructive trust over

17

1 this entire development versus seeking a constructive
2 trust just over the profits, the lost corporate
3 opportunity, whatever MDC is going to be making, and that
4 is going to be way on down the road

5 The other big point -- I want to talk about
6 the constructive trust. Of course, because they don't
7 have any kind of legal interest, legitimate legal
8 interest in the property, plaintiffs are going to
9 constructive trust route, and there is one case, the
10 Findley vs Hughes case. It's a 1952 federal district
11 court case that says you can rely on a constructive trust
12 to assert a lis pendens.

13 So you got to look at what do you have to
14 show to get a constructive trust? You got to show that
15 someone took something that didn't belong to them. It's
16 put in Findley vs Hughes, the plaintiff, quote, claims
17 an equitable lien, which, remember, you can't do under
18 the statute, in each of the set above described
19 properties by reason of the defendant having purchased
20 said real estate with funds he held in trust for the
21 plaintiff.

22 If CDM or MDC had gone out and somehow
23 obtained Republic's funds and bought the property with
24 those funds, we would be having a different conversation,

25 but nobody has ever claimed that These funds to buy

18

1 this property came from a third party, totally unrelated

2 to Republic

3 CDM owns this land because it showed up at

4 the foreclosure with cash It doesn't own this land

5 because they defrauded Republic, it doesn't own this land

6 because they lied to Republic, it doesn't own this land

7 because they manipulated MDC to do something, it doesn't

8 own this land because it breached a fiduciary duty It

9 owns this land because it had money, waited for the

10 foreclosure that was delayed repeatedly, it showed up and

11 was the only bidder at that foreclosure

12 The other problem with the constructive trust

13 is Republic hasn't identified anything that CDM did

14 wrong, and, again, it's important to remember CDM is the

15 lender MDC is the partner They've alleged basically

16 two problems with what went on among the defendants

17 One, they said CDM or MDC -- well, they say the

18 defendants usurped the corporate opportunity Well, in

19 this case, CDM is the corporate opportunity I mean,

20 that's -- CDM is the corporate opportunity that was

21 brought to the table, the \$32 million

22 CDM didn't do that If anyone did it, it was

23 MDC It's certainly not saying we support our

24 codefendants here, but CDM didn't do that MDC allegedly

488

1 The other thing they're complaining about is
2 this mutual release. In the mutual release that was
3 signed back in May, there was a provision that MDC would
4 not object to the foreclosure -- I'm sorry, to the
5 bankruptcy, would not object if Republic filed for
6 bankruptcy, and there are complaints with that

7 They filed for bankruptcy, and then
8 MDC wouldn't consent to it, and there was a big fight
9 over if not objecting to, consenting are the same thing
10 Judge Norton rejected it, Judge Waites rejected it. The
11 point here is that was an MDC obligation. It has nothing
12 to do with CDM. It didn't say CDM would not object to
13 the bankruptcy. It said MDC would not object, so they
14 haven't identified anything that CDM, standing alone, has
15 done

16 Instead, they're trying to mash together MDC
17 and CDM under an alterego theory, and that is why this is
18 not going to work. There are many, many reasons

19 First, under an alterego theory, just like
20 any piercing of the corporate veil theory, you have to
21 show some sort of fraud. You have to show misuse of the
22 corporate form. They've cited a lot of Delaware cases
23 because the CPA operating agreement is governed by
24 Delaware law. Delaware law is even more strict than

25 South Carolina law about having to show fraud

/ 20

1 The alterego theory requires the corporate
2 structure caused fraud or similar injustice
3 Effectively, the corporation must be a sham and exist for
4 no other purpose other than as a vehicle for fraud
5 South Carolina law is not the same The instrumentality
6 theory would not apply, even in the presence of total
7 domination without some misuse of control by the dominant
8 corporation

9 This just goes back to the point I made
10 before CDM owns this property because it showed up with
11 money It didn't manipulate MDC to do something It
12 showed up with money There is no misuse of the
13 corporate form here, nor is it alleged Alterego theory
14 in South Carolina, that's for third parties looking in
15 for a project and trying to make a lender responsible for
16 the project

17 In this case, you've got a partner in the
18 project making that claim, even though that partner has
19 signed an operating agreement that identified CDM as a
20 lender and not a lender They signed a mutual release
21 that recognizes the same thing They have signed a
22 foreclosure that recognizes the same thing, and it's
23 helpful to look real quickly at the operating agreement
24 This is going back to the CPA operating agreement

25 The signature page on it, just so it's

21

1 crystal clear, this is a signature page of the big
2 operating agreement, members, Republic, MDC Below the
3 line, Republic -- their national entity is signing it
4 because they've got some duties under it, but they're not
5 a member They're signing it because they've got some
6 duties, and even further down, CDM is signing it because
7 they combined this operating agreement with the sale, and
8 they're only signing it for paragraph six

9 So the whole operation agreement is replete
10 with recognizing CDM as a lender, not a member That
11 operating agreement is attached to the complaint It's
12 part of the pleadings You can sit there and plead the
13 exact opposite of something you agree to for five years
14 and operated under for five years

15 They can plead alterego all they want, but
16 once they sign a contract and attach it to the complaint
17 that says MDC and CDM, they're affiliated, they have
18 similar owners, but CDM is a lender and not a partner,
19 that resolves the issue This isn't a third party
20 looking from the outside in

21 So just a word about -- this argument, I mean
22 all of these points are to cancel the lis pendens, and
23 there are also points on a motion to dismiss this
24 constructive trust claim There has been some discussion

25 about the standard of review that we're looking at here,

22

1 especially with regards -- we all know what it is for,
2 motion to dismiss, but for a lis pendens, what should be
3 the standard of a review from motion to cancel lis
4 pendens? And it's in statutes 15-11-40 It's a poorly
5 worded statute, but what's very clear is that the phrase
6 good cause shown is in there

7 Number two Every case that's looked at a
8 motion to cancel lis pendens, and particularly the Palm
9 Partners case, has said you absolutely have to look at if
10 there is an interest in the property, a legitimate
11 interest in the property, and you have to scrutinize that
12 carefully to make sure that complying with the statutory
13 requirement that there is a legitimate claim in the
14 property

15 Now, plaintiffs have gone outside of South
16 Carolina and cite some black letter law and some CJS I
17 would urge you to go look at the CJS, the lis pendens,
18 the whole section 39 It's 54 CJS lis pendens section
19 39, because that goes on about a probable cause standard
20 and even acknowledges that a technically proper lis
21 pendens can still be cancelled on equitable principles
22 if, in the discretion of the trial judge, the benefits of
23 the notice are far outweighed by the damages and causes

24 And that's kind of our last point We

25 submitted some affidavits This is not a game My

23

1 clients have \$32 million invested in this property They
2 currently have a contract to sell some apartment
3 buildings for \$7 million With this lis pendens that's
4 in place in June, that contract is going to fall through

5 My clients have national builders beating
6 down their door They anticipate, without this lis
7 pendens in place, another \$12 to \$14 million in deals by
8 the end of the year Of course all of that is going to
9 be scuttled Nobody is going to buy a property with a
10 lis pendens on it So this is having some very real and
11 very immediate impact on my client

12 This is a property that has been through
13 bankruptcy once because of Republic's actions It's been
14 through a foreclosure There is a shadow over it This
15 lis pendens only accentuates that shadow and makes it
16 worse, both in the immediate future and the long-term
17 future, and it's not serving any purpose in this case,
18 other than trying to gain some leverage over my clients

19 So I just want the Court to keep in mind and
20 remember that this property has been through a
21 foreclosure That foreclosure wiped out all of the
22 rights that the plaintiffs have, legal, equitable,
23 everything, gone You can cancel this lis pendens,
24 Republic can pursue their claims in tort for damages

25 against whoever they want to, but they won't be allowed

24

1 to use a lis pendens as a sword hanging over our head
2 and, you know, continuing to be involved in the
3 management of the property, which is exactly what they're
4 doing

5 Thank you, Your Honor

6 THE COURT Ms Hughes, you or Mr Walker
7 want to chime on anything before I turn it over to
8 Mr Rosen to respond on this issue?

9 MR WALKER No, Your Honor Thank you

10 THE COURT Mr Rosen?

11 MR ROSEN Thank you, Your Honor We all
12 have to have boards in this case

13 If I could, I would like to first address
14 some things that Mr Wilson said which I have to take
15 some exception Judge Waites has never been involved in
16 this case, as far as I know The district judge was
17 Judge Norton, and the bankruptcy judge was Judge Duncan

18 THE COURT I think you misspoke

19 MR WILSON Yes

20 MR ROSEN I think as everyone knows, Judge
21 Norton issued an order in federal court vacating all
22 findings of fact in all orders So there is nothing in
23 the federal court that happened that's of any moment here
24 or can be relied on So Judge Norton just said, I'm not

25 going to give you an injunction and go across the street

25

1 and file your lawsuit, which is what we did. So that
2 brings us to you.

3 The characterization of facts by Mr. Wilson
4 is, of course, not before you. What's before you is a
5 motion to dismiss a pleading. That's the only motion
6 involved here. This is a motion to dismiss the complaint
7 and a motion to dismiss the lis pendens, and, of course,
8 the standard on this motion is very clear in this state.

9 The Court is to look at the allegations of
10 the complaint to determine if the allegations of the
11 complaint set forth the cause of action, and as to the
12 lis pendens, do they set forth the cause of action for
13 constructive trust?

14 THE COURT: Let me ask you this. Kind of
15 short circuit to kind of where I see this going, so I'll
16 let you address it, is the remedy that the Brook Valley
17 Court came up with was to allow -- all that, I gather,
18 was a nonjury trial and ultimately found and imposed a
19 constructive trust on the gains from the net proceeds of
20 the property, and isn't that really what we need to do
21 here, is dismiss the lis pendens because the property has
22 been foreclosed on, and there is just no way to
23 collaterally attack that.

24 So at the end of the day, I see the lis

25 pendens getting cancelled, however, again, this is a

26

1 motion to dismiss It's not summary judgment, but just
2 looking at the pleadings, I think you probably have pled
3 enough to go forward with a cause of action for
4 constructive trust as to the profits of the deal that you
5 were signed up for and that perhaps you might need to
6 amend your complaint since you have alleged it to be --
7 ultimately let us back in and develop the deal -- well,
8 that's just not going to work, and the cloud hanging over
9 the title is effectively going to shut the project down

10 But the deal is -- but to allow the lis
11 pendens to stay in place is an improper collateral attack
12 on the foreclosure sale, and your client's interest in
13 that is extinguished as to the real property, but that
14 does not mean they were not entitled to the benefit of
15 the bargain which they contracted for

16 How you get there is probably through, you
17 know, a constructive trust claim -- well, that would be
18 your remedy Constructive trust as to the gains from
19 that breach of fiduciary duty is probably the vehicle
20 that you use to get there, but that's ultimately where --
21 I mean, I kind of see that's where we're heading

22 So now that you have my thinking -- you think
23 about that

24 MR ROSEN Let me say this At the end of

25 the day, after all the depositions have been taken, the

27

1 subpoenas have been complied with, the e-mails have been
2 produced, and we got a full record of what the facts are,
3 Your Honor may come to that conclusion. The question
4 today is, does it -- and I think Your Honor concedes the
5 complaint pleads enough facts to justify imposition of a
6 constructive trust. Now, your question is, is the lis
7 pendens appropriate, and the answer is yes.

8 I think some of the facts that maybe have
9 been twisted a little bit. A lot of what Mr. Wilson
10 said, of course, are not facts, and they're not in the
11 record, but one thing in the record is that he says
12 the operating agreement. They act as if CDM was a new
13 company that put in \$38 million and therefore they should
14 be immune from lis pendens.

15 CDM has been in existence since 1998 and has
16 not changed. It's the same company that entered into an
17 agreement with my client and became a fiduciary. They
18 became a fiduciary because CDM is defined in the
19 agreement as an affiliate. An affiliate in this case, in
20 this, means CDM controls and is controlled by MDC. These
21 are two entities with letters spelled backwards. This is
22 Marino, Chalsty and Dittrick. However you want to flip
23 those names around, these are the same three
24 gentlemen that orchestrated this coup.

25 And, of course, what they did was found a

28

1 corporate opportunity in Grove, Grove Investments
2 Everybody was looking for one at the time Everybody was
3 looking for somebody to pump some money in and take out
4 this first mortgage, which was upheld by PDH after buying
5 it at a discount from the bank PDH bought this note at
6 a big discount, brought the foreclosure

7 Everybody is trying to find the buyer There
8 was a contract outstanding for \$75 million Mr Marino,
9 in one of his affidavits or testimonies, has said, it's
10 in the record, he believed if the bankruptcy went
11 forward, that contract would close, in which event they
12 would share

13 Now, they found another investor In this
14 case, it's very similar to the Brook Valley case, with
15 the exception that for whatever reason the law in Brook
16 Valley didn't go so far as to allow lis pendens, but what
17 it does say in these circumstances is they've got
18 fiduciary duties, and if they find someone who has got
19 the available resources to pay out the first mortgage and
20 preserve this property, then they have an obligation to
21 bring that deal to the LLC, to Carolina Park Forget
22 Republic They had an obligation to Carolina Park
23 So --

24 THE COURT I get all that, but the problem

25 is, is that the situation is untenable as it stands right

29

1 now with somebody -- you got a lot of money tied up, and
2 you've got people that don't get along trying to say,
3 Well, I control the deal, and so what is going to end up
4 happening is everybody is goes to lose twice

5 Now, under your scenario is there was real
6 money paid to pay off that first mortgage, \$28 million,
7 so your clients didn't put anything into that at that
8 bid, so, you know, for them -- and the other side, while
9 they got a second party in to fund a second mortgage, the
10 bottom line is a combination of real cash and a credit
11 bid is \$50 million

12 So even if you were able to say, okay,
13 everybody gets fairy dust sprinkled and gets in a better
14 mood and can work it out, your clients aren't going to
15 get anything until we start talking about net money But
16 the people that put in money first, the real money, get
17 it out first, so it's net profit that gets distributed to
18 people

19 Now, it's not possible at this point in the
20 game to figure out what net is, but for this point in the
21 process, you go, well, let's look at what the remedy
22 ultimately could possibly be And it's going to be net,
23 and net, for somebody else to decide, if it's a jury down
24 the road, if it's me if you decide to go nonjury down the

25 road, but that's always going to be what the outcome is,

30

1 is your folks are going to be entitled to net

2 They haven't put anything in at this point to

3 salvage the deal and get it back over in these hands and

4 get it out of foreclosure, so they don't get to say,

5 well, pay us back our expenses out of it Maybe

6 ultimately they'll figure out some way to get back that

7 ten I think they put in or what, five or ten, whatever

8 they put in, for operating money up front

9 But at this point, under your theory of they

10 did wrong, they were supposed to bring that deal to us

11 and they didn't bring it to us and we're entitled to the

12 benefit of that bargain, that's how we get to the same

13 place and still get the possibility of there ever being a

14 net profit, because there is no possibility of a net

15 profit happening at this point with two parties that do

16 not get along, and somebody has got to develop the

17 property

18 MR ROSEN If I could like to address two

19 points Your Honor is raising, number one The benefit of

20 the bargain is ownership That's what my clients had

21 They had ownership They own this property, and as a

22 result of this deal, they should have still had

23 ownership Maybe in a different form That's what the

24 case is about It's not about profits as much as

25 ownership in the property

31

1 THE COURT What does that get you, other
2 than profit?

3 MR ROSEN A voice at the table It gets
4 them a voice at the table

5 THE COURT And what does that get you?

6 MR ROSEN Control of the property

7 THE COURT And what does that get you?

8 Ultimately, it's about the money It's always about the
9 money

10 MR ROSEN Ultimately --

11 THE COURT My econ professor always said,
12 Rule number one It's about the money Number two If
13 they say it's not about the money, they're lying, because
14 it's about the money This is not to have a sticker on
15 your shirt that says, I own this piece of property on the
16 road It's about the profits from the sale and
17 development

18 MR ROSEN I understand that

19 THE COURT You still get there, or at least
20 you get a seat at the table when the checks are divided
21 up under the theory that the case moves forward on
22 constructive trust, breach of contract, breach of
23 fiduciary duty You still get ultimately what you got if
24 you kept title to the property and somehow found all

25 these buyers

32

1 MR ROSEN Your Honor, we appreciate it, and
2 I think putting an injunction or a trust on the funds is
3 great We're all in favor of that What is asked for in
4 the case is a constructive trust over the property so
5 that ownership can be returned where it rightfully should
6 be That's what the case is, and, in the alternative for
7 damages

8 So I know that Judge Scarborough, at least on
9 one occasion I know of, did exactly what you said, he put
10 a constructive trust on the property

11 THE COURT It's not putting one on I'm
12 just saying at this point I'm not dismissing a
13 constructive trust cause of action It's just -- I'm
14 dismissing the lis pendens so that the property can be
15 developed and sold There is going to be an accounting

16 MR ROSEN Let me point out, so far, other
17 than the argument heard this morning, there is no
18 evidence that the developer of the property has been held
19 up by lis pendens

20 As a matter of fact, Republic and the
21 defendants have cooperated and consented on various
22 easements that the town of Mount Pleasant wanted to put
23 on and the Mount Pleasant Water and Sewer Authority, so
24 nothing has stopped any development so far What has

25 happened is we got phone calls from the other side They

33

1 say, We've got this deal We've got this opportunity

2 Will you release his pendens?

3 We say yeah Let us tell you about this deal

4 because you should know X, Y, and Z So, for example,

5 that is what has been happening I haven't heard any

6 complaints from anybody that Republic or Carolina Park

7 has been difficult

8 THE COURT There is some allegations about,

9 you know, easements with Mount Pleasant Water Work, but

10 I'm not getting into the evidence part of it All right?

11 I mean, that's not appropriate for this stage

12 This stage is to look at that time and go,

13 Can you attack collateral or attack mortgage foreclosure

14 sale? Very, very, very difficult

15 MR ROSEN The Deer Valley case -- Brook

16 Valley, that Mr Wilson cited, has an interesting

17 paragraph on that very issue, and what it says is

18 cogently, this is not a collateral attack on foreclosure

19 As a matter of fact, this claim arises because of, as a

20 result of, after the foreclosure That's the whole

21 point

22 THE COURT And that is still the point

23 MR ROSEN Right

24 THE COURT The bottom line is, we don't get

25 to upset the foreclosure sale, and to put -- to upset the

34

1 title of record in any way, shape, or form is an improper
2 attack, collateral attack, on the foreclosure sale

3 So do you have a theory or a mechanism by
4 which you get to share in the profits that you would have
5 got had the property not gone through foreclosure?

6 MR ROSEN Sure, yes

7 THE COURT You got that I think you do, at
8 least at this point Whether or not you're ultimately
9 successful, I have no idea, but you still get to go
10 forward on the theory of breach of fiduciary duty, all
11 your causes of action, and I would say you amend your
12 complaint to allege a constructive trust over the gain or
13 net property or however you want to phrase it, but that's
14 what you would -- if you feel like it's necessary, again,
15 I would have to go back and look at the complaint to say
16 one way or another, but I think you probably ought to
17 amend your complaint to take off the allegation that you
18 are entitled to the title to the property

19 MR ROSEN We have never alleged that the
20 plaintiffs are entitled to the title of the property

21 THE COURT That's the only reason why you
22 can file a lis pendens, otherwise, you're subjecting
23 yourself to serious causes of action for abuse of
24 process Because if you do not want, ultimately, the

25 title of property back, then not only are they entitled

35

1 to have it cancelled and sue your clients for abuse of
2 process, so that has to be your theory

3 MR ROSEN Your Honor, Palm Place Partners
4 and the Findley case both says that a lis pendens is
5 proper and a constructive trust is proper to protect an
6 equitable interest in property, which, as Your Honor
7 points out, is the beneficial ownership, but not title
8 Title not required for a constructive trust or lis
9 pendens, and those cases are clear -

10 THE COURT It is for a lis pendens, it is
11 not for a constructive trust, because, as I keep trying
12 to tell you, you can still allege constructive trust over
13 the profits that would, if any are ever made out of this
14 sale, but it's the profits

15 MR ROSEN Could I read to you a little bit
16 from Findley?

17 THE COURT Sure

18 MR ROSEN Findley says the doctrine of lis
19 pendens applies to all suits or actions which directly
20 affect real property, and not only those which involve
21 the question of fact, not only those which involve the
22 question of fact, but also those that are brought to
23 establish an equitable interest

24 That's the position of the South Carolina

25 appellate courts, and Findley was a fellow case, Palm

36

1 Place adopted that, and the Fourth Circuit has said that
2 is the law of the South Carolina in FDIC versus Jones
3 So all I'm saying, it is not necessary for plaintiff to
4 seek title It is only necessary for the plaintiff to
5 show that the property was improperly taken from the
6 plaintiff, the plaintiff has an equitable interest in the
7 property, and the plaintiff is entitled to constructive
8 trust on the real estate

9 That is what these cases say This is the
10 law that we followed This is why we brought the action
11 the way we did because these cases are a road map for how
12 these cases are resolved in South Carolina, in state
13 court and federal court

14 So I think the lis pendens is proper to the
15 extent that we've alleged an equitable interest, to the
16 extent we've alleged fiduciary duties, to the extent
17 we've alleged that there is a limited liability company
18 in which one member and another entity control that
19 member, violated fiduciary duties, the Courts say you are
20 entitled to a constructive trust, and, of course, in
21 Brook Valley, that happened, and maybe the Court there,
22 because it was a bankruptcy, said, It's going to be a
23 constructive trust over the funds

24 But, Your Honor, right now there is a lis

25 pendens that protects my client and all subsequent

37

1 purchasers If Your Honor would have cancelled that --

2 THE COURT Protects them from what?

3 MR ROSEN From losing their equitable

4 interest in the property This is a deal that should

5 have been brought to them It wasn't

6 THE COURT At the end of the day, don't your

7 clients want the money?

8 MR ROSEN Sure

9 THE COURT Is not what I'm saying that you

10 still get your money? You still got a vehicle to get to

11 the money? Because somebody has got to develop this

12 property Somebody has got to be in control and sharing

13 it and going and saying, All right We got to put it all

14 back while you're developing it It's just not a

15 workable situation And it upsets and, in fact, it

16 supplants the foreclosure, and it is an improper

17 collateral attack on it

18 Your people, if they got buyers, send them

19 over there, and I'm sure they'll get you -- it gets you

20 to the point where you want to be sooner against them to

21 pay off all the expenses to get to the net profit, which

22 is what people are --

23 MR ROSEN If you were to issue an

24 injunction today and say to the defendants, You cannot

25 disburse any money from this project without Court

38

1 approval, the Court has got to be involved in the

2 operation of this project

3 THE COURT No, not necessarily It could be

4 an accounting I'm not agreeing at this point that a

5 receiver needs be to put on the property I don't know

6 that anything needs to be done in that respect

7 MR ROSEN You're not talking about an

8 injunction?

9 THE COURT What?

10 MR ROSEN If you're not talking about an

11 injunction, then a lis pendens is the only protection our

12 client has It's got to be one or another

13 THE COURT They're ultimately entitled to a

14 money judgment, and they're at risk, no more, no less,

15 than any other client that has ever been before me

16 MR ROSEN Your Honor, the possibility of

17 recovering a money judgment from these defendants would

18 be speculative at best You've got a single purpose

19 LLC set up to help this property If they spend the

20 money, if they don't use it wisely, if they mess up the

21 development, if they distribute fees to themselves, how

22 will we ever recoup that money? The lis pendens prevents

23 that An injunction would prevent that

24 THE COURT Why couldn't that be said just in

25 the opposite? If I say in the meantime, Okay The lis

39

1 pendens stays, then your clients are going to be running
2 the show, and they're sitting there going, We're totally
3 at risk

4 MR ROSEN Our clients would have to be
5 consulted on the sales and real estate They would have
6 to be consulted and say, Would you release your lis
7 pendens on this seven acres so they've done it already

8 They've released the lis pendens as to the
9 easements They've done everything they've been asked to
10 do so far They've agreed, but the point is that the lis
11 pendens protects their ultimate interest in the real
12 estate and yes, in profits, but to cancel it gives the
13 defendants a free hand that says go do what you want to
14 do, and they may end up poorly developing it, developing
15 it and make a lot of money, and they may end up spending
16 all that money and hide that money so we never get a
17 chance to recover That is the purpose of lis pendens,
18 is to protect and to give notice to the public

19 The case law is very clear that it's allowed
20 in South Carolina to protect an equitable interest We
21 have pled all the elements necessary There are no facts
22 that are before you that contradict what's been pled in
23 the complaint

24 Yes, an injunction would be an alternative,

25 but that would have to be a real court injunction that

40

1 says I'm going to lift the lis pendens, but I'm going to
2 protect the plaintiff by requiring that all income be
3 escrowed and disbursed only on Court approval That
4 might be able to be short cut in many different ways with
5 the receiver, by agreement, by consent motions, but to
6 leave the property free with no protection eliminates the
7 plaintiff's claim, in essence

8 Think is why Courts have allowed lis pendens
9 This is why I think Judge Scarborough said, I'm going to
10 let you develop property to one defendant, but I'm going
11 to impose an injunction so you have to account for all
12 funds and keep the funds, so that is the only
13 alternative

14 THE COURT I thought I mentioned that a
15 minute ago

16 MR ROSEN Well, if you have an injunction,
17 the accounting works If you don't have an injunction,
18 the accounting can be useless remedy

19 THE COURT I can order that they produce a
20 regular accounting to you in the interim

21 MR ROSEN And what protection do we have
22 that the money doesn't get spent?

23 THE COURT Well, I mean, if it looks like
24 it's improper, you bring it to my attention and then I

25 can always review it and say, Look, this is an improper

41

1 distribution Put that receiver in place

2 MR ROSEN Sure If distributions are based
3 on Court approval, there's protection

4 THE COURT Well, I'm not going to sit here
5 and do them on a weekly basis, but on some kind of -- you
6 know, I don't know exactly what would be fair and
7 reasonable, but I could say quarterly, every six months,
8 something along those lines, but, I mean --

9 MR ROSEN Subject to Court approval I
10 mean, otherwise, you're allowing the defendants,
11 essentially, to get away with the very misconduct they
12 alleged

13 In other words, they want to have their cake
14 and eat it too They want to violate their fiduciary
15 duties, make misrepresentations to the plaintiffs,
16 essentially lie, say they consent to bankruptcy, then
17 they come in and testify against us

18 They go to the lender, who's got the first
19 lawyers, and tell the lender, we entered into an
20 agreement where we said we wouldn't object, but guess
21 what? We didn't consent, and therefore I think you can
22 make a motion to dissolve the bankruptcy because it would
23 require consent Then they testify -- in the bankruptcy
24 court they didn't consent, despite the fact they entered

25 into an agreement to allow the bank -- the whole purpose

42

1 of this mutual release was to allow the bank to go

2 forward

3 THE COURT I'm not even discussing what went

4 on the at bankruptcy court We've got the order vacated

5 It's like it didn't happen So you can't talk about it

6 MR ROSEN We can talk about the fact

7 that --

8 THE COURT For today's purposes, it's

9 irrelevant to me

10 MR ROSEN Okay

11 THE COURT It really is It's considering

12 things outside of the pleading, correct?

13 MR ROSEN No, this is in the pleadings

14 It's in the pleadings What I'm telling you is in the

15 pleadings

16 THE COURT Okay Well, it does seem to me

17 to be the only way to make it workable is cancel the lis

18 pendens and put the title owner of record after the

19 foreclosure sale is the person who's -- and confirm that

20 title at this point, and they're the ones that move

21 forward

22 As far as moving on and having an accounting

23 process that goes forward, I think probably at this

24 point, you know, every six months is sufficient, and, you

25 know, it would have to be done by a -- I would like it,

43

1 you know, in some format by a certified accountant who
2 would submit it to the Court on the other side. If
3 you've got some objection, we'll see how it works out for
4 a little while on that, and if it becomes unworkable,
5 we'll look at changing it.

6 I'll either say yeah or nay, or we'll put a
7 receiver in, which would be a very drastic remedy, but I
8 mean, at this point here, I think that you go forward on
9 a constructive trust theory, but it's as to the profits,
10 the gains, because you don't end up, at the end of the
11 day, with legal title back in your name, which is what
12 you do under your theory of the constructive trust, but
13 ultimately what you want out of it, you still have a very
14 good possibility of getting if you prevail on your
15 theory, and that is the profits from the development of
16 the property.

17 MR. ROSEN: Your Honor, that constructive
18 trust only has any forced effect if the lis pendens
19 remains, otherwise, essentially, the defendant would be
20 allowed to do whatever they want to do.

21 THE COURT: Well, somebody has to be allowed
22 to do it.

23 MR. ROSEN: You got allegations here that a
24 trust was violated. You got allegations here the

25 fiduciary duties were violated You got allegations

44

1 there was property taken from one fiduciary to another,
2 and under those circumstances fiduciary duty is proper

3 THE COURT It doesn't sound like you're
4 going to agree with me

5 MR ROSEN No, sir

6 THE COURT And it doesn't sound like y'all
7 played well together I'm going to rule I'll put it in
8 writing and you can appeal it, and, you know, the effect
9 of that, I guess we're going to have to figure out
10 whether that stayed -- lis pendens would have any
11 effect -- would have, I guess, probably the first whack
12 at whether it would stay in effect or have to be a bond,
13 but ultimately our Court of Appeals would decide whether
14 or not you have a lis pendens in place here pending the
15 action, if you can't grasp what I'm saying

16 MR ROSEN There is some protection If
17 there was an injunction, I would agree with Your Honor

18 THE COURT I'm saying, you know, six
19 months -- I really don't know how much activity is being
20 done that would make a quarterly report -- I mean, I'm
21 not a bankruptcy judge and I'm not a bankruptcy trustee,
22 and, you know, I've got my 4,000 cases assigned to me
23 just like every other judge does that statistically in
24 this state, although I say that is not evenly distributed

25 around this state, but, at any rate, you know, quarterly

45

1 is something that I would look at if every six months
2 doesn't work, but why don't we just see how it goes that
3 you have -- provide an accounting in six months, and if
4 you think there is skullduggery going on and I need to
5 view it closer than that, I will look at that We need
6 to move forward a little bit

7 MR ROSEN If Your Honor is considering
8 issuing an order cancelling his pendens, I would ask that
9 you advise the clerk of that order not to cancel his
10 pendens for ten days in accordance with the Liebovitz vs
11 Mudd case, which says we are entitled to ten days'
12 notice It's Liebovitz vs Mudd, 347 S E 2d 94, 1996
13 case

14 THE COURT All right I was going to have
15 Joe draft something up, so unless he's got it primed and
16 ready to go, it's not getting done today, but I would
17 like to give Joe a shot at preparing an order and then
18 run it by you and -- I'm going to be gone the end of this
19 week We have to go to Spartanburg, so it would be the
20 first of next week anyway

21 MR ROSEN We want ten days until the time
22 the order is entered until the his pendens is cancelled
23 We hope you'll rethink it, but if that is what you're
24 intending to do, we're entitled to ten days' notice

25 before it's cancelled from the date of the order to the

46

1 cancellation

2 THE COURT All right Under Liebovitz

3 MR ROSEN Liebovitz vs Mudd,

4 L-1-e-b-o-v-1-t-z, versus M-u-d-d, 347 S E 2d 94 I

5 probably have a copy here somewhere Well, this is a

6 different cite

7 THE COURT It's not it? That's the case,

8 but not the cite?

9 MR ROSEN This is not the right cite that I

10 have

11 THE COURT I'll tell you what Before we

12 move on to whatever else we need to deal with, I might

13 need to take a break here, so let's take a look at that

14 Make sure you give me the right case We'll be back in

15 five minutes

16 (Recess taken)

17 THE COURT Okay What's next?

18 MS PAYLOR Your Honor, we have a motion to

19 compel return of privileged documents

20 There are two affidavits, one submitted by

21 Mr Rosen and one submitted by myself Basically, this

22 has to do with the lis pendens Richard Rosen was

23 contacted by CDM's development lawyer, John Haggerty,

24 with a request to lift the lis pendens as to a proposed

1 Richard and I discussed this matter with our
2 clients who stated that this was in the works prior to
3 the foreclosure sale and they provided some background as
4 to the issues as they saw

5 During some e-mail communications, Steve
6 Griggs, who is a member of Republic, sent an e-mail to
7 Richard stating that Republic's general position with the
8 town and other public authorities would be to act to
9 allow things as if it were still the managing member of
10 the development

11 He made the statement that Republic might act
12 differently if there were a private developer involved
13 and there was a purchase of property resulting in income
14 Same thing we were just talking about, Your Honor He
15 then stated that if Republic would have granted the
16 easement, if it were still the managing member, then it
17 would consent to the lifting of the lis pendens and asked
18 CDM to grant it

19 The last sentence in his e-mail, which I will
20 say has been very misconstrued, was the sentence that if
21 CDM did not cooperate with giving the easement as
22 previously agreed to, that would be CDM's problem because
23 it was their decision

24 THE COURT All these e-mails you're

25 referring to that you want to remain privileged are just

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1 between you and your client, right?

2 MS PAYLOR Correct It was an inadvertent
3 hitting of the forward button by Mr Rosen that sent
4 those privileged e-mails to John Haggerty, because there
5 was -- they asked us for a copy of the agreement that
6 CPA had reached with Mount Pleasant Water Works, and,
7 interestingly, attached to Mr Navarro's affidavit, they
8 doctored the e-mail and took off the last one which was
9 Mr Rosen sending the e-mail to Mr Haggerty

10 THE COURT And Mr Haggerty is who?

11 MS PAYLOR John Haggerty He is the
12 development attorney for CDM He's with Nelson Mullins
13 They're handling the development side, and I believe
14 Mr Pierce's law firm is handling this litigation, Your
15 Honor

16 So he sent that The idea was to send them a
17 copy of the agreement, and when they attached it to
18 Mr Navarro's affidavit, they took off the last part, so
19 when we saw that, we said, How did they get ahold of
20 that? And so we had to go back through all of these
21 e-mails and we finally found the one, and that was now
22 attached to Mr Rosen's affidavit, saying that he was
23 forwarding to agreement to Mr Haggerty

24 They act like there is some statement of bad

25 faith There is nothing It's been misconstrued It

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1 basically says what I just said They also make an
2 argument that I gave them some attorney-client privileged
3 documents, and they attach an e-mail for me to Mr Jay
4 Claypoole, who is also in Nelson Mullins' office We had
5 been having conversations about what the concerns of
6 Republic were as the former managing member

7 I asked Stacy Hornstein, who is a
8 representative who was the main person in charge of
9 developing Carolina Park, to give me a document to
10 provide for -- for the purpose, sole purpose, of
11 providing to CDM to show them what the concerns were I
12 did provide that document It was not a waiver of
13 attorney-client privilege It was done with the specific
14 purpose of giving it to CDM to use, and, in fact, after
15 all of this, Mr Claypoole sent an e-mail back to me
16 stating CDM agrees that the restrictions set forth in the
17 document are beneficial to the property and will transfer
18 these easements and fee simple parcels to MPW consistent
19 with the terms of this document

20 All Republic was doing was trying to tell
21 them, There are some issues We've already negotiated
22 those When you transfer it, you want to make sure that
23 you allow for these things And, basically, CDM thanked
24 us for helping them out That was not a waiver of

1 Mr Rosen --

2 THE COURT Well, your client -- where was
3 the communications between you and your client that
4 you're claiming are privileged?

5 MS PAYLOR Just Mr Rosen and Mr Griggs
6 They've made an argument because I sent this other
7 document that I asked to be prepared for CDM that I was
8 also waiving attorney-client privilege That was not a
9 waiver It was provided to them

10 Inadvertent is defined as not actually
11 attentive, marked by unintentional lack of care and if
12 you look at rule 4 4(b) of the code of professional
13 ethics, when Mr Haggerty and Mr Wilson received that
14 document, they had an ethical obligation to call
15 Mr Rosen up and say, you sent us attorney-client
16 privileged material That didn't happen

17 Instead, what happened was they altered the
18 document, they misconstrued it, and then said there was a
19 waiver of attorney-client privilege because he
20 intentionally forwarded that document

21 If you read Mr Wilson's memo, he says, Well,
22 he intended to send it because he hit the button send
23 Well, yeah, he intended to send the document, but he just
24 didn't delete it I know, unfortunately, I have done

25 that before when I've sent things that I didn't mean to

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1 send because they were attached to an e-mail

2 What is the remedy? Rule 4 4(b) does not
3 specify a remedy, but we've cited some cases in our memo,
4 Your Honor, and we believe that the remedy for failure to
5 honor the rules should be a prohibition of the use of
6 that e-mail by the recipient in any way, Your Honor, of
7 that privileged document. And I'm finding that we have
8 not waived the attorney-client privilege but that
9 inadvertent disclosure

10 Thank you, Your Honor

11 MR. PIERCE: Your Honor, it would be nice if
12 the law was such that you could decide what was waived
13 and what was not waived, depending on what you do with
14 it, but the record in this case suggests that what both
15 Mr. Rosen did and Ms. Paylor did was exactly the same.
16 They were discussing certain matters, and in order to
17 explain their client's position, instead of retyping it
18 up and sending it to Nelson Mullins' transactional
19 attorneys, they simply forwarded e-mails to their clients
20 setting out their concerns.

21 Unfortunately, when Mr. Rosen did that, he
22 gave us a window into what his client was thinking. And
23 this window, much like the Court has already determined
24 is how they were using the lis pendens, they were

25 discussing this easement, and the reason we had to have

52

1 their involvement is that we had to get them to release
2 the lis pendens so that we could handle this transaction

3 Look what they're saying, Your Honor I
4 believe our general position with the town or other
5 public authorities would need to act to allow things as
6 though we were still the managing member So what
7 they're in essence saying here, Your Honor, is we're not
8 the managing member We have no interest in this real
9 estate any longer, but we are going to contend to all
10 public agencies, organizations, or political subdivisions
11 that we are

12 THE COURT Yeah, but aside from that, Steve
13 Griggs is his client?

14 MR PIERCE Steve Griggs is his client

15 THE COURT And this is an e-mail to the
16 lawyer?

17 MR PIERCE Right This was sent to the
18 Nelson Mullins' lawyer to explain -- this was numerous
19 e-mails This is just part of the e-mail chain

20 THE COURT Who is David Peter, Stacy
21 Hornstein --

22 MR PIERCE Representatives of Republic,
23 Your Honor, so they're discussing this easement issue,
24 what position they should take on the easement So in

25 the chain e-mails back and forth between Mr Rosen and

53

1 his client, they discuss the easement, what position to
2 take He then forwards that, and they have various
3 concerns

4 He then forwards that intentionally, not
5 inadvertently, but intentionally to the Nelson Mullins
6 transactional lawyer They have a pattern of doing that,
7 so what Mr Rosen does immediately, because they're
8 contending that Mr Wilson has had an ethical violation
9 and that Mr Haggerty have had an ethical violation for
10 not returning this, but they have a problem with that,
11 Your Honor, because Mr Claypoole has done the same thing
12 for them, forwarded communications to our client, so he
13 does -- he immediately then, after this comes to light,
14 goes back, finds that other e-mail, and forwards it back

15 Now, unfortunately for him, that's not a
16 damaging e-mail for us, but he can't take this position
17 that he did this and as an ethical obligation without
18 returning the e-mail that we had done the same thing, or
19 Mr Claypoole and other transactional attorneys at Nelson
20 Mullins had done, discussing another issue, and that's is
21 in their memorandum

22 They've cited it, so after the fact, they
23 don't return it But what they're sending out here, Your
24 Honor, is they're sending out their client's position

25 Look what they're saying We're going to misrepresent

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1 who has an interest in this party, to political

2 subdivisions and public authorities Act as if we're

3 still the member

4 They don't want to tell you, but let me read

5 it literally I think if CDM won't cooperate with these

6 political subdivisions with affecting this, they will be

7 the bad guys, not us

8 So we have property that we've purchased and

9 you've ruled on They are going to the public

10 authorities and contending that they are members in an

11 organization and have a property interest that they do

12 not have That falls within another exception, which is

13 the crime for all exception, and Joe cited it in the

14 brief

15 Also, if you go back to the law governing

16 lawyers, you know, when you take this position and you

17 send something you meant to send it, you can't later come

18 back and say you didn't intend to waive the privilege

19 The question is did you intend to send the e-mail, and he

20 clearly did because he sent all these discussions about

21 issues, just like Ms Paylor did, with regard to this

22 easement and this transaction

23 This wasn't just sent as an attachment alone

24 It was sent discussing all of the issues regarding this

25 easement and the position that Republic was taking about

55

1 this easement And then, after he took the position that
2 it was a violation, he went, looked back, and said yes,
3 he had received several communications from Mr Paylor at
4 Nelson Mullins and returned those

5 So, Your Honor, that's the point I want to
6 make there, and, you know -- and, again, I don't want to
7 beat a dead horse but you see they intentionally set it
8 with their client's position and take a position contrary
9 to the law and to the facts as they know it Then
10 they're going to claim they have an ownership interest in
11 the property when they don't

12 I hesitate to say this, but since they're
13 citing ethical rules, it's further complicated by the
14 fact that this easement came to their attention because
15 another partner of Mr Rosen's represents the town of
16 Mount Pleasant So he's the one that sent this to them
17 So this whole issue of the easement -- so then it gets
18 forwarded with those concerns up to the Nelson Mullins
19 transaction lawyers, so they were both representing
20 Republic and the town of Mount Pleasant They're
21 discussing our property, and they're going to contend and
22 pretend they're the managing member in this property

23 Thank you, Your Honor

24 THE COURT Okay I guess I've got to -- I

525

25 spent most of the time on first issue we discussed I

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1 kind of glanced through this portion of it, but I didn't
2 get a chance to fully think about this, so I've got to
3 get my head straight to who got sent where and what

4 MS PAYLOR I would point you to the
5 affidavit, Your Honor The only affidavits that were
6 filed were filed by Richard and me John Haggerty didn't
7 file an affidavit, nobody filed an affidavit to refute
8 what he said or what I said, and they say that I
9 attacked -- I forward an e-mail string I most certainly
10 did not

11 I sent an attachment that said, Jay, attached
12 is Stacy Hornstein's account of the considerations in
13 dealing with MPWW So, you know, I just ask you to look
14 at those things

15 THE COURT I will I'll take this one under
16 advisement

17 What else do we need to deal with?

18 MS PAYLOR We have a motion to compel
19 responses to supplemental subpoenas, Your Honor, and that
20 is actually against Nexsen Pruet Well, three people,
21 I'm sorry

22 MS HUGHES For the record, it's not against
23 the first

24 MS PAYLOR It's against Mr Wallace,

1 MR WALLACE That's correct, Your Honor

2 THE COURT Who subpoenaed who?

3 MS PAYLOR We subpoenaed, Your Honor When

4 the motion to dismiss was filed by Mr Wilson, he

5 attached to that his memorandum or motion the affidavit

6 of Mr Ben Marino who is the client of Nexsen Pruet and

7 now Mr Walker

8 He attached to his affidavit an

9 attorney-client privileged e-mail dated January 25, 2010

10 that we feel they -- this was absolutely an intentional

11 waiving of the privilege with this The client attached

12 it to his affidavit, and in there, they are talking

13 about, in January, about the fact that, you know, they're

14 getting together, trying to decide what is best for MDC,

15 irregardless of what is best for Carolina Park

16 Associates

17 And we asked for -- we subpoenaed early in --

18 right after we filed our case, we subpoenaed e-mails and

19 communications from the McNair Law Firm, Lucas Padgett,

20 who subpoenaed them from Nexsen Pruet and all the lawyers

21 involved No one ever produced this e-mail Mr Padgett

22 didn't produce it, and none of the Nexsen Pruet lawyers

23 ever produced it

24 So when we got this, we served a supplemental

25 subpoena and asked them to produce all the their

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1 attorney -- all of their e-mails with their client or
2 otherwise, that dealt with the subject matter of that
3 e-mail, which under the communication is once you waive
4 it, you waive it not just to that communication, but to
5 all communications wherein that subject matter is
6 discussed

7 And what we've got here, that's what we want
8 We want to get the rest of the documents that we feel are
9 very crucial to our clients' case where these matters are
10 discussed and where they talk about getting together with
11 Grove to go forward and buy the property and not bringing
12 it and not telling our clients anything about it

13 So what we're asking is that our supplemental
14 subpoenas be responded We served them and they
15 objected

16 THE COURT All right Mr Wallace?

17 MR WALLACE Thank you, Your Honor Bruce
18 Wallace on behalf of myself, David Hawkins, and Neil
19 Robinson, who are not parties to this litigation We've
20 served as counsel for CDM in foreclosure litigation and
21 that is the only reason why I'm here cause My partner
22 Molly Cherry obviously represents CDM in this case, so
23 Nexsen Pruet is still involved, but I'm not an attorney
24 of record I'm here as a special appearance in regard to

25 these subpoenas

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1 I feel, Judge, a little at odds here about
2 all the fine argument going on about the meat of the
3 case I'm not potatoes I'm not even dessert I'm off
4 the table These e-mails are a collateral issue, in
5 light of what is really at stake here, and that's all set
6 forth in the complaint

7 These are e-mails about conversations my
8 client had in January with his lawyers, one conversation
9 about four times Ms Paylor would have the Court
10 believe that subpoenas that were issued arising out of
11 that e-mail set up a conference She cited a case in her
12 memorandum that says, An intentional waiver waives the
13 communications as to -- waives privilege as to that
14 communication and all communications on the same subject
15 She had the Court believe that perhaps that means much
16 broad than it does Reminding the Court of the timeline
17 here --

18 THE COURT Do have you a privileged log that
19 you've got that I need to review on what it is that
20 you're saying remains privileged?

21 MR WALLACE We don't, Your Honor, and here
22 is the problem When Mr Rosen issued his subpoena back
23 in July of 2010, he asked for non-privileged documents,
24 and in conversation with my partner Molly Cherry, we

25 agreed we did not have to produce a privileged log

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1 because we don't have a privileged log

2 THE COURT But now they want privileged

3 stuff, or stuff you assert is privileged, so you have to

4 give me a privilege log

5 MR WALLACE We would, Your Honor, if we had

6 gone through and done the search again, and that is the

7 second problem here, which is, if you'll give me a moment

8 of the timeline is after the first subpoena, we went

9 through and produced 3,900 pages of e-mails between

10 Nexsen Pruet and a variety of parties, including Lucas

11 Padgett, including Groveland, including everybody,

12 basically, connected with this litigation other than our

13 client because Mr Rosen agreed we didn't have to produce

14 a privileged log

15 We didn't, but we did go through all those

16 e-mails to review them for privilege and produced the

17 non-privileged ones That took several hours, several

18 days by my partner, Molly Cherry Our IT department was

19 engaged to do the search That search alone, just the

20 cost of producing the documents, full review by Molly,

21 was \$1,200, so we've got a cost and a burden problem,

22 because now we've got to go back and we've got to look

23 for documents that are somewhat narrow, but if you read

24 the subpoena, Your Honor, you'll see it's really not

25 narrow because they want all the e-mails related to, the

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1 quote, foreclosure, even though the e-mail at issue only
2 talks about the timing of the foreclosure So they want
3 to expand, first of all, the subject matter of the
4 communication

5 Secondly, they want to force us to go back
6 without any records at the time or subject matter to
7 produce all privileged e-mails that were not in the
8 subject e-mail that waived privilege

9 I want the Court to understand I'm not
10 arguing that the privilege is not waived as to the
11 subject matter of the e-mail, but it's a very narrow
12 waiver There are four topics, and if I may approach,
13 Your Honor, I've got a quick comparison, quoted a
14 comparison of both the e-mail and the subpoena

15 You'll see what's going on here, Your Honor
16 The e-mail at issue has four subjects First one, and
17 I'm quoting from the e-mail which is an exhibit to the
18 subpoenas, which is attached to the motion to compel,
19 foreclosure and bankruptcy implications have agreed to
20 some of these new brokerage contracts What they want is
21 any e-mails and foreclosure of the property, and then
22 they want any broker's contracts concerning the property

23 So they want to expand it from the
24 foreclosure and bankruptcy implications and agree to some

25 of the brokers' contracts to just foreclosure in all the

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1 contracts They say what level of confidence do we have
2 that either a sale by parcel in foreclosure or
3 reorganization in Chapter 11 bankruptcy is a lengthy
4 outcome

5 The subpoena then seeks the filing of
6 bankruptcy by Carolina Park, all of the e-mails related
7 to the filing of the bankruptcy, rather than
8 reorganization and Chapter 11 bankruptcy, and seek any
9 negotiations, agreements, discussions with, or concerning
10 MDC's position with regard to a parcel sale in bankruptcy
11 sale of the property, which is not indicate in that
12 communication

13 They want any negotiations, agreements,
14 discussions with concerning MDC's position with regard to
15 a bankruptcy filing by CPA, which is way beyond the scope
16 of the e-mail, second one is possible legal procedures if
17 Republic refuses to agree to a buyout proposal that
18 MDC supports, and that means, frankly, the only one that
19 is closely related to that and it says discussions
20 regarding Republic Charleston LLC's potential refusal to
21 accept the buyout deal, but, really, what is the legal
22 procedure? What is the legal procedure if they refuse?
23 Not discussions about the potential refusal, so it's a
24 little bit different, but significantly different

25 The third one is the ability to avoid

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1 CDM installing a note tax if we act jointly with Grove
2 and foreclosure and buy the project, and the note stays
3 outstanding Subpoena seeks e-mails and communications
4 regarding all tax implications and potential transactions
5 related the property

6 So, again, they want to broaden the scope of
7 what they see And, finally, the latest estimate of
8 foreclosure timing, and, again, goes back to foreclosure
9 of the property, not foreclosure timing

10 And then the last topic, topic H of the
11 subpoena, and I tried to match it up, one of those topics
12 with the e-mail, an agreement, joint venture, partnership
13 or other affiliation with Groveland investors
14 subsidiaries, and affiliates Your Honor, what the
15 plaintiff seeks here is us to go back and look at over
16 3,900 pages of documents again to determine if they are
17 responsive and if they haven't otherwise been produced,
18 which is an incredible burden, but then they also go
19 beyond the subject matter of the e-mails --

20 THE COURT I guess I'm still not clear on
21 what you're asking me to do If you want to say, I don't
22 want to respond because it's attorney-client privilege,
23 you're supposed to produce a privileged log and say,
24 Judge, these are the things that we think are privileged

25 and you decide if they are or they aren't

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1 And so what are you asking me to do at this
2 point, if not that? Are you asking me to kind of rule
3 that you don't have to produce anything without looking
4 at it? I already got thumped on the head a couple weeks
5 ago, although I read everything they submitted to me
6 The Supreme Court said, well, you got to look at
7 everything that they submit to you, and they said you
8 didn't -- and one side, the best I can come up with their
9 decision is one side said rather than give you the actual
10 documents, they provided me a summary, or a matrix, so I
11 didn't have to look at every single one

12 This is that freedom of information case out
13 of Berkeley County, and rather than look at every single
14 one, they did a matrix up and said, here are the
15 questions and here are the answers, and I reviewed that,
16 but they said, Oh, you're supposed to look at every
17 document that they say claim is privileged

18 So just submitting me something and saying
19 give us cart blanche that this is privileged log, I guess
20 that's not the way to do it

21 MR WALLACE And if it were just a matter of
22 creating a privileged log, I would create a privilege log
23 and allow them to test its viability The problem is the
24 cost and expense of going and creating the privileged

1 THE COURT What am I supposed to do about
2 that? I could ship it to them How much is it?

3 MR WALLACE It would be at least \$1,200
4 because we have to generate another search, and there
5 would be all my time to review the documents to
6 responsiveness to see if they have been produced
7 previously along with 3,900 pages of e-mails and then to
8 determine if the privilege attaches because it's not the
9 same subject matter or to redact them because it contains
10 other subject matter

11 That's a tremendous burden, Your Honor, and
12 all we're asking, on top of the narrowing of the scope of
13 the subpoena, is that the plaintiff bear the burden, and
14 I'll explain why Because the prior subpoena issued in
15 July of 2010 sought all the communication with all third
16 parties, such that to the extent that this is an issue
17 about CPM's intentions, and those intentions have been
18 expressed to third parties, the plaintiff has over 3,900
19 pages of e-mails to those third parties

20 I don't know if in the last six months or
21 eight months they've gone through and reviewed all those
22 e-mails, but I suspect they have started and have a
23 pretty good idea of what third parties knew and what
24 communications CPM had with those third parties, so to

25 ask us to go back and look internally at what they have

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1 with Nexsen Pruet et cetera on four narrow issues seems
2 incredibly burdensome, and, frankly, not part of the main
3 part of this litigation

4 As the Court knows, the Supreme Court
5 recently changed with regard to electronically stored
6 information and requires a balance. It says a person --
7 it says 45(d)(1)(d). The person responding to a subpoena
8 need not provide discovery, electronically stored
9 information from sources that the person identified as
10 not reasonably accessible because of undue burden of
11 cost, and that is, of course, in my letter. It's 1,200
12 bucks to reduce the last one, plus Molly's time. You
13 guys won't reimburse us for either one of those

14 Motion to compel discovery or quash the
15 person from whom discovery is sought must show the
16 information sought is not reasonably accessible because
17 of undue burden, and, Your Honor, that is clearly in the
18 record, based on my letter that is attached to the motion
19 to compel

20 And if the showing is made, the Court may
21 nonetheless order discovery from such sources if the
22 requesting party shows good cause, considering the
23 limitations of Rule 26(b)(6). Rule 26(b)(6) talks
24 about balancing of -- if I may go back, Your Honor,

25 because that was also changed The discovery is

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1 unreasonably cumulative or duplicative or is obtainable
2 from some other source that is more convenient, less
3 burdensome, and less expensive and I may submit to the
4 Court, Your Honor, these are conversations that the
5 plaintiff is looking for with regard to what was said

6 We are going to be deposed this case
7 Deposition is lot cheaper What did you tell Lucas
8 Padgett? And they'll learn exactly what I told them, the
9 conversations we had with them, they'll learn what did
10 you say to X, Y, and Z, and those guys will testify
11 Very reasonable and inexpensive counter proposal to make
12 us go through all this expensive stuff

13 Then the second party, party seeking
14 discovery, has had ample opportunity and discovery to
15 obtain the information sought Again, Your Honor, this
16 is the intentions, as I understand it, intentions of
17 CPM to foreclose on property and buy it in foreclosure
18 There are 3,900 pages of e-mail on that issue that have
19 already been produced, and, finally, the burden of
20 expense outweighs the slightly benefit, Your Honor

21 I'm not aware of any benefit these e-mails
22 would provide to the plaintiff as not already expressed
23 the non-privileged documents will be produced

24 In all fairness, Your Honor, I don't know

25 what e-mails I'm talking about, because I haven't looked

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1 at them because of the expense of even searching for
2 them, but having been involved in the foreclosure, as the
3 attorney of record for CPM, I have a fairly good idea I
4 represent to the Court that I don't believe there is
5 going to be any new material produced that's different or
6 significantly sheds any additional light on the e-mails
7 already produced

8 Then said the amount in controversy, the
9 parties' resources, the importance of issues at stake in
10 the litigation, and the importance of the proposed
11 discovery in resolving those issues, again, Your Honor,
12 without going too much further into it, this discovery
13 isn't going to assist in resolving the issues because the
14 other e-mails are already out there, so what we ask is
15 either quash the subpoena and deny the motion or do
16 exactly that, ask the plaintiffs to pay for the cost of
17 searching this duplicative and additional information
18 that is a collateral issue at best

19 THE COURT All right Y'all willing to
20 write a check in order to find out if they got anything
21 responsive to your request? Because it sounds like it's
22 going to cost them money

23 MS PAYLOR We're willing to pay that first
24 \$1,200 That was an oversight that wasn't paid I think

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25 now, because they didn't produce things that they're

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1 waiving the attorney-client privilege as to that should
2 be on them, and I will say, when he was going through his
3 chart here, he left out the first e-mail from Marino

4 He says we go forward and bid in foreclosure
5 jointly with Griggs, and that is the heart of the
6 controversy we have here, so we believe that we're
7 entitled to discovery as to anything having to do with
8 their talking to Grove about negotiating how they're
9 going to do it

10 We don't know when that started, Your Honor
11 We will limit it to whenever that is

12 THE COURT The point of this motion is that
13 if you want to get stuff beyond what you've already got,
14 then -- and they want to have to go through the expense
15 of reviewing it for attorney-client privilege if it's
16 beyond this -- actually, it sounds like they -- I'm not
17 sure why they need to go back through the 3,900 they've
18 already provided Those are disclosed, but to go through
19 the additional ones, then it's going to cost some money
20 to find that out, if they're going to be able to claim
21 privilege on something beyond the 3,900 that you got

22 MS PAYLOR If they provide us an estimate
23 of that, we'll be happy to come forward with it They
24 are very important documents

25 THE COURT Then give them an estimate Find

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1 out if there is a controversy on how much it is that you
2 want to charge them, and then produce the privileged log,
3 if they agreed on the amount If they don't think it's
4 fair and reasonable, I guess y'all contact me

5 MR WALLACE It will take about 30 to 40
6 hours for me to go through all the documents and to
7 answer the question of Ms Paylor by the Court The
8 reason why I have to go back through is that there are --
9 the subpoena seeks --

10 THE COURT If you already produced it, you
11 don't get to claim privilege to me So it's other
12 documents, right? So you don't need to go back and
13 reinvent the wheel, do you?

14 MR WALLACE The problem I have, Your Honor,
15 is we didn't segregate in our documentation what was
16 privileged and kept out and what was not privileged, so
17 we have to go back through that database of preserved
18 e-mails and actually conduct a new search because they're
19 seeking a little bit different stuff for privileged
20 documents and then make sure that this is not privileged,
21 was produced, was produced and was responsive in that
22 field because we're talking about e-mails that overlap,
23 but don't include one another

24 So in order to make sure I produce everything

25 that would be responsive and paid for by the plaintiff, I

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1 have to go back through the ones that were already

2 produced, not to look at them on the --

3 THE COURT Well, the things that are already

4 produced, you don't get to come back and say they're now

5 privileged

6 MR WALLACE Let's say we've got ten e-mails

7 and three of them have been produced as not privileged

8 I have to read those again to make sure they're not

9 privileged and that they have been produced, but if

10 they're privileged and responsive, I got to pull them out

11 and produce them

12 Does that make sense? In other words, I

13 don't know which e-mails in the database were produced

14 I've got to go back and read them If they don't include

15 our client, they were produced

16 THE COURT It sounds to me like y'all are

17 going to look at paying about \$5,000, because he's got

18 30, 40 hours of his time, that's a big --

19 MR ROSEN We are not understanding why it

20 would take any time at all Since they don't have to

21 pull out privileged documents, they're going to send us

22 the privileged documents, so they can produce everything

23 they've done so far It won't take any money at all

24 We'll have the burden of going through them

25 THE COURT They're not going to send you

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1 stuff and then let you decide whether or not they claim

2 an attorney-client privilege

3 MR ROSEN I'm sorry I thought the

4 attorney-client privilege issue was over They're go --

5 THE COURT Maybe I just sat here in total

6 oblivion for the last 15 minutes, but I thought you said

7 in order to get the -- they've sent you a bunch of new

8 document requests You want to go back through now and

9 see if there is anything, one, that is responsive to it,

10 and, two, if it's subject to the attorney-client

11 privilege claim So if it is subject to the

12 attorney-client privilege, you'll produce a privilege log

13 and let me decide

14 MR WALLACE Absolutely, Your Honor, because

15 the subpoena on its face should only seek documents in

16 relation to four discreet areas, maybe five, if you hear

17 what Ms Paylor is saying in regard to further e-mail,

18 but they want everything They want everything regarding

19 to the foreclosure, rather than the timing of the

20 foreclosure or discreet issues about bidding in the

21 foreclosure I got to go in and say I don't -- first of

22 all, I don't agreed or concede that they're entitled to

23 everything related to the foreclosure I do agree to

24 concede they're entitled to communication related to that

25 very narrow topic stated in the e-mail, and the cases

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1 that cite that, it's the same subject matter

2 It doesn't broaden the waiver just because I

3 say my client says foreclosure in his e-mail That's the

4 past That's the expense, and I don't know how many

5 privileged communications there are

6 THE COURT Getting to be expensive, so --

7 MR ROSEN We can get an estimate Your

8 Honor, there seems to be a certain amount of unfairness

9 here They supplied to you, the Court, an affidavit from

10 their client, and they attached that affidavit per this

11 communications about the foreclosure, the bankruptcy, the

12 entire relationship with Grove

13 They submit that, and then they say we should

14 have to pay to search for the rest of it I think this

15 is a matter you ought to take under advisement and

16 determine later whether cause should be lifted now or

17 later Certainly, we have an estimate if we agree to pay

18 it, if necessary, but I don't think we created this

19 problem

20 MR WALLACE I didn't file a motion on this

21 issue Mr Wilson submitted this e-mail E-mail was

22 discreet, was one Mr Rosen up and says, I want

23 everything related to this e-mail It's not enough that

24 I got this e-mail I want everything that is privileged,

25 previously privileged related to this e-mail plus --

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1 THE COURT That's the way I understood it as
2 you said you don't want privileged stuff, and they gave
3 you 3,900 pages, and now you're saying, well, we want
4 everything you got Well, they got to go back and look
5 at it and see if there are now things that since the
6 scope is bigger are there other things that might be
7 responsive to it but might be privileged, so if you want
8 to pursue it, then you got to pay the money

9 So, Mr Wallace, you come up with an estimate
10 of what you think it will cost to do it and let him know

11 MR WALLACE Thank you, Your Honor I'll do
12 that

13 THE COURT All right What else?

14 MS PAYLOR That's all for the plaintiffs

15 THE COURT Anything else?

16 MR WILSON I think that's it

17 THE COURT You send me a proposed order on
18 the cancellation of lis pendens

19 MR WILSON We could have that by Friday,
20 Your Honor

21 THE COURT Okay All right Well, good

22 - - -

23 (Whereupon, the proceedings were concluded)

24 - - -

I, the undersigned Amanda K Haffenden, RPR, CRR, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County South Carolina, on the 2nd of May 2011

I do further certify that I am neither of kin, counsel, nor interest to any party hereto

May 12, 2011

Circuit Court Reporter

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May 11, 2011

Honorable Roger Young
Circuit Court Judge
Charleston County Courthouse
Charleston, SC 29401

Re Carolina Park Associates, LLC, et al v Benedict T Marino, et al

Dear Judge Young

I have reviewed today's letter to you from Joe Wilson and apologize that it is necessary to address a few of the issues raised by him. Throughout the letter, Mr. Wilson refers only to Plaintiff Republic Charleston LLC, and Mr. Wilson fails to disclose that the claim for constructive trust was not brought on behalf of Republic and, instead, was brought by the other plaintiff, Carolina Park Associates, LLC. Carolina Park has been deprived of its ownership of the property at issue as a result of the fraudulent actions of the Defendants, including Mr. Wilson's client, CDM of Charleston, LLC. Republic never had any ownership interest in the real property and has never sought to obtain title. However, Carolina Park is seeking title in this action and has properly filed notice of lis pendens.

Without re-hashing Plaintiff Carolina Park's arguments in their entirety, I would submit that a straightforward analysis is determinative of the matters before the Court and that analysis has been buried in the myriad of irrelevant defenses and arguments propounded by CDM. Mr. Wilson correctly cites Pond Place Partners, Inc v Poole, 351 S C 1, 567 S E 2d 881, 889 (Ct App 2002), for the proposition that a party must strictly comply with the relevant statutory provisions to be entitled to a lis pendens. S C Code Ann § 15-11-10 sets forth the conditions that must be met before a party may file a lis pendens. In relevant part, the statute mandates that a lis pendens may be filed in "an action affecting the title to real property." Because Plaintiff Carolina Park has stated a cause of action against CDM for a constructive trust, an action affecting title to real property, it has complied with the statute and the lis pendens is proper. See Pond Place, 351 S C at 18, 567 S E 2d at 890 ("an action 'affecting the title to real property' clearly allows the filing of a lis pendens. [s]uch actions include actions to establish a constructive trust over real estate.")

S C Code Ann § 15-11-40 does not, however, despite Mr. Wilson's representation, give the Court discretion to cancel the lis pendens "on good cause shown." Rather, that statute permits the cancellation of a lis pendens in the Court's discretion "at any time after the action is

May 11, 2011

Page 2

settled, discontinued, or abated **and** on good cause shown” S C Code Ann § 15-11 40 (emphasis added) The statute unequivocally mandates that considerations relevant to ‘good cause shown’ are only properly considered once the action is settled, discontinued, or abated Because, in South Carolina, the filing of a lis pendens is governed by statute, the statute controls and Mr Wilson’s citations to case law of other states or to generic law are irrelevant

Mr Wilson’s assertion that a cause of action for a constructive trust over unknown future profits is supported by In re Brook Valley VII, 496 F 3d 892 (8th Cir 2007), is not accurate By reviewing the history of the proceedings as set forth in the documents that I attached to my earlier letter, it is clear that Brook Valley merely shows that, during litigation, if there is a sale of the real property to which different parties claim title and those parties agree to allow the sale to go forward so long as the proceeds are held by the Court pending the litigation, then the constructive trust may attach to those proceeds The initial claim that was not dismissed in Brook Valley was for a constructive trust over the real property, not for a constructive trust over unknown future profits

Finally, I would reiterate our objections to the numerous unsupported factual findings proposed in the order submitted by Mr Wilson In response to the remaining points addressed by Mr Wilson, I would respectfully refer the Court to Plaintiffs’ pleadings, memoranda and my earlier letter I remain willing to provide Your Honor with an appropriate proposed order

Sincerely yours,



Richard S Rosen

/rsr

Enclosures

Cc Trenholm Walker, Esquire
Carl Pierce, Esquire
Joe Wilson, Esquire
Molly Cherry, Esquire

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Roger M Young, Circuit Court Judge

Court of Common Pleas Case No 10-CP-10-6042

CAROLINA PARK ASSOCIATES, LLC, and REPUBLIC-CHARLESTON,
LLC, for itself and on behalf of Carolina Park Associates, LLC,
Plaintiffs-Appellants


v

BENEDICT T MARINO, DOUGLAS H DITTRICK, JOHN CHALSTY, MDC
OF CHARLESTON, LLC, and CDM OF CHARLESTON, LLC,
Defendants-Respondents

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material
proposed to be included by any of the parties and not any other material

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September 21, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Roger M Young, Circuit Court Judge

Court of Common Pleas Case No 10-CP-10-6042

CAROLINA PARK ASSOCIATES, LLC, and REPUBLIC-CHARLESTON,
LLC, for itself and on behalf of Carolina Park Associates, LLC,
Plaintiffs-Appellants

v

BENEDICT T MARINO, DOUGLAS H DITTRICK JOHN CHALSTY, MDC
OF CHARLESTON, LLC, and CDM OF CHARLESTON, LLC,
Defendants-Respondents

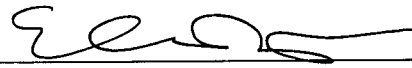
PROOF OF SERVICE

I certify that I have served a copy of the Record on Appeal on Respondent CDM of Charleston, LLC by depositing it in the United States Mail, postage prepaid on September 23, 2011, addressed to its attorneys of record as follows

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September 23, 2011

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