

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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SEP 24 2014

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

S.C. Supreme Court

Richard L. Booth, Master-in-Equity

Common Pleas Case No. 2009-CP-43-2538
Court of Appeals Case No. 2013-000255

First Citizens Bank and Trust Company, Inc.,.....Respondent,

v.

Charles T. Brooks, III and the South Carolina Department of Revenue, Defendants,

Of Whom Charles T. Brooks, III, is.....Petitioner..

APPENDIX

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

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

First Citizens Bank and Trust Company, Inc.,
Respondent,

v.

Charles T. Brooks, III, and the South Carolina
Department of Revenue, Defendants,

Of Whom Charles T. Brooks, III, is the Appellant.

Appellate Case No. 2013-000255

Appeal From Sumter County
Richard L. Booth, Master-in-Equity

Unpublished Opinion No. 2014-UP-241
Submitted May 1, 2014 – Filed June 25, 2014

AFFIRMED

Andrew Sims Radeker, of Harrison & Radeker, P.A., of
Columbia, for Appellant.

Damon Christian Wlodarczyk, of Riley Pope & Laney,
LLC, of Columbia, for Respondent.

PER CURIAM: Charles T. Brooks, III, appeals the Master-in-Equity's (master's) grant of partial summary judgment in favor of First Citizens Bank and Trust Company (First Citizens). On appeal, Brooks argues the master erred in making various factual findings in its order. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the master erred in "making a factual finding that 'the forbearance agreement also provided for ongoing payment of the monthly payments due under the Note and Line of Credit[,] in addition to the payments called for under the language of the forbearance agreement, where ambiguity in the document (particularly when coupled with the parties' course of dealing) created an issue of material fact": *Cowburn v. Leventis*, 366 S.C. 20, 41, 619 S.E.2d 437, 449 (Ct. App. 2005) ("In order for an issue to be preserved for appellate review, with few exceptions, it must be raised and ruled upon by the trial [court]."); *In re Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998) ("When a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCPP, to alter or amend the judgment in order to preserve the issue for appeal.").

2. As to whether the master erred in "making a factual finding that '[t]he forbearance agreement contained a term that stated that acceptance of monies under the agreement was not an estoppel, prejudice[,] or waiver of [First Citizens]'s right to proceed with the foreclosure action' without also making findings as to other language in the documents at issue that makes that term ambiguous": *Cowburn*, 366 S.C. at 41, 619 S.E.2d at 449 ("In order for an issue to be preserved for appellate review, with few exceptions, it must be raised and ruled upon by the trial [court]."); *id.* ("When a trial court makes a general ruling on an issue, but does not address the specific argument raised by a party, that party must make a Rule 59(e)[,SCRCPP,] motion asking the trial court to rule on the issue in order to preserve it for appeal.").

3. As to whether the master erred in "making a factual finding that '[Brooks] breached the terms of the forbearance agreement by failing to withdraw his [a]nswer in this matter' when the record showed at least an issue of fact about that and, in any event, the matters in dispute arose well after the answer was served": *S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 490, 732 S.E.2d 205, 208-09 (Ct. App. 2012) ("When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCPP; summary judgment is proper when there is no genuine issue as to any material fact

and the moving party is entitled to judgment as a matter of law."); *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) (holding when the underlying action requires proof by a preponderance of the evidence, "the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment"); *S. Glass & Plastics Co.*, 399 S.C. at 490, 732 S.E.2d at 209 ("In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party."); *Nelson v. Piggly Wiggly Cent., Inc.*, 390 S.C. 382, 389, 701 S.E.2d 776, 779 (Ct. App. 2010) ("As Rule 56(e), SCRCF, states, a party may not rest upon the mere allegations or denials of his pleading[s]." (alteration in original) (internal quotation marks omitted)).

AFFIRMED.¹

HUFF, THOMAS, and LOCKEMY, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

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Of Whom Charles T. Brooks, III, is.....Appellant.

PETITION FOR REHEARING
AND MEMORANDUM IN SUPPORT

Appellant (hereinafter, sometimes, "Brooks") hereby moves and petitions, pursuant to Rules 219 and 221(a), SCACR, as well as all other applicable law, for an order granting rehearing in this case and submits the memorandum below in support of the same. Appellant respectfully submits that the court may have overlooked or misapprehended certain points, as the following shows:

I. The court erred in finding issues were not preserved for review.

No magic words are required to be said below in order that an issue be preserved for review on appeal. See e.g. Toole v. Toole, 260 S.C. 235, 240, 195 S.E.2d 389, 390-91 (1973); State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001) (issue was preserved even though defendant did not use the exact words "corpus delicti" in his request for directed verdict); In re: Robert D., 340 S.C. 12, 530

S.E.2d 137 (Ct. App. 2000) *overruled on other grounds by State v. Liverman*, 398 S.C. 130, 727 S.E.2d 422 (2012) (although party did not specifically mention any constitutional provisions to the trial court, the record reflected that he complained the testimony would violate his right of confrontation). Our Supreme Court has noted that “civil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party” in the context of issue preservation. Elam v. S.C. Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772, 780 (2004). Our Supreme Court has remarked upon “the need to approach issue preservation rules with a practical eye and not in a rigid, hypertechnical manner.” Herron v. Century BMW, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011). In consonance with the Supreme Court in this regard, this court recently held that an off-the-record argument noted in a general way in an order ruling against the party who advanced it was preserved for review. Allegro Inc. v. Scully, Op. No. 5245 (S.C. Ct. App. filed June 30, 2014) (Shearouse Adv. Sh. No. 26 at 118, 128).

Despite the marked similarity between this case and the situation in Allegro vis-à-vis preservation of the subject issues, the court here determined that two of the issues raised by Brooks in this appeal are not preserved for review. These issues are, however, fully preserved for review. The master noted Brooks’ argument that “all ambiguities in the operative documents should be construed against [First Citizens,]” (R. p. 2), and the master’s order rules on and against that argument in the particulars that this court found were unpreserved. (R. p. 5.)

While the court’s memorandum opinion does not articulate its analysis of the preservations questions, the court’s opinion seems to indicate that these issues are unpreserved because Brooks did not make a motion about them under Rule 59(e),

SCRCF. This is error. It is "[w]here a matter is not ruled on by the circuit court [that] the issue is not preserved for appellate review unless the complaining party moves to amend the judgment pursuant to Rule 59(e)." Vespazziani v. McAlister, 307 S.C. 411, 413, 415 S.E.2d 427, 428 (Ct. App. 1992). Rule 59 motions are not necessary to preserve issues that have been ruled upon by the circuit court; rather, "they are used to preserve issues that have been raised to the trial court but not yet ruled upon by it." Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731, 734 (1998); accord Bailey v. Segars, 346 S.C. 359, 365, 550 S.E.2d 910, 913 (Ct. App. 2001). The master did rule on these issues. Just as Brooks need not have stated any magic words to preserve these arguments, neither did the master need to. See e.g. Toole, 260 S.C. at 240. His recognition of these arguments and ruling against them was enough to preserve these issues.

Furthermore, in light of the procedural posture of the case at the time of this appeal, Brooks had little choice but to bring the appeal without first making a Rule 59(e) motion on these points. The master's order sets the case for trial on February 7, 2013, and Brooks received written notice of the entry of the order on February 4, 2013. (R. p. 52.) There was not time to make a motion to reconsider and have it heard and ruled upon before a trial would be had with the findings the master made in his order established for that trial's purposes. The pendency of a motion to reconsider would not have stayed the trial. See Rule 62, SCRCF. Under the circumstances, which include the failure of the lower court or First Citizens (the moving party) to provide a court reporter, the master's recognition of Brooks' arguments is sufficient for their preservation for review by this court.

Appellant respectfully submits that this court overlooked or misapprehended the law in this regard and the aspects of the master's order that show that these issues are preserved. If this is a close question, the court should resolve that question in favor of preservation and reach the merits of the issues.

II. The record contained at least a scintilla of evidence (and probably a lot more) showing a question of material fact as to whether Brooks withdrew his answer, and Brooks did not have to submit his own factual material to show that, since the Respondent's factual showing already did.

The court's opinion, though it does not state its analysis, seems to indicate that the court believed that, to avoid summary judgment, Brooks was required to put some factual material into the record on the question of whether he violated the parties' agreement by failing to withdraw his answer. This is a misapprehension of the law.

The forbearance agreement document at issue states that Brooks "hereby withdraws its [sic] answer and defenses with prejudice[.]" (R. p. 44.) This statement is contained in the forbearance agreement document attached to the affidavit that Respondent (hereinafter "First Citizens") served in support of its motion for summary judgment. (R. p. 44.)

Under Rule 56, SCRCF, "the party seeking summary judgment has the initial responsibility of demonstrating the absence of any genuine issue of material fact." Baughman v. American Telephone & Telegraph Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545-46 (1991). "The party seeking summary judgment has the burden of clearly establishing by the record properly before the court the absence of a triable issue of fact." Owens v. Magill, 308 S.C. 556, 562, 419 S.E.2d 786, 790 (1992). "A party who fails to show the absence of genuine issue of material fact is not entitled to summary

judgment even though his adversary does not come forward with opposing materials.”
Standard Fire v. Marine Contracting, 301 S.C. 418, 421, 392 S.E.2d 460, 462 (1990).

First Citizens did not meet its initial burden of demonstrating the absence of a material fact on this point. In fact, the factual showing it made in support of its motion demonstrated the existence of an issue of material fact. Brooks did not have to submit still more material on this point to argue that First Citizens was not entitled to summary judgment on this question. See id.

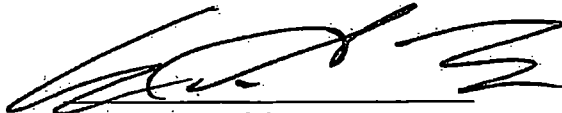
Where an agreement between parties is embodied in more than one document, as here, the documents are considered as a whole and construed together. E.g., Klutts Resort Realty, Inc. v. Down’Round Dev. Corp., 268 S.C. 80, 232 S.E.2d 20 (1977). When the settlement agreement document and the forbearance agreement document are construed together, they show at least an ambiguity about whether Brooks withdrew his answer by signing the forbearance agreement document. (R. pp. 40-46.) That is an issue of fact that is material to whether summary judgment on this point was proper. The law is that “summary judgment may be rendered only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law[.]” Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986), and that “[e]ven when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied[.]” Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004). There was at least a genuine issue of material fact here, and summary judgment on this point should have been denied. It was error for this court to affirm

the grant of summary judgment on this point. This was particularly so if the court's reasoning was, as it appears to be, that Brooks was required to put his own factual material in the record in order to survive summary judgment, as First Citizens' showing revealed it was not entitled to summary judgment on this issue.

Appellant respectfully submits that this court overlooked or misapprehended the law and the record in this regard.

WHEREFORE Appellant prays for an order granting rehearing in this case.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Andrew S. Radeker', written over a horizontal line.

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Attorney for Appellant

July 9, 2014

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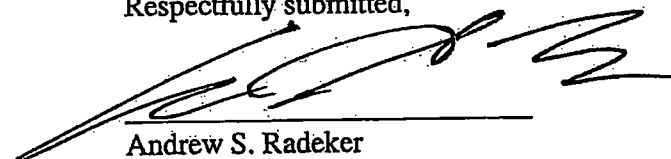
PROOF OF SERVICE

I certify that I served the foregoing petition for rehearing on the Respondent by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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July 9, 2014

Respectfully submitted,



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The South Carolina Court of Appeals

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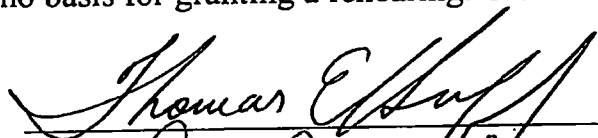
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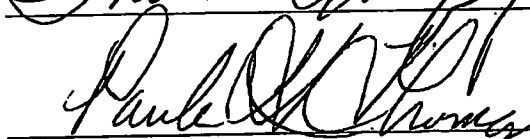
Of whom Charles T. Brooks, III, is the Appellant.

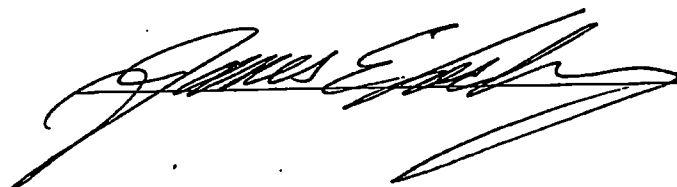
Appellate Case No. 2013-000255

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 J.

 J.

 J.

Columbia, South Carolina

FILED

REG 8-25-14

cc: Andrew Sims Radeker, Esquire
Damon Christian Wlodarczyk, Esquire
The Honorable Richard L. Booth

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

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First Citizens Bank and Trust Company, Inc , . .

Respondent,

v

Charles T Brooks, III and the South Carolina Department of Revenue, Defendants,

Of Whom Charles T Brooks, III, is

Appellant

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES

- I. Did the lower court err in making a factual finding that “the forbearance agreement also provided for ongoing payment of the monthly payments due under the Note and Line of Credit[,]” in addition to the payments called for under the language of the forbearance agreement, where ambiguity in the document (particularly when coupled with the parties’ course of dealing) created an issue of material fact on that point?**
- II. Did the lower court err in making a factual finding that “[t]he forbearance agreement contained a term that stated that acceptance of monies under the agreement was not an estoppel, prejudice or waiver of Plaintiff’s right to proceed with the foreclosure action” without also making findings as to other language in the documents at issue that makes the term ambiguous?**
- III. Did the lower court err in making a factual finding that “the Defendant breached the terms of the forbearance agreement by failing to withdraw his Answer in this matter” when the record showed an issue of fact about that and, in any event, the matters in dispute arose well after the answer was served?**

STATEMENT OF THE CASE

Respondent (hereinafter "First Citizens") filed a summons and complaint on October 30, 2009, seeking foreclosure of a mortgage given to a predecessor bank by Appellant (hereinafter "Brooks") (R pp 7-18) Brooks timely served and filed an answer to the complaint (R pp 3, 19-20) Brooks' answer contained only admissions and denials of First Citizens' allegations and did not assert any affirmative defenses or counterclaims (R pp 19-20)

First Citizens and Brooks reached a settlement, which was memorialized in two documents, one entitled "Release and Settlement Agreement" and the other (not dated) entitled "Forbearance Agreement – In Foreclosure " (R pp 40-46) Under the forbearance agreement, Brooks was required to make an initial \$5,000 00 payment and monthly \$1,500 00 payments to First Citizens until March 1, 2011 (R p 44) Brooks made monthly payments pursuant to the forbearance agreement, which were accepted by First Citizens for several months after March 1, 2011 (R p 5)

On August 9, 2012, First Citizens served a motion for summary judgment (R p 47) The text of the motion simply stated that it was made "on the grounds that there is no genuine issue as to any material fact and the Plaintiff is entitled to an Order for Foreclosure and Sale as a matter of law Said motion shall be based upon the statute and case law of the State of South Carolina, upon the pleadings and other evidence developed in discovery and upon the affidavits attached hereto and other material properly received by the Court in connection therewith" (R p 21) It attached an affidavit of Dave Davies, to which were in turn attached a copy of a note, a mortgage, and the "Release and Settlement Agreement" and "Forbearance

Agreement – In Foreclosure” mentioned above (R pp 22-46) Davies’ affidavit contained the following statement

On March 7, 2010, Charles T Brooks entered into a Settlement Agreement with the Plaintiff in which for valuable consideration, Plaintiff agreed to allow Mr Brooks to enter into a forbearance agreement on the above referenced defaulted Note and Mortgage The Settlement Agreement attached hereto as Exhibit “C” and Forbearance Agreement attached hereto as Exhibit “D” are incorporated by reference as if fully set forth verbatim The terms of the Settlement Agreement provided in part that Charles T Brooks agreed to withdraw his Answer in the above captioned case Charles T Brooks has failed to comply with the provisions of the Settlement Agreement

(R p 24)

Davies’ affidavit contained no other statements about a purported default of the settlement agreement or the forbearance agreement (R pp ____, Affidavit of Davies) The forbearance agreement document attached to the affidavit states that Brooks “hereby withdraws its [sic] answer and defenses with prejudice[]” (R p 44)

On October 9, 2012, before the summary judgment hearing, Brooks timely served his own affidavit, which he filed with the court (R pp 2, 48-51) Brooks’ affidavit states as follows

Up to around Christmas of 2011, I continued to make the monthly forbearance payments to First Citizens in the monthly payment amounts First Citizens always accepted those payments

After I fell behind in those payments, I asked First Citizens, through its counsel, to provide me with a reinstatement figure to bring those payments current As the attached emails show, First Citizens would not provide that to me

At the time I requested the reinstatement figure, I could have brought the monthly payments current, however, First Citizens would not provide me with a reinstatement figure, much less accept a payment to bring the loan current

(R p 48) Printouts of emails between Brooks and counsel for First Citizens were attached to the affidavit and confirmed First Citizens would not provide Brooks a reinstatement figure (R pp 49-51)

On November 19, 2012, the Sumter County Master-in-Equity held a hearing¹ on the motion for summary judgment, after which he issued an order that was filed January 23, 2013 (R p 1) That order contained the following

In support the Motion for Summary Judgment, the Plaintiff submitted an Affidavit and counter-Affidavit of a business records custodian for the Plaintiff The Defendant Brooks also filed and timely served an Affidavit in opposition to the Plaintiff's motion

The Plaintiff argued at the hearing that the affidavits it filed established the debt amount owing and that Defendant Brooks is in default of the note, mortgage, and forbearance agreement (which are described below) The Plaintiff argued that, coupled with an affidavit of attorneys' fees and costs that Plaintiff's counsel stated he was ready to submit, these materials showed that the Plaintiff was entitled to judgment as a matter of law The Plaintiff argued that Defendant Brooks' affidavit failed to show the existence of a genuine issue of material fact because, even taking the statements in that affidavit as true, Defendant Brooks was still in default of the written terms of the forbearance agreement Defendant Brooks argued that the Plaintiff's continued acceptance for some months of payments less than the balance due under the written terms of the forbearance agreement (the balance of the loan) constituted either a modification of the terms of the note, mortgage, and/or forbearance agreement

¹ No court reporter was present at the hearing, which arguably prevented compliance with Rule 71(a), SCRPC ("In all [foreclosure] actions a record of hearings shall be made and preserved in the case file in the office of the clerk of court ")

through a course of dealing and conduct between the parties, an estoppel or laches of the Plaintiff's right to declare a default under the terms of the forbearance agreement as written, or a waiver of any such default. Defendant Brooks maintained that the evidence showed at least an issue of material fact as to these matters. He provided the Court and Plaintiff's counsel with copies of Rakestraw v Dozier Assocs., Inc., 285 S C 358, 329 S E 2d 437 (1985), and King v PYA/Monarch, Inc., 317 S C 385, 453 S E 2d 885 (1995), and argued that these cases support his argument. The Plaintiff countered with an argument that the parol evidence rule precluded Defendant Brooks' arguments because the forbearance agreement was an integrated writing. Defendant Brooks countered by stating that a contract may be modified by means other than writing even if it states that modifications must be in writing and that, since the conduct at issue occurred after the execution of the forbearance agreement, it did not fall within the ambit of the parol evidence rule. Defendant Brooks contended that all ambiguities in the operative documents should be construed against the Plaintiff. The Plaintiff acknowledged that it drafted the documents at issue but denied that there are any material ambiguities in them. Defendant Brooks contended that, under the requirements of equity and the operative terms between the parties as affected by the conduct between them, the Plaintiff could not treat the loan as matured and was required to let Defendant Brooks reinstate by bringing current the amount that would have been paid had he continued making \$1500.00 monthly payments to the present day, that the Plaintiff had refused to let him do that, and that the course of conduct between the parties created a fact issue as to whether he has a right to reinstate, a fact issue as to what the debt amount owed to the Plaintiff is, and a fact issue as to whether the Plaintiff is entitled to foreclosure. The Plaintiff argued that there was no genuine issue of material fact because the affidavits on file showed that Defendant Brooks was in default of the terms of the note, the terms of the mortgage, and the terms of the forbearance agreement.

After reviewing and taking into consideration the pleadings and affidavits submitted in this case as well as the arguments presented at the motion hearing, the

Court makes the following findings of fact and conclusions of law

FINDINGS OF FACT

- 1) The Lis Pendens was filed on July 23, 2009. An Amended Lis Pendens was filed on October 30, 2009.
- 2) The Summons and Complaint were filed on October 30, 2009.
- 3) Service was made upon the Defendants as shown by the proof of service filed herein.
- 4) The Defendants filed and timely served responsive pleadings.
- 5) The Defendants and all attorneys of record were notified of the time, date, and place of the hearing in this matter.
- 6) For value received, Charles T. Brooks III made, executed and delivered a note ("Note") dated May 12, 2005, promising thereby to pay to the order of Sumter National Bank the sum of One Hundred Twelve Thousand and 00/100 (\$112,000.00) Dollars, with interest at the rate of 7.50% per annum, with a current rate of 4.2500% per annum. Other terms and conditions are stated in the Note, which is of record herein.
- 7) To better secure the payment of the Note described above, Charles T. Brooks III made, executed, and delivered to Sumter National Bank a certain real estate mortgage ("Mortgage") in writing, dated May 12, 2005, covering real property in Sumter County, which is the same as that described in the Complaint. The Mortgage provided for the anticipation of future advances secured by the Mortgage subject to the maximum principal amount secured by the mortgage at any one time shall not exceed \$112,000.00.
- 8) The Mortgage was filed in the Office of the Register of Mesne Conveyances/Register of Deeds for Sumter County on May 12, 2005, in Book 980 at Page 770. Thereafter, on October 1, 2006, Sumter National

Bank merged into and subsequently operated as part of Community Resource Bank, National Association, thereafter, on November 1, 2008, Community Resource Bank, National Association, merged into and subsequently operated as part of First Citizens Bank and Trust Company, Inc., leaving First Citizens Bank and Trust Company, Inc. as the surviving entity

9) The Note and Mortgage matured on May 5, 2010

10) On July 27, 2007, Charles T Brooks III made, executed, and delivered to Community Resource Banks, National Association, a Note for a line of credit ("Line of Credit") in the amount of \$30,150 00

11) To better secure the payment of the Line of Credit described above, Charles T Brooks III agreed in writing that the Mortgage dated May 12, 2005, and more fully described above would also serve as additional security for the Line of Credit, but subject to the extent of the future advance clause limit expressed in the mortgage

12) The Line of Credit matured on August 2, 2008

13) The Mortgage evidences and secures the repayment of money advanced by the mortgagee to, or on behalf of, the mortgagors and constitutes a first mortgage lien on the mortgaged premises

14) The Plaintiff is the real party in interest pursuant to SCRCP 17(a)

15) The titleholder of record of the subject property as of the filing of the Lis Pendens in this action is Charles T Brooks III, who is the original mortgagor

16) The loan evidenced by the Note and Mortgage is not owned, securitized or guaranteed by Fannie Mae or Freddie Mac, and is not serviced by a servicer participating in the Home Affordable Modification Program (HAMP) Therefore the Court finds that there are no HAMP issues to be resolved before foreclosure is ordered or the sale is commenced

17) As stated in the Certification of Exemption from Administrative Order 2011-05-02-01 filed herein, the real property which is the subject of this action is not an "owner occupied dwelling" as defined in the Order

18) The Defendant Brooks defaulted on the Note and Mortgage on or about March 2, 2009

19) The Defendant Brooks defaulted on the Line of Credit, also secured by the Mortgage, on August 2, 2008 when the Line of Credit matured

20) The Plaintiff and the Defendant Brooks entered into a release and settlement agreement dated April 7, 2010, which was a valid and binding agreement and also entered into a forbearance agreement which was a valid and binding agreement in which, among other things, Defendant Brooks agreed to pay the sum of \$1,500 00 per month toward arrearage beginning April 1, 2010 and ending March 1, 2011, at which time the remaining balance became due and payable. The forbearance agreement also provided for ongoing payment of the monthly payments due under the Note and Line of Credit proper, but was silent on the issue of the maturity of the original note and the post-maturity status of the line of credit note during the forbearance period

21) The forbearance agreement contained default terms that provided for acceleration of all unpaid amounts under both the agreement and the loan documents

22) The forbearance agreement contained a term that stated that acceptance of monies under the agreement was not an estoppel, prejudice or waiver of Plaintiff's right to proceed with the foreclosure action

23) The forbearance agreement provided in part that Defendant Brooks would withdraw his answer in this matter and the Defendant breached the terms of the forbearance agreement by failing to withdraw his Answer in this matter but in any event, the Answer has not been withdrawn

24) Defendant Brooks made monthly payments pursuant to the forbearance agreement which were accepted by Plaintiff for several months after the maturity date of the original forbearance agreement but has not paid the balance of unpaid amounts due under the forbearance agreement or the loan documents

25) All payments made under the terms of the loan documents and after entry into the forbearance agreement are not accounted for in the affidavits submitted by the Plaintiff

CONCLUSIONS OF LAW

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED

1) That there is no genuine issue of any material fact as to the findings setting forth in paragraphs 1 through 25 above and Defendant Brooks is prohibited from further contesting those findings in future proceedings

2) That the Court convene a non-jury trial on February 7th, 2013 at 11 00 A M, at which time the parties will present evidence as to the following remaining issues

a The balance due Plaintiff after giving credit for all payments made pursuant to the loan documents and also the forbearance agreement,

b The intention of the parties in Defendant Brooks' payment of and Plaintiff's acceptance of monthly forbearance payments after the March 1, 2011 maturity date of the original forbearance agreement, the relevance of the language of the forbearance agreement referring to acceptance of payments, and the effect on Plaintiff's right to proceed with foreclosure,

c Whether or not Plaintiff [sic] made any monthly payments as they came due under the existing loan documents after entering into the settlement and forbearance agreements, and the effect of the forbearance agreement upon the post-maturity status of the line of credit note at the inception of the forbearance

agreement and the maturity of the real estate note and mortgage during the forbearance period

(R pp 2-6)

This appeal followed

STATEMENT OF FACTS

First Citizens and Brooks settled their foreclosure case by entering into a settlement agreement memorialized in two documents drafted by someone on behalf of First Citizens, one dated April 7, 2010, and entitled "Release and Settlement Agreement" and the other (not dated) entitled "Forbearance Agreement – In Foreclosure" (R pp 2, 40-46) Those documents are rife with ambiguities (R pp 40-46) The "Release and Settlement Agreement" document provides in material terms as follows

Brooks and First Citizens now desire to settle, compromise, and resolve the foreclosure action pursuant to the terms and conditions hereinafter set forth in this settlement agreement

Settlement Terms. Brooks shall (1) sign a separate forbearance agreement on the Office Mortgage [which is how the parties referred to the mortgage at issue – Brooks had other properties mortgaged with the same bank] to resume payments plus arrearage for a period of 12 months, at the conclusion of which a balloon payment will be due for the entire amount due, (4) refinance the Office Mortgage to include the deficiency amounts once [other properties mortgaged to the same bank] have sold and the deficiency amounts are fixed, [and,] in consideration for First Citizens to (1) hold the foreclosure on the Office Mortgage as long as the Court will allow or until Brooks defaults on any portion of this Agreement[]

Covenant Not To Sue. Brooks agrees to withdraw his Answers in the current litigation and agrees to take any actions necessary to facilitate the dismissal of the foreclosure

(R p 41)

The forbearance agreement document materially provides as follows

1 Lender's Forbearance Lender [First Citizens] shall forbear from exercising any and all of its rights and remedies presently existing or arising during the term of this Agreement under the Loan Documents, the ongoing foreclosure action or this Agreement, provided that there exists no Event of Default as such term is defined herein at Paragraph 5,

2 Borrower [Brooks] hereby withdraws its [sic] answer and defenses with prejudice,

3 Borrowers Payment of the Arrears THIS FORBEARANCE AGREEMENT IS NOT DESIGNED TO CURE THE ARREARAGE The intent of this agreement is to provide time for the Lender to sell other properties deeded to it from Borrower as part of a separate Settlement and Release Agreement dated March __, 2010 [(this is the settlement agreement document dated April 7, 2010)] At the conclusion of this agreement the Loan shall be refinanced to include any deficiency from the sale of the other properties This must be accomplished no later than March 1, 2011 Borrower shall comply with this agreement in the following manner

- a By paying to Lender the sum of \$5,000 00, in certified funds, no later than March 15, 2010, this payment is to be applied to the arrearage,
- b By paying to Lender the sum of \$1,500 00, in certified funds, due the first day of each month beginning April 1, 2010, and ending March 1, 2011
- c On March 1, 2011 the balance of the loan will become immediately due and payable, should Borrower and Lender fail to enter a separate agreement by that date to cure the arrearage or pay off this loan The balance of

the loan will include the capitalization of all accrued interest on the principal, fees, and other amounts as they become due during the course of this Agreement because the payments specified hereunder are not designed to cure the arrearage

- d If this is an escrowed loan, the regular monthly payment amount may change during the term of this agreement. If so, the Borrower will be required to pay the new regular monthly payment amount in addition to the monthly payment amount designed to cure the arrearage
- e By paying to lender any additional default and/or foreclosure costs which may be incurred by Lender during the course of this Agreement

4 Borrower's Payment of Payments Coming Due Commencing with the regular payment due (next regular payment date), Borrower shall make all future Payments as they become due, which Payments may change in accordance with the terms of the Notes and Mortgage

5 Events of Default If Borrower fails to make any of the payments of the Arrears as specified herein on the due date hereof, if the Borrower fails to make any of the Payments pursuant to the terms of the Notes and Mortgage, or [sic] if the Borrower fails to keep a promise or agreement or perform or discharge any agreement, covenant, obligation or undertaking created or agreed to by Borrower in the Loan Documents and this Agreement, same shall constitute an event of default ("Event of Default") hereunder and under the Loan Documents

6 Lender's Rights and Remedies Upon Events of Default Upon and after the occurrence of an Event of Default all amounts then remaining unpaid under the Loan Documents and this Agreement shall be immediately due and payable and Lender shall be free to exercise any or all rights and remedies provided for under the Loan Documents, including, but not limited to, continuance of the foreclosure action, which rights and remedies are incorporated herein by reference as if fully set forth herein. By entering into this Agreement,

Lender shall in no way be considered to have waived or have been estopped from exercising any or all of its rights and remedies under the Loan Documents. Noting [sic] contained herein shall constitute a waiver of any or all of the Lender's rights or remedies including the right to proceed with the foreclosure action. This Agreement shall not be construed as a discontinuance of the foreclosure action and any forbearance by the Lender and acceptance of monies hereunder shall not be deemed an estoppel, prejudice or waiver of Lender's right to proceed with the foreclosure action.

It is also agreed that the Lender, may without further notice to the Borrower, proceed ex parte with all further proceedings in the foreclosure action, inclusive of the order of reference, appointment of a referee, preparing a referee's oath and report and entering final judgment of foreclosure and sale, except that the Lender agrees to forbear in scheduling the foreclosure sale as long as an Event of Default does not exist.

13 Reinstatement. In the event Borrower cures the Arrears by making all payments required under paragraphs [sic] 3, is current with the Payments then due, and no Event of Default exists under the Loan Documents and this Agreement, Lender shall reinstate the Notes and Mortgage according to its original terms and conditions.

(R pp 43-46)

Brooks made all the payments provided for under paragraph 3 of the forbearance agreement (R p 48) In fact, he made more (R p 48) Though March 1, 2011, came and went, Brooks continued to make monthly payments in the same amount called for under the forbearance agreement, and First Citizens accepted the continuing payments without complaint (R p 48) He fell moderately behind on those payments and sought to catch them up, but First Citizens refused to allow him to do that (R pp 48-51) First Citizens then made a summary judgment motion on

the basis of an affidavit² that makes the vaguely worded statement that “Brooks has failed to comply with the provisions of the Settlement Agreement” – not the forbearance agreement – and intimates, but does not state, that Brooks has defaulted the settlement agreement by failing to withdraw his answer in this case (R p 24) This is despite the fact that the forbearance agreement document states that “[Brooks] hereby withdraws its [sic] answer and defenses with prejudice ” (R p 44)

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRPC Fleming v Rose, 350 S C 488, 493, 567 S E 2d 857, 860 (2002) That standard is that “summary judgment may be rendered only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law Additionally, it must be shown that further inquiry into the facts of the case is not desirable to clarify the application of the law ” Folkens v Hunt, 290 S C 194, 196, 348 S E 2d 839, 841 (Ct App 1986)

“All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied” Nelson v Charleston County Parks & Recreation Comm, 362 S C 1, 605 S E 2d 744 (Ct App 2004) If “the

² The master’s order states that First Citizens submitted a “counter-Affidavit of a business records custodian”, however, Brooks’ counsel never received any such affidavit. (R p 2) For that matter, Brooks’ counsel was never provided with the purported affidavit of attorney’s fees and costs First Citizens’ counsel stated he was ready to submit (R p 2)

parties vehemently dispute the inferences and conclusions to be drawn from the undisputed facts, that simply establishes that summary judgment is not appropriate[]” Montgomery v CSX Transp, Inc., 656 S E 2d 20, 29 (S C 2008)

“When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues ” Englert, Inc v LeafGuard USA, Inc., 377 S C 129, 133-34, 659 S E 2d 496, 498 (2008)

In 2009, the South Carolina Supreme Court clarified earlier confusion about whether a scintilla of evidence is sufficient to defeat summary judgment Hancock v Mid-South Management Co., Inc., 381, S C 326, 330, 673 S E 2d 801, 802-3 (2009) In Hancock, the Court held that “in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment” Id More than a scintilla is required only in cases requiring heightened burdens of proof or applying federal law Id Accordingly, when the ordinary burden of proof is applicable, only a scintilla of evidence is required to withstand summary judgment Id

The factual statements in an affidavit offered in support of summary judgment must be specific, a court will not consider an affiant’s conclusory averments in conjunction with summary judgment proceedings Dawkins v Fields, 354 S C 58, 68, 580 S E 2d 433, 438 (2003), Cox & Floyd Grading, Inc v Kajima Construction Services, Inc., 356 S C 512, 516-17, 589 S E 2d 789 (Ct App 2003) It is only

“when a motion for summary judgment is made and supported as provided in [Rule 56]” that the non-movant is required to meet the motion with factual material that shows there is a genuine issue for trial Rule 56(e), SCRCP (emphasis added)

ARGUMENT

- I. The lower court erred in making a factual finding that “the forbearance agreement also provided for ongoing payment of the monthly payments due under the Note and Line of Credit[,]” in addition to the payments called for under the language of the forbearance agreement, where ambiguity in the document (particularly when coupled with the parties’ course of dealing) created an issue of material fact on that point.

“A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation. It is a question of law for the court whether the language of a contract is ambiguous. Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. The determination of the parties’ intent is then a question of fact.” S C Dept of Natural Resources v Town of McClellanville, 345 S C 617, 623, 550 S E 2d 299, 302-03 (2001) (internal citations omitted)

It is well settled that ambiguous language in a contract document should be interpreted strongly in favor of the party who did not draft the document and against the party who did. E.g., So Atlantic Financial Servs., Inc v Middleton, 356 S C 444, 447, 590 S E 2d 27, 29 (2003), Mid-Continent Refrigerator Co v Way, 263 S C 101, 109, 208 S E 2d 31, 35 (1974). Any conflict between clauses in a contract must be resolved in favor of the non-drafting party. Mid-Continent Refrigerator, 263 S C at 109

“The conduct of the parties is entitled to great weight in interpreting an ambiguous contract” Langston v Niles, 265 S C 445, 458, 219 S E 2d 829, 834 (1975) In cases of doubt, the interpretation of a contract that the evidence shows was shared by both parties to it is determinative Kitchens v Lee, 221 S C 59, 66, 69 S E 2d 67, 69 (1952) “Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence” Stackhouse v Pure Oil Co., 176 S C 318, 337, 180 S E 188, 196 (1935) The behavior of the parties to the contract in carrying it out is evidence that may speak to their mutual interpretation of the contract terms Langston, 265 S C at 458 (in interpreting ambiguous terms, noting behavior of parties after agreement struck), Kitchens, 221 S C at 66 (“[t]he repeated payments by appellant and long-continued and unqualified acceptances by respondent are conclusive of their respective interpretations of the terms of the contract, by which both are bound even if there were uncertainty as to the terms of the contract”)

Here, the terms of the documents at issue show marked ambiguity about what payments Brooks was required to make under his settlement with First Citizens First Citizens argued that Brooks “is in default of the note, mortgage, and forbearance agreement[,]” and the lower court found that, in addition to the forbearance payments of the initial \$5,000 00 and the \$1,500 00 monthly payments – which Brooks made – “[t]he forbearance agreement also provided for ongoing payment of the monthly payments due under the Note and Line of Credit proper[]” (R pp 2, 5) Paragraph 3 of the forbearance agreement, however, states that “Borrower shall comply with this

agreement *in the following manner*" (emphasis added) and then lists five sub-items, one of which does not call for Brooks to do anything (item (c)), one of which does not apply at all (item (d), since this is not an escrowed loan), and one of which does not apply in the situation of this case (item (e)), since no evidence was presented that First Citizens incurred "any additional default and/or foreclosure costs during the course of this Agreement" (R p 44) The only actually applicable obligations from this list of what Brooks is required to do to "comply with this agreement" are to pay the initial \$5,000 00 payment and pay the \$1,500 00 monthly payments through March 1, 2011 (R p 44) To the extent that there are provisions in the forbearance agreement that purport to require Brooks to make these payments *and* other payments under the note and mortgage, the controlling language is in Paragraph 3, which states Brooks is required to do only the things specifically enumerated in the list set out there in order to "comply with this agreement" (R p 44) "It is, of course, elementary that any conflict between [Paragraph 3] and any other provision of the contract documents would have to be resolved or construed in favor of [Brooks,]" the non-drafting party Mid-Continent Refrigerator, 263 S C at 109

Further, the parties' course of performance of the settlement bears out that First Citizens and Brooks both construed the forbearance agreement as obligating Brooks to pay only the \$5,000 00 initial payment and \$1,500 00 monthly payments Those are the payments Brooks made, and First Citizens accepted them without complaint (R p 48) This is evidence that speaks to a shared interpretation of the contract terms by Brooks and First Citizens Langston, 265 S C at 458, Kitchens, 221 S C at 66 Indeed, when First Citizens moved for summary judgment, the

supporting affidavit it used did not state that Brooks was in default of the forbearance agreement for failure to make required payments (R pp 22-25)

This is an ambiguity that the law required the master to construe in favor of Brooks, the non-drafting party By finding that “the forbearance agreement also provided for ongoing payment of the monthly payments due under the Note and Line of Credit[,]” the master construed the ambiguity in favor of First Citizens, the drafting party (R p 5) This was error At the very least, there was a genuine issue of material fact regarding the construction of the forbearance agreement’s terms in this regard

II. The lower court erred in making a factual finding that “[t]he forbearance agreement contained a term that stated that acceptance of monies under the agreement was not an estoppel, prejudice or waiver of Plaintiff’s right to proceed with the foreclosure action” without also making findings as to other language in the documents at issue that makes that term ambiguous.

The forbearance agreement does contain a term that states that “acceptance of monies hereunder shall not be deemed an estoppel, prejudice or waiver of Lender’s right to proceed with the foreclosure action ” (R p 45) The forbearance agreement also contains other, inconsistent terms, however Paragraph 1 of the document states that “Lender shall forbear from exercising any and all of its rights and remedies presently existing or arising during the term of this Agreement under the Loan Documents, the ongoing foreclosure action or this Agreement, provided that there exists no Event of Default[]” (R p 43)

This, too, is an ambiguity that the law required the master to construe in favor of Brooks So Atlantic Financial, 356 S C at 447, Mid-Continent Refrigerator, 263 S C at 109 The master’s finding that the forbearance agreement contained this term,

without any findings about its ambiguity and inconsistency, was at best incomplete
(R p 5) This was error

III. The lower court erred in making a factual finding that “the Defendant breached the terms of the forbearance agreement by failing to withdraw his Answer in this matter” when the record showed at least an issue of fact about that and, in any event, the matters in dispute arose well after the answer was served.

The master found “the Defendant breached the terms of the forbearance agreement by failing to withdraw his Answer in this matter but in any event, the Answer has not been withdrawn ” (R p 5) This is the only basis even arguably articulated in Mr Davies’ affidavit for Brooks’ purported default of the settlement agreement (R pp 22-25)

The forbearance agreement document, however, states that Brooks “hereby withdraws its [sic] answer and defenses with prejudice[]” (R p 44) Viewed in the light most favorable to Brooks, Davies’ intimation that Brooks breached the settlement agreement by failing to withdraw his answer was false

That the forbearance agreement provides that Brooks withdrew his answer by entering into that agreement does not, however, preclude Brooks from contesting the Plaintiff’s motion for summary judgment or any further proceedings, at most, it precludes him from contesting such proceedings on the basis of defenses articulated in Brooks’ answer (R p 44) Here, the matters in dispute with regard to the summary judgment motion all arose well after Brooks answered in the case and concern the effect of the parties’ actions in performing the settlement agreement Our courts do not penalize litigants for failing to raise a defense in an answer where the facts giving rise to the defense do not come into existence until after the answer is

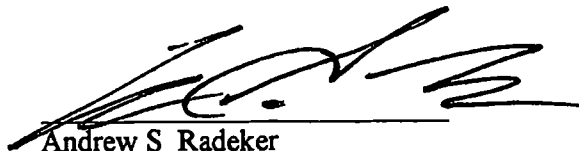
given LaRosa v Johnston, 328 S C 293, 297, 493 S E 2d 100, 102 (Ct App 1997) (where “Johnston acquired a statutory defense that had not previously been available” Court of Appeals declined “to penalize Johnston for failing to raise a defense which she could not have raised” earlier), Wagner v Wagner, 286 S C 489, 491-92 335 S E 2d 246, 247-48 (Ct. App 1985) (permissible for litigant to raise unpled defense where facts supporting defense were not in existence at the time she answered)

In any event, it was error for the master to find that “the Defendant breached the terms of the forbearance agreement by failing to withdraw his Answer in this matter but in any event, the Answer has not been withdrawn ” (R p 5) At the very least, there was a genuine issue of material fact on that point Given that a scintilla of evidence on an issue of material fact is all that is required to avoid summary judgment, this was error by the master and, along with the other errors in the order below, requires reversal

CONCLUSION

The lower court erred in making the findings subject of this appeal The Court should reverse the master’s grant of partial summary judgment as to those findings, so that the disposition of these factual issues is made at trial

Respectfully submitted,

A handwritten signature in black ink, appearing to read "A. S. Radeker", is written over a horizontal line.

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September 16, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Richard L. Booth, Master-in-Equity

Common Pleas Case No 2009-CP-43-2538
Appellate Case No 2013-000255

First Citizens Bank and Trust Company, Inc , .. Respondent,

v

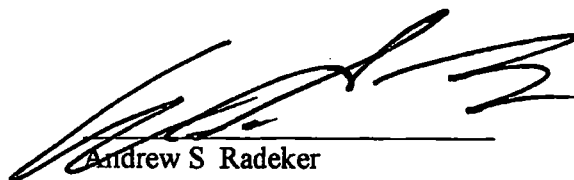
Charles T Brooks, III and the South Carolina Department of Revenue, Defendants,

Of Whom Charles T Brooks, III, is Appellant

CERTIFICATE OF COUNSEL

I certify that the foregoing brief complies with Rule 211(b), SCACR

Respectfully submitted,



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September 16, 2013

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
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APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Richard L Booth, Master-in-Equity

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Appellate Case No 2013-000255

First Citizens Bank and Trust Company, Inc ,

Respondent,

v

Charles T Brooks, III and the South Carolina Department of Revenue, Defendants,

Of Whom Charles T Brooks, III, is

Appellant

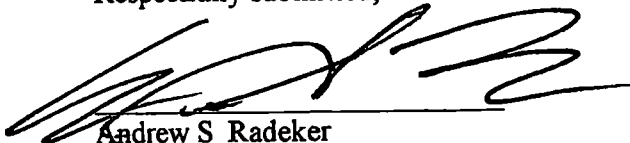
PROOF OF SERVICE

I certify that I served the final brief of Appellant on the Respondent by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows

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SC Court of Appeals

Case No.: 2009-CP-43-2538

First Citizens Bank and Trust Company, Inc.....Respondent,

v.

Charles T. Brooks III and the South Carolina Department of Revenue, Defendants,
of whom Charles T. Brooks is the Appellant.

RESPONDENT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. THE TRIAL COURT CORRECTLY FOUND THAT THE FORBEARANCE AGREEMENT PROVIDED FOR ONGOING PAYMENT OF THE MONTHLY PAYMENTS DUE UNDER THE NOTE AND LINE OF CREDIT.
- II. THE LOWER COURT CORRECTLY FOUND THAT THE FORBEARANCE AGREEMENT CONTAINED A TERM THAT "THE ACCEPTANCE OF MONIES UNDER THE AGREEMENT WAS NOT AN ESTOPPEL, PREJUDICE OR WAIVER OF PLAINTIFF'S RIGHT TO PROCEED WITH THE FORECLOSURE ACTION" WITHOUT MAKING ADDITIONAL FINDINGS REGARDING THE AGREEMENT.
- III. THE LOWER COURT CORRECTLY FOUND THAT APPELLANT HAS BREACHED THE TERMS OF THE FORBEARANCE AGREEMENT BY AGREEING TO WITHDRAW HIS ANSWER BUT BY FAILING TO DO SO.

STATEMENT OF THE CASE

The Respondent is not dissatisfied with the Appellant's Statement of the Case with the noted exception that follows and elects not to provide a detailed Statement of the Case aside from setting forth the following exception. With regard to Appellant's footnote 1 stating that since no court reporter was present, Respondent arguably could not have complied with Rule 71, SCRCF. [Appellant's Final Brief, p. 4]. Had the lower court granted summary judgment and issued an Order for Foreclosure and Sale, a written record would have been prepared, signed by the lower court, and filed with the Clerk of Court which would have complied with Rule 71, SCRCF. However, the issue is immaterial for the purposes of this appeal.

FACTS

This case involves the foreclosure of a commercial mortgage involving Appellant's business property located in Sumter County. [R. pp. 7-18, 26-39]. The validity of the Note, Line of Credit and Mortgage, the terms of the Note, Line of Credit and Mortgage, the default of the terms of the Note, Line of Credit and Mortgage prior to the initiation of the foreclosure action, the Respondent's right to accelerate the payment prior to the initiation of the foreclosure action, and Respondent's right to foreclose on the property in an attempt to satisfy the debt are not in dispute based upon the Affidavit and Counter-Affidavit filed and served prior to the summary judgment hearing. The specific terms of the Note, Line of Credit and Mortgage are incorporated as if more fully set forth herein verbatim. [R. pp. 22-51]. The Note and Mortgage had a maturity date of May 5, 2010 and, therefore, the

Appellant would have been in maturity default on the instruments by failing to pay the balance due on the debt by that date. [*Id.*].

It is further uncontested that on or about March 7, 2010, prior to maturity default, the parties entered into a settlement and forbearance agreement in which Respondent allowed Appellant the opportunity to avoid foreclosure of his business property by making payments as more fully set forth in the document entitled "Forbearance Agreement." [R. pp. 40-42]. In addition, the parties agreed as part of the Settlement that Appellant would withdraw the Answer filed and served on or about November 3, 2009, and allow the foreclosure action to remain pending with the lower court until such time as the lower court would allow or until [Appellant] "defaults on any portion of this Agreement." [R. pp. 41-42 at part 1, subpart (6)-(1) and part 3].

The terms of the forbearance agreement provided *in part* that in order to address the arrearage, Appellant would pay to Respondent an initial lump sum of \$5,000.00 no later than March 15, 2010, that Appellant would continue to make payments to Respondent in the amount of \$1,500.00 per month beginning April 1, 2010 and ending March 1, 2011, and that the "balance of the loan will become immediately due and payable, should [Appellant] and [Respondent] fail to enter a separate loan agreement by that date to cure the arrearage or pay off the loan." [R. pp. 44 at part 3]. It is uncontested that the loan has not been paid off and that the Respondent again failed to make monthly payments after this agreement was made. [R. pp. 22 at paragraphs 2 and 3].

It is uncontested that the Appellant failed to withdraw his Answer as provided by the terms of the settlement agreement, payoff the loan as required, or make monthly payments in or around December 2011. [R. pp. 22-25, 48].

The only evidence before the lower court for consideration at the summary judgment hearing was the Complaint, Answer, Motion for Summary Judgment with Affidavit of Dave Davies and supporting exhibits, and Counter-Affidavit of Charles Brooks. [R. pp. 1-2].

The lower court issued its Order making twenty-five (25) findings of fact which it determined were not at issue and could not be further contested. The lower court also ordered that a non-jury trial take place on February 7, 2013 for the parties to present evidence regarding the following issues.

- a. The balance due Plaintiff after giving credit for all payments made pursuant to the loan documents and also the forbearance agreement;
- b. The intention of the parties in Defendant Brooks' payment of and Plaintiff's acceptance of monthly forbearance payments after the March 1, 2011 maturity date of the original forbearance agreement, the relevance of the language of the forbearance agreement referring to acceptance of payments, and the effect on Plaintiff's right to proceed with foreclosure;
- c. Whether or not Plaintiff made any monthly payments as they came due under the existing loan documents after entering into the settlement and forbearance agreements, and the effect of the forbearance agreement upon the post-maturity status of the line of credit note at the inception of the forbearance agreement and the maturity of the real estate note and mortgage during the forbearance period.

[R. p. 6]. This appeal followed.

STANDARD OF REVIEW

The appellate court applies the same standard as the trial court when reviewing an order granting summary judgment. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). It is appropriate to grant summary judgment when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Id. citing Rule 56(c), SCRPC. "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." Id.

The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact. However, once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent must come forward with specific facts showing there is a genuine issue for trial." Garvin v. Bi-Lo, Inc., 337 S.C. 436, 523 S.E.2d 481 (Ct. App. 1999). The opponent cannot merely rely upon the pleadings, but must submit some additional evidence creating a genuine issue of material fact. Id.

ARGUMENT

I. THE TRIAL COURT CORRECTLY FOUND THAT THE FORBEARANCE AGREEMENT PROVIDED FOR ONGOING PAYMENT OF THE MONTHLY PAYMENTS DUE UNDER THE NOTE AND LINE OF CREDIT.

Appellant contends that the lower court erred in finding that, in addition to the lump sum payment of \$5,000.00 and monthly payments of \$1,500.00, the Forbearance Agreement also provided for ongoing payment of the payments due and payable under the Note and Line of Credit. Appellant contends that to the extent the

payment requirements set forth above which are stated in paragraph 3 of the Forbearance Agreement conflict with other provisions in the agreement, paragraph 3 should control. Appellant argues that the conflicting provisions create an ambiguity that should be resolved in favor of the Appellant. [Appellant's Final Brief, pp. 18-19].

As an initial matter, Respondent contends the issue is not preserved for appellate review.

In order for an issue to be preserved for appellate review, with few exceptions, it must be raised and ruled upon by the trial judge. When a trial court makes a general ruling on an issue, but does not address the specific argument raised by a party, that party must make a Rule 59(e) motion asking the trial court to rule on the issue in order to preserve it for appeal.

Cowburn v. Leventis, 366 S.C. 20, 41, 619 S.E.2d 437, 449 (Ct. App. 2005) (internal citations omitted).

The only evidence regarding the specific terms of the Forbearance Agreement is contained in the agreement itself. Respondent's Affidavit in support of summary judgment provides no evidence concerning the specific provisions of the Forbearance Agreement other than stating that the Forbearance Agreement was attached to the affidavit and the terms were incorporated by reference. [R. pp. 22-47].

Appellant's counter-affidavit does not address the payment terms of the Forbearance Agreement and does not allege any matter related to the forbearance payments as they relate to the monthly payments under the Note and Line of Credit. [R. p. 48]. Finally, there is no argument set forth in the Order relating to Appellant's contention that there was ambiguity relative to whether Appellant was required to make regular monthly payments as required by the Note and Line of Credit in

addition to the forbearance payments. [R pp. 2-3]. Finally, Appellant did not file a Rule 59(e), SCRCF motion raising the alleged error to the lower court where it could be addressed and ruled upon.

As this issue was never specifically raised or ruled upon by the lower court either at the hearing or through a motion for reconsideration, it cannot be raised here for the first time on appeal. Leventis, 366 S.C. at 41, 619 S.E.2d at 449.

Should the Court find the issue was properly preserved, “[i]n construing a contract, the primary objective is to ascertain and give effect to the intention of the parties.” Ecclesiastes Prod. Ministries v. Outparcel Associates, LLC, 374 S.C. 483, 497-98, 649 S.E.2d 494, 501-02 (Ct. App. 2007).

The parties’ intention must, in the first instance, be derived from the language of the contract. To discover the intention of a contract, the court must first look to its language-if the language is perfectly plain and capable of legal construction, it alone determines the document’s force and effect “Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions. The parties’ intention must be gathered from the contents of the entire agreement and not from any particular clause thereof.

Id. (internal citations omitted) (emphasis added).

Contrary to Appellant’s arguments, the following provisions when read as a whole support the lower court’s finding:

1. Lender’s Forbearance. Lender shall forbear from exercising any and all of its rights and remedies presently existing or arising during the term of this Agreement under the Loan Documents, the ongoing foreclosure action or this Agreement, provided that there exists no Event of Default as such term is defined herein at Paragraph 5; . .
3. Borrower’s Payment of the Arrears. **THIS FORBEARANCE AGREEMENT IS NOT DESIGNED TO CURE THE ARREARAGE.** The intent of this agreement is to provide time for the Lender to sell other properties deeded to it from Borrower

as part of a separate Settlement and Release Agreement dated March __, 2010. . . .

4. Borrower's Payment of Payments Coming Due. **Commencing with the regular payment due (next regular payment date),** Borrower shall make all future Payments as they become due, which Payments may change in accordance with the terms of the Notes and Mortgage.

5. Events of Default. If Borrower fails to make any of the payments of the Arrears as specified herein on the due date thereof; **if the Borrower fails to make any of the Payments pursuant to the terms of the Notes and Mortgage;** of if Borrower fails to keep a promise or agreement or perform or discharge any agreement, covenant, obligation or undertaking created or agreed to by Borrower in the Loan Documents and this Agreement, same shall constitute an event of default ("Event of Default") hereunder and under the Loan Documents.

13. Reinstatement. In the event Borrower cures the Arrears by making all payments required under paragraphs 3, **is current with the Payments then due, and no Event of Default exists under the Loan Documents and this Agreement,** Lender shall reinstate the Notes and Mortgage according to its original terms and conditions.

[R. pp. 43-46].

As evidenced above, the \$5,000.00 lump sum payment and the \$1,500.00 monthly payments set forth in paragraph 3 were not intended to cure the arrearage and the Forbearance Agreement clearly states that Appellant was obligated to make regular future payments in accordance with the terms of the Note and Mortgage as they became due which would have been the next regular payment date after executing the agreement. Moreover, the document clearly provides for default if the borrower failed to make payments set forth in paragraph 3 or if the borrower failed to make payments under the terms of the Notes and Mortgage as set forth in paragraph 5. Accordingly, there is no ambiguity in the terms and the lower court did not err. Id.

II. THE LOWER COURT CORRECTLY FOUND THAT THE FORBEARANCE AGREEMENT CONTAINED A TERM THAT "THE ACCEPTANCE OF MONIES UNDER THE AGREEMENT WAS NOT AN ESTOPPEL, PREJUDICE OR WAIVER OF PLAINTIFF'S RIGHT TO PROCEED WITH THE FORECLOSURE ACTION" WITHOUT MAKING ADDITIONAL FINDINGS REGARDING THE AGREEMENT.

Appellant contends the lower court erred in making a factual finding that the Forbearance Agreement contained a term that "the acceptance of monies under the agreement was not an estoppel, prejudice or waiver of Plaintiff's right to proceed with the foreclosure action" [R. p. 5 at paragraph 22] without making additional findings regarding alleged ambiguities in the agreement. [Appellant's Final Brief, p. 19-20]

The Forbearance Agreement specifically provides:

6. Lender's Rights and Remedies Upon Events of Default. . . . Noting [sic] contained herein shall constitute a waiver of any or all of the Lender's rights or remedies including the right to proceed with the foreclosure action. This Agreement shall not be construed as a discontinuance of the foreclosure action and any forbearance by the Lender and acceptance of monies hereunder shall not be deemed an estoppel, prejudice or waiver of Lender's right to proceed with the foreclosure action.

[R. p. 45].

As previously set forth above, the only evidence regarding the terms and conditions of the Forbearance Agreement are the document itself. As the document specifically contains the term set forth in the lower court's order, there is no error.

As to the argument that the lower court should have made additional findings of fact regarding the terms of the Forbearance Agreement, this issue was not raised or ruled upon by Appellant at the hearing or by subsequent motion and, therefore, it

cannot be raised here for the first time on appeal. Leventis, 366 S.C. at 41, 619 S.E.2d at 449.

As a practical matter, Appellant's arguments are without merit as the lower court scheduled a non-jury trial in part to determine "...the relevance of the language of the forbearance agreement referring to acceptance of payments, and the effect on [Respondent's] right to proceed with foreclosure." Accordingly, although the lower court correctly made a finding of fact about a term contained in the Forbearance Agreement, the relevance and effect of the term was left open as an issue to be proven at trial. Accordingly, judgment was not rendered on the term to affect Appellant's rights.

III. THE LOWER COURT CORRECTLY FOUND THAT APPELLANT HAS BREACHED THE TERMS OF THE FORBEARANCE AGREEMENT BY AGREEING TO WITHDRAW HIS ANSWER BUT BY FAILING TO DO SO.

Appellant contends the lower court erred in finding as a matter of law that Appellant agreed in the Forbearance Agreement to withdraw his Answer but failing to do so. [Appellant's Final Brief, pp. 20-21].

In support of Respondent's summary judgment motion, an Affidavit of Dave Davies was submitted along with supporting documentation. [R. pp. 22-47]. The affidavit established the following: the creation of the Note, Line of Credit and Mortgage; the terms of the original security instrument; the default by Appellant on the terms of the security instruments; Respondent's acceleration of the debt and election to foreclose its mortgage in an attempt to satisfy the debt Id.

Appellant's Answer admitted the Note, Line of Credit and Mortgage as being created as evidence of the underlying debts, but denied the default or right to

foreclose the mortgage due to his default on the terms of the security instruments. [R. pp. 19-20]. The Answer contains no legal or equitable affirmative defenses.

As evidenced by the Forbearance Agreement voluntarily entered into by the parties, which is uncontested, the Appellant agreed to the following statements:

WHEREAS, Borrower is in default in the payment of monthly installments of principal, interest, escrow, and other payments called for under the Loan Documents (the "Payments") for the period commencing on May 10, 2009 (the "Arrears")

WHEREAS, as a result of the Arrears, Lender has the right to require that Borrower make immediate payment in full of all monies remaining unpaid under the Loan Documents, and has already commenced foreclosure proceedings to foreclose the Mortgage;

..

2. Borrower's Admissions. Borrower admits the amounts owing to Lender under the Loan Documents as indicated in this Agreement, and represents and acknowledges that there are no defenses, offsets or counterclaims of any nature whatsoever to any of the Loan Documents. Borrower acknowledges valid service of the Summons and Complaint in the foreclosure action, that Borrower does not intend to enter any answer or defenses therein, and specifically waives any rights Borrower might otherwise have to do so. If Borrower has already answered, Borrower hereby withdraws its answer and defenses with prejudice;

[R. pp. 43-44].

Appellant did not present any evidence in his counter-affidavit addressing the allegations in Respondent's Complaint or Appellant's failure to withdraw his Answer after entering into the Forbearance Agreement. Accordingly, the only admissible evidence presented to the lower court is that Appellant voluntarily entered into a contract supported by consideration, admitted the material terms entitling Respondent to obtain a judgment or foreclosure and sale *prior* to the execution of the Settlement

and Forbearance Agreements, agreed to withdraw the Answer, and the Answer has not been withdrawn which, in and of itself is a breach of the terms of the agreement.

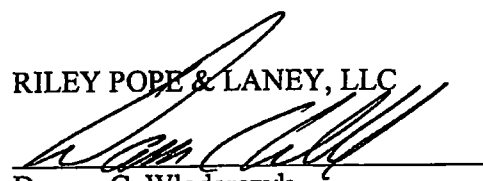
Moreover, because no counter-affidavit was served by Appellant specifically addressing the factual allegations raised in the Complaint and in-part addressed by Respondent's affidavit in support of its motion for summary judgment, there is no genuine issue of material fact as to those matters and the lower court correctly determined that Appellant cannot further contest those issues. Bi-Lo, Inc., 337 S.C. 436, 523 S.E.2d 481 (holding once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent must come forward with specific facts showing there is a genuine issue for trial and cannot merely rely upon the pleadings, but must submit some additional evidence creating a genuine issue of material fact).

Finally, there is no ruling by the lower court that Appellant's Answer was "struck" or otherwise indicating that Appellant cannot further contest the issues preserved for trial as set forth by the Order all of which involve matters that took place after the Defendant's Answer was filed

CONCLUSION

Based upon the evidence and arguments set forth, Respondent respectfully requests that the Court find there was no error in the lower court's findings of fact, issue an Opinion affirming the lower court's Order, remanding this case to the lower court for trial as to the specific issues set forth in the Order, and for such other and further relief as may be just and property.

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September 13, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Richard L. Booth, Master-In-Equity

Case No.: 2009-CP-43-2538

First Citizens Bank and Trust Company, Inc..... Respondent,

v.

Charles T. Brooks III and the South Carolina Department of Revenue, Defendants,
of whom Charles T. Brooks is the Appellant.

CERTIFICATE OF SERVICE

I hereby certify that this day I have deposited a copy of the **Respondent's**

Final Brief in the United States Mail, postage prepaid and addressed to the following
individuals:

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Damon C. Wlodarczyk

September 16, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Richard L. Booth, Master-In-Equity

RECEIVED

SEP 16 2013

SC Court of Appeals

Case No.: 2009-CP-43-2538

First Citizens Bank and Trust Company, Inc Respondent,

v.

Charles T. Brooks III and the South Carolina Department of Revenue, Defendants,
of whom Charles T. Brooks is the Appellant.

CERTIFICATE OF COMPLIANCE

I hereby certify that Respondent's Final Brief complies with Rule 211(b),
SCACR.


Damon C. Włodarczyk
Attorney for Respondents

September 16, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Richard L Booth, Master-in-Equity

Common Pleas Case No 2009-CP-43-2538
Appellate Case No 2013-000255

First Citizens Bank and Trust Company, Inc , Respondent,

v

Charles T Brooks, III and the South Carolina Department of Revenue, Defendants,

Of Whom Charles T Brooks, III, is Appellant

FINAL REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUES

- I. Does the Respondent incorrectly argue that Appellant violated the parties' agreement by not withdrawing his answer when the forbearance agreement document states that Appellant "hereby withdraws its [sic] answer"?**
- II. In arguing lack of ambiguity, does the Respondent focus on some provisions of the documents at issue while ignoring contradictory provisions?**
- III. Are Appellant's arguments preserved for review?**
- IV. By binding itself to an interpretation of a finding in the master's order, has the Respondent effectively conceded a favorable interpretation of that finding to Appellant once this appeal is over?**

ARGUMENT

- I. **The forbearance agreement document expressly states that Brooks “hereby withdraws its [sic] answer[,]” yet First Citizens still argues that Brooks violated the parties’ agreement by not withdrawing his answer.**

The forbearance agreement document at issue states that Appellant (hereinafter “Brooks”) “hereby withdraws its [sic] answer and defenses with prejudice[.]” (R p 44) This statement is contained in the forbearance agreement document attached to the affidavit that Respondent (hereinafter “First Citizens”) served in support of its motion (R p 44) First Citizens still argues, though, that “the only admissible evidence presented to the lower court is that [Brooks] agreed to withdraw the Answer, and the Answer has not been withdrawn which, in and of itself is a breach of the terms of the agreement ” (Initial Brief of Respondent p 12)

It is no wonder that First Citizens contends – even in the face of the contradictory evidence in the material it served in support of its motion and in the face of a specific argument to the contrary in Brooks’ brief – that “it is uncontested that the Appellant failed to withdraw his Answer as provided by the terms of the settlement agreement[.]” (Initial Brief of Respondent p 4) This is the only basis even arguably articulated for Brooks’ purported default of the settlement agreement that is noted in the affidavit First Citizens served in support of its motion (R pp 22-25) First Citizens’ contention, though, is not correct

Brooks argued that “all ambiguities in the operative documents should be construed against [First Citizens]” (R p 2) First Citizens now argues that Brooks did not comply with a provision of the settlement agreement document that provides

that "Brooks agrees to withdraw his Answers in the current litigation[]" (R p 41)

Where an agreement between parties is embodied in more than one document, the documents are considered as a whole and construed together E.g., Klutts Resort Realty, Inc v Down'Round Dev Corp., 268 S C 80, 232 S E 2d 20 (1977) When the settlement agreement document and the forbearance agreement document are construed together, they show at least an ambiguity about whether Brooks withdrew his answer by signing the forbearance agreement document (R pp 40-46) That is an issue of fact that is material to whether summary judgment on this point was proper Given that the law is that "summary judgment may be rendered only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law[.]" Folkens v Hunt, 290 S C 194, 196, 348 S E 2d 839, 841 (Ct App 1986), and that "[e]ven when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied[.]" Nelson v Charleston County Parks & Recreation Comm., 362 S C 1, 605 S E 2d 744 (Ct App 2004), there was at least a genuine issue of material fact here, and summary judgment on this point should have been denied

II. In arguing lack of ambiguity, First Citizens focuses on some provisions of the documents at issue while ignoring contradictory provisions.

As quoted in First Citizens' brief, in construing a contract, "the parties' intention must be gathered from the contents of the *entire* agreement and not from any particular clause thereof" Ecclesiastes Prod Ministries v Outparcel Associates.

LLC, 374 S C 483, 497-98, 649 S E 2d 494, 501-02 (Ct App 2007) (emphasis added) Admittedly, there provisions in the forbearance agreement document from which one might argue, as First Citizens does, that Brooks was required to make the \$1,500 00 monthly payments *as well as* the regular payments coming due under the note and mortgage (Initial Brief of Respondent pp 7-9) That, however, is only one interpretation of the ambiguous, inconsistent provisions of the document For instance, the term "Payments" is not defined in the document (R pp 43-46) First Citizens ignores that paragraph 3 of the forbearance agreement states that "Borrower shall comply with this agreement *in the following manner*" (emphasis added) and then lists five sub-items, the only one of which that is actually applicable to this case being that Brooks pay the initial \$5,000 00 payment and pay the \$1,500 00 monthly payments through March 1, 2011 (R p 44) That list does *not* state that the monthly payments due under the note and mortgage must also be paid (R p 44)

Also, First Citizens states in its brief that "[t]he Note and Mortgage had a maturity date of May 5, 2010 [which means that it came and went during the time the forbearance agreement document called for Brooks to make monthly payments] and, therefore, [Brooks] would have been in maturity default on the instruments by failing to pay the balance due on the debt by that date " (Initial Brief of Respondent pp 2-3) If the loan matured on May 5, 2010, then Brooks would have been required to pay the entire balance of the loan on or before that date, thus, there would be no need to make *any* further payments beyond that, but monthly payments beyond that date, at least arguably in lieu of the payments per the note and mortgage provisions, were exactly what the forbearance agreement called for (R p 44)

The presence of these provisions in the same document presents an ambiguity “Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. The determination of the parties’ intent is then a *question of fact*” S C Dept. of Natural Resources v Town of McClellanville, 345 S C 617, 623, 550 S E 2d 299, 302-03 (2001) (internal citations omitted, emphasis added)

That only the specific payments called for under the forbearance agreement, and not the monthly payments under the note and mortgage, were what was required is borne out by the parties’ performance under the agreement (R p 48) Perhaps most telling as to the parties’ shared understanding of their agreement’s terms is that when First Citizens moved for summary judgment, the supporting affidavit it used did not state that Brooks was in default of the forbearance agreement for failure to make required payments (R pp 22-25)

There was a genuine issue of material fact on this point. It was, accordingly, error for the master to grant summary judgment on it.

III. Brooks’ arguments are preserved for review.

No magic words are required to be said below in order that an issue be preserved for review on appeal. See e.g. Toole v Toole, 260 S C 235, 240, 195 S E 2d 389, 390-91 (1973), State v Russell, 345 S C 128, 546 S E 2d 202 (Ct App 2001) (issue was preserved even though defendant did not use the exact words “corpus delicti” in his request for directed verdict), In re Robert D., 340 S C 12, 530 S E 2d 137 (Ct App 2000) *overruled on other grounds by* State v Liverman, 398 S C 130, 727 S E 2d 422 (2012) (although party did not specifically mention any

constitutional provisions to the trial court, the record reflected that he complained the testimony would violate his right of confrontation) Our Supreme Court has noted that “civil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party” in the context of issue preservation Elam v S C Dept of Transp., 361 S C 9, 602 S E 2d 772, 780 (2004) Not long ago, the Supreme Court remarked upon “the need to approach issue preservation rules with a practical eye and not in a rigid, hypertechnical manner” Herron v Century BMW, 395 S C 461, 470, 719 S E 2d 640, 644 (2011)

Despite this, First Citizens argues that some issues raised by Brooks in this appeal are not preserved for review (Notably, First Citizens does not argue that the issue of whether the master erred in finding Brooks failed to withdraw his answer is unpreserved While this issue certainly is preserved, as the master noted Brooks’ argument that “all ambiguities in the operative documents should be construed against [First Citizens,]” (R p 2), even if it were not preserved, the Court could still consider it due to First Citizens’ failure to argue that it is unpreserved See McCormick v England, 328 S C 627, 494 S E 2d 431 (Ct App 1997)) All of Brooks’ arguments on appeal center around ambiguity in the contractual documents and the parties’ understanding of or modification of their agreement as reflected in their behavior, and Brooks’ arguments on both of these points were raised to the master, who necessarily ruled against those arguments on the points at issue when he made the challenged findings (R pp 2-3, 5)

Furthermore, in light of the procedural posture of the case at the time of this appeal, Brooks had little choice but to bring the appeal without first making a Rule

59(e) motion on these points The master's order sets the case for trial on February 7, 2013, and Brooks received written notice of the entry of the order on February 4, 2013 (R p 52) There was not time to make a motion to reconsider and have it heard and ruled upon before a trial would be had with the findings the master made in his order established for that trial's purposes The pendency of a motion to reconsider would not have stayed the trial See Rule 62, SCRCP Under the circumstances, which include the failure of the lower court or First Citizens (the moving party) to provide a court reporter, the master's recognition of Brooks' arguments is sufficient for their preservation for review by this Court

IV. By binding itself to an interpretation of a finding in the master's order, First Citizens has effectively conceded a favorable interpretation of that finding to Brooks once this appeal is over.

Brooks has argued in this appeal that the master's finding that the forbearance agreement contained a term stating that "acceptance of monies hereunder shall not be deemed an estoppel, prejudice or waiver of Lender's right to proceed with the foreclosure action[.]" without any findings about its ambiguity and inconsistency, was at best incomplete (R p 5) In response, First Citizens has stated in its brief that "the relevance and effect of the term was left open as an issue to be proven at trial Accordingly, judgment was not rendered on the term to affect [Brooks'] rights" (Initial Brief of Respondent p 10)

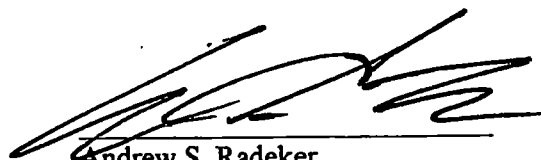
First Citizens has made a concession here that makes the Court's work light on this issue As First Citizens' position is that "judgment was not rendered on the term to affect [Brooks'] rights[.]" First Citizens cannot argue at trial that this finding

in the master's order precludes Brooks from arguing anything or even that it precludes the master from finding anything

CONCLUSION

First Citizens has grasped at straws in an effort to maintain findings the master made that were favorable to First Citizens but improper, particularly at the summary judgment stage. Further, Brooks' arguments are indeed preserved for review. Accordingly, reversal on the issues subject of this appeal is warranted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Andrew S. Radeker', is written over a horizontal line.

Andrew S. Radeker
Harrison & Radeker, P A
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellant

September 16, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Richard L Booth, Master-in-Equity

Common Pleas Case No 2009-CP-43-2538
Appellate Case No 2013-000255

First Citizens Bank and Trust Company, Inc , Respondent,

v

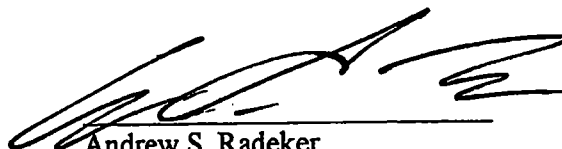
Charles T Brooks, III and the South Carolina Department of Revenue, Defendants,

Of Whom Charles T Brooks, III, is Appellant

CERTIFICATE OF COUNSEL

I certify that the foregoing brief complies with Rule 211(b), SCACR

Respectfully submitted,



Andrew S Radeker
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Post Office Box 50143
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(803) 779-2211
Attorney for Appellant

September 16, 2013

RECEIVED

SEP 16 2013

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Richard L. Booth, Master-in-Equity

Common Pleas Case No 2009-CP-43-2538
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First Citizens Bank and Trust Company, Inc , Respondent,

v

Charles T. Brooks, III and the South Carolina Department of Revenue, Defendants,

Of Whom Charles T. Brooks, III, is Appellant

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

First Citizens Bank and Trust Company, Inc.,

Plaintiff,

vs.

Charles T. Brooks, III and the South Carolina
Department of Revenue,

Defendant(s).

(File No. 4026 00709)

RILEY POPE & LANEY, LLC
Attorneys for PlaintiffIN THE COURT OF COMMON PLEAS
JAN 23 2013

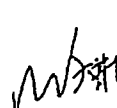
C/A NO.: 2009-CP-43-2538

CLERK OF COURT
SUMTER COUNTY, S.C.ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENTAndrew S. Radeker, Esq.
Attorney for Charles T. Brooks, IIIRonald W. Urban, Esq.
Attorney for South Carolina Department of
Revenue

This matter came before the court on November 19, 2012, for a hearing on the Plaintiff's Motion for Summary Judgment. Present representing the Plaintiff was Damon C. Wlodarczyk of Columbia. Andrew S. Radeker appeared on behalf of the Defendant Brooks, who was also present.

The action commenced with the filing of a Lis Pendens, Summons and Complaint. The Defendant was personally served with the Summons and Complaint and timely filed and served an Answer. The Plaintiff filed and served a Motion for Summary Judgment.

Summary Judgment is warranted only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRPC. "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party." Bloom v. Ravoira, 339 S.C. 417, 529 S.E.2d 710 (2000). The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact. However, once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent must come forward with specific facts showing there is a genuine issue for trial." Garvin v. Bi-Lo, Inc., 337 S.C. 436, 523 S.E.2d 481



(Ct. App. 1999). The opponent cannot merely rely upon the pleadings, but must submit some additional evidence creating a genuine issue of material fact.

In support the Motion for Summary Judgment, the Plaintiff submitted an Affidavit and counter-Affidavit of a business records custodian for the Plaintiff. The Defendant Brooks also filed and timely served an Affidavit in opposition to the Plaintiff's motion.

The Plaintiff argued at the hearing that the affidavits it filed established the debt amount owing and that Defendant Brooks is in default of the note, mortgage, and forbearance agreement (which are described below). The Plaintiff argued that, coupled with an affidavit of attorneys' fees and costs that Plaintiff's counsel stated he was ready to submit, these materials showed that the Plaintiff was entitled to judgment as a matter of law. The Plaintiff argued that Defendant Brooks' affidavit failed to show the existence of a genuine issue of material fact because, even taking the statements in that affidavit as true, Defendant Brooks was still in default of the written terms of the forbearance agreement. Defendant Brooks argued that the Plaintiff's continued acceptance for some months of payments less than the balance due under the written terms of the forbearance agreement (the balance of the loan) constituted either a modification of the terms of the note, mortgage, and/or forbearance agreement through a course of dealing and conduct between the parties, an estoppel or laches of the Plaintiff's right to declare a default under the terms of the forbearance agreement as written, or a waiver of any such default. Defendant Brooks maintained that the evidence showed at least an issue of material fact as to these matters. He provided the Court and Plaintiff's counsel with copies of Rakestraw v. Dozier Assocs., Inc., 285 S.C. 358, 329 S.E.2d 437 (1985), and King v. PYA/Monarch, Inc., 317 S.C. 385, 453 S.E.2d 885 (1995), and argued that these cases support his argument. The Plaintiff countered with an argument that the parol evidence rule precluded Defendant Brooks' arguments because the forbearance agreement was an integrated writing. Defendant Brooks countered by stating that a contract may be modified by means other than writing even if it states that modifications must be in writing and that, since the conduct at issue occurred after the execution of the forbearance agreement, it did not fall within the ambit of the parol evidence rule. Defendant Brooks contended that all ambiguities in the operative documents should be construed against the Plaintiff. The Plaintiff acknowledged that it drafted the documents at issue but denied that there are any material ambiguities in them. Defendant Brooks contended that, under the requirements of equity and the operative terms between the parties as affected by the conduct between them,

the Plaintiff could not treat the loan as matured and was required to let Defendant Brooks reinstate by bringing current the amount that would have been paid had he continued making \$1500 00 monthly payments to the present day, that the Plaintiff had refused to let him do that, and that the course of conduct between the parties created a fact issue as to whether he has a right to reinstate, a fact issue as to what the debt amount owed to the Plaintiff is, and a fact issue as to whether the Plaintiff is entitled to foreclosure. The Plaintiff argued that there was no genuine issue of material fact because the affidavits on file showed that Defendant Brooks was in default of the terms of the note, the terms of the mortgage, and the terms of the forbearance agreement.

After reviewing and taking into consideration the pleadings and affidavits submitted in this case as well as the arguments presented at the motion hearing, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT:

- 1) The Lis Pendens was filed on July 23, 2009. An Amended Lis Pendens was filed on October 30, 2009.
- 2) The Summons and Complaint were filed on October 30, 2009.
- 3) Service was made upon the Defendants as shown by the proof of service filed herein.
- 4) The Defendants filed and timely served responsive pleadings.
- 5) The Defendants and all attorneys of record were notified of the time, date, and place of the hearing in this matter.
- 6) For value received, Charles T. Brooks III made, executed and delivered a note ("Note") dated May 12, 2005, promising thereby to pay to the order of Sumter National Bank the sum of One Hundred Twelve Thousand and 00/100 (\$112,000.00) Dollars, with interest at the rate of 7.50% per annum, with a current rate of 4.2500% per annum. Other terms and conditions are stated in the Note, which is of record herein.
- 7) To better secure the payment of the Note described above, Charles T. Brooks III made, executed, and delivered to Sumter National Bank a certain real estate mortgage ("Mortgage") in writing, dated May 12, 2005, covering real property in Sumter County, which is the same as that described in the Complaint. The Mortgage provided for the anticipation of

Wb 3

future advances secured by the Mortgage subject to the maximum principal amount secured by the mortgage at any one time shall not exceed \$112,000.00.

8) The Mortgage was filed in the Office of the Register of Mesne Conveyances/Register of Deeds for Sumter County on May 12, 2005, in Book 980 at Page 770. Thereafter, on October 1, 2006, Sumter National Bank merged into and subsequently operated as part of Community Resource Bank, National Association; thereafter, on November 1, 2008, Community Resource Bank, National Association, merged into and subsequently operated as part of First Citizens Bank and Trust Company, Inc., leaving First Citizens Bank and Trust Company, Inc. as the surviving entity.

9) The Note and Mortgage matured on May 5, 2010.

10) On July 27, 2007, Charles T. Brooks III made, executed, and delivered to Community Resource Banks, National Association, a Note for a line of credit ("Line of Credit") in the amount of \$30,150.00.

11) To better secure the payment of the Line of Credit described above, Charles T. Brooks III agreed in writing that the Mortgage dated May 12, 2005, and more fully described above would also serve as additional security for the Line of Credit, but subject to the extent of the future advance clause limit expressed in the mortgage.

12) The Line of Credit matured on August 2, 2008.

13) The Mortgage evidences and secures the repayment of money advanced by the mortgagee to, or on behalf of, the mortgagors and constitutes a first mortgage lien on the mortgaged premises.

14) The Plaintiff is the real party in interest pursuant to SCRCF 17(a).

15) The titleholder of record of the subject property as of the filing of the Lis Pendens in this action is Charles T. Brooks III, who is the original mortgagor.

16) The loan evidenced by the Note and Mortgage is not owned, securitized or guaranteed by Fannie Mae or Freddie Mac, and is not serviced by a servicer participating in the Home Affordable Modification Program (HAMP). Therefore the Court finds that there are no HAMP issues to be resolved before foreclosure is ordered or the sale is commenced.

17) As stated in the Certification of Exemption from Administrative Order 2011-05-02-01 filed herein, the real property which is the subject of this action is not an "owner occupied dwelling" as defined in the Order.

Wb#4

18) The Defendant Brooks defaulted on the Note and Mortgage on or about March 2, 2009.

19) The Defendant Brooks defaulted on the Line of Credit, also secured by the Mortgage, on August 2, 2008 when the Line of Credit matured.

20) The Plaintiff and the Defendant Brooks entered into a release and settlement agreement dated April 7, 2010, which was a valid and binding agreement and also entered into a forbearance agreement which was a valid and binding agreement in which, among other things, Defendant Brooks agreed to pay the sum of \$1,500.00 per month toward arrearage beginning April 1, 2010 and ending March 1, 2011, at which time the remaining balance became due and payable. The forbearance agreement also provided for ongoing payment of the monthly payments due under the Note and Line of Credit proper, but was silent on the issue of the maturity of the original note and the post-maturity status of the line of credit note during the forbearance period.

21) The forbearance agreement contained default terms that provided for acceleration of all unpaid amounts under both the agreement and the loan documents.

22) The forbearance agreement contained a term that stated that acceptance of monies under the agreement was not an estoppel, prejudice or waiver of Plaintiff's right to proceed with the foreclosure action.

23) The forbearance agreement provided in part that Defendant Brooks would withdraw his answer in this matter and the Defendant breached the terms of the forbearance agreement by failing to withdraw his Answer in this matter but in any event, the Answer has not been withdrawn.

24) Defendant Brooks made monthly payments pursuant to the forbearance agreement which were accepted by Plaintiff for several months after the maturity date of the original forbearance agreement but has not paid the balance of unpaid amounts due under the forbearance agreement or the loan documents.

25) All payments made under the terms of the loan documents and after entry into the forbearance agreement are not accounted for in the affidavits submitted by the Plaintiff.

CONCLUSIONS OF LAW

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED.

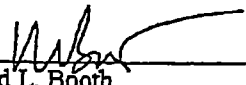
WBS #5

1) That there is no genuine issue of any material fact as to the findings setting forth in paragraphs 1 through 25 above and Defendant Brooks is prohibited from further contesting those findings in future proceedings.

2) That the Court convene a non-jury trial on February 7th 2013 at 11:00 A.M. at which time the parties will present evidence as to the following remaining issues:

- a. The balance due Plaintiff after giving credit for all payments made pursuant to the loan documents and also the forbearance agreement;
- b. The intention of the parties in Defendant Brooks' payment of and Plaintiff's acceptance of monthly forbearance payments after the March 1, 2011 maturity date of the original forbearance agreement, the relevance of the language of the forbearance agreement referring to acceptance of payments, and the effect on Plaintiff's right to proceed with foreclosure;
- c. Whether or not Plaintiff made any monthly payments as they came due under the existing loan documents after entering into the settlement and forbearance agreements, and the effect of the forbearance agreement upon the post-maturity status of the line of credit note at the inception of the forbearance agreement and the maturity of the real estate note and mortgage during the forbearance period.

3) - Defendant Brooks is further ordered to file a request for protection from appearing in any court in which he is an attorney of record for the trial date above. Counsel for Plaintiff and Defendant Brooks need not file protective requests if another attorney from their respective firms will be able to attend the trial should they be required to appear before another court.


Richard L. Booth
Master in Equity, Sumter County

January 15 2013
December 15, 2012
Sumter, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

First Citizens Bank and Trust Company, Inc.

vs.

Charles T. Brooks, III

Defendant(s)

RECORDED

IN THE COURT OF COMMON PLEAS

2009 NOV -2 PM 2:04

CIVIL ACTION COVERSHEET

2009-CP-43

2538

Plaintiff(s)
JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

Submitted By:

T. Lowndes Pope, SC Bar #66507
Roy F. Laney, SC Bar #64279
Heidi B. Carey, SC Bar #7020
Heath M. Stewart, III, SC Bar #74190
RILEY POPE & LANEY, LLC
Attorneys for Plaintiff

Address: POST OFFICE BOX 11412, COLUMBIA, SC 29211

Telephone #: (803) 799-9993

Fax #: (803) 239-1414

Other: http://rplfirm.lawoffice.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

- ☐ JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

- | | | | |
|---|--|---|--|
| Contracts
☐ Construction (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199) | Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case #
20 ____-CP-_____
☐ Notice/ File Med Mal (230)
☐ Other (299) | Torts - Personal Injury
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Other (399) | Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☒ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499) |
| Inmate Petitions
☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599) | Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment Rights Application (760)
☐ Other (799) | Administrative Law/Relief
☐ Reinstatement Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture - Petition (840)
☐ Forfeiture - Consent Order (850)
☐ Other (899) | Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)

☐ Zoning Board (970)
☐ Administrative Law Judge (980)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999) |
| Special/Complex/Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699) | | | |
| ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of-State Depositions (650)
☐ Motion to Quash Subpoena in Out-of-County Action (660)
☐ Sexual Predator (610) | | | |

Submitting Party Signature:

Date: October 29, 2009

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Act, S.C. Code Ann. §15-36-10 et. seq. SCCA/234 (10/09)

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Colleton, Florence, Greenville,
Hampton, Horry, Jasper, Lexington, Pickens (Family Court Only), and Richland

**SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN
ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.**

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

SCCA / 234 (10/09)

RECORDED

2009 OCT -2 PM 2:04

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

First Citizens Bank and Trust Company, Inc.,

vs.

Charles T. Brooks, III,

JAMES C. GIBBELL
CLERK OF COURT
SUMTER COUNTY, S.C.
Plaintiff,IN THE CIRCUIT COURT
FOR THE THIRD
JUDICIAL CIRCUITCERTIFICATE OF EXEMPTION
FROM ADRDocket No. 2009-CP-431 288

Defendant(s).

(File No. 4026.00709)

I CERTIFY THAT THIS ACTION IS EXEMPT FROM ADR BECAUSE:

- ☐ this is a special proceeding or action seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
- ☐ this action is appellate in nature;
- ☐ this is a post-conviction relief matter;
- ☐ this is a contempt of court proceeding.
- ☐ this is a forfeiture proceeding brought by the State;
- ☒ this is a case involving a mortgage foreclosure; or
- ☐ the parties submitted the case to voluntary mediation with a certified mediator prior to the filing of this action.

RILEY POPE & LANEY, LLC


 T. Lowndes Pope, SC Bar 66507
 Roy F. Laney, SC Bar 64279
 Heidi B. Carey, SC Bar 7020
 Heath M. Stewart, III, SC Bar 74190
 2838 Devine Street
 Post Office Box 11412 (29211)
 Columbia, South Carolina 29205
 (803) 799-9993
 Attorneys for Plaintiff

 October 29, 2009
 Columbia, South Carolina

NOTE: Motion must be presented to the court, a hearing held, and a finding made, for exemption or withdrawal from arbitration for "strong and compelling reason" sought pursuant to Rule 1(d), Rules of Circuit Court Arbitration.

RECORDED

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER
First Citizens Bank and Trust Company, Inc.
vs.
Charles T. Brooks, III,

Plaintiff,
Defendant(s).

IN THE COURT OF COMMON PLEAS
C/A NO.: 2009-CP-43-2538
JAMES C. BELL
CLERK OF COURT
SUMTER COUNTY, S.C.

SUMMONS AND NOTICE
(Deficiency Demanded)

(File No. 4626 00700)

TO THE DEFENDANT(S) ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to appear and defend by answering the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer on the subscribers at their offices, 2838 Devine Street, Columbia, South Carolina 29205, within thirty (30) days after the service hereof, exclusive of the day of such service; except that the United States of America, if named, shall have sixty (60) days to answer after the service hereof, exclusive of the day of such service; and if you fail to do so, judgment by default will be rendered against you for the relief demanded in the complaint.

TO MINOR(S) OVER FOURTEEN YEARS OF AGE, AND/OR TO MINOR(S) UNDER FOURTEEN YEARS OF AGE AND THE PERSON WITH WHOM THE MINOR(S) RESIDES, AND/OR TO PERSONS UNDER SOME LEGAL DISABILITY:

YOU ARE FURTHER SUMMONED AND NOTIFIED to apply for the appointment of a guardian ad litem within thirty (30) days after the service of this Summons and Notice upon you. If you fail to do so, application for such appointment will be made by Plaintiff.

YOU WILL ALSO TAKE NOTICE that should you fail to answer the foregoing Summons, the Plaintiff will move for a general Order of Reference of this cause to the Master-in-Equity or a Special Referee for the aforesaid County, which Order shall, pursuant to Rule 53, SCRCF, specifically provide that the said Master or Special Referee is authorized and empowered, to enter a final judgment in this case and any appeal from the final judgment entered herein to be made directly to the Supreme Court.

YOU WILL ALSO TAKE NOTICE that under the provisions of S.C. Code Ann. §29-3-100, effective June 16, 1993, any collateral assignment of rents contained in the attached mortgage is perfected and Plaintiff hereby gives notice that all rents shall be payable directly to it by delivery to its undersigned attorneys from the date of default. In the alternative Plaintiff will move before a Judge of this Circuit on the 10th day after service hereof, or as soon thereafter as counsel may be heard, for an Order enforcing the assignment of rents, if any, and compelling payment of all rents covered by such assignment directly to the Plaintiff, which motion is to be based upon the original note and mortgage which is the subject of this action and the Complaint attached hereto.

THIS COMMUNICATION IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION GAINED WILL BE USED FOR THAT PURPOSE.

RILEY POPE & LANEY, LLC



T. Lowndes Pope, SC Bar 66507
Roy F. Laney, SC Bar 64279
Heidi B. Carey, SC Bar 7020
Heath M. Stewart, III, SC Bar 74190
2838 Devine Street
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Columbia, South Carolina 29205
(803) 799-9993
Attorneys for Plaintiff

October 29, 2009
Columbia, South Carolina

RECORDED
IN THE COURT OF COMMON PLEAS
C/A NO. 2009-CP-43-
SUMTER COUNTY, S.C.

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

First Citizens Bank and Trust Company, Inc.,
Plaintiff,

vs.
Charles T. Brooks, III,
Defendant(s).

COMPLAINT
FIRST CAUSE OF ACTION – Foreclosure
of Real Estate Mortgage
(Deficiency Demanded)

(File No. 4026 00709)

The Plaintiff above-named, complaining of the Defendants above named, herein alleges:

GENERAL ALLEGATIONS

1. This is an action for the foreclosure of a mortgage upon real estate in Sumter County, South Carolina.
2. The Plaintiff is a corporation or other legal entity duly organized and existing under and by virtue of the laws of one of the States of The United States of America and is authorized to transact business in the State of South Carolina.
3. The Plaintiff is the owner and holder of the Note and Mortgage described hereafter and that are the subject of this action.
4. Some lien on or right, title, or interest in the real estate, the subject of this action, may be claimed by the Defendant(s) herein.
5. Based upon a search of the public records of Sumter County, all persons or entities having an interest or lien or possible claim in or upon the mortgaged premises subordinate to the lien of the Plaintiff as of the date and time of the filing of the Lis Pendens herein have been made defendants.
6. The Defendant(s) herein described, if any, as judgment creditors, have by filing said judgments designated their attorney entering the judgment as their agent for service of process under the provisions of S.C. Code Ann. §15-35-840.
7. On or about May 12, 2005, Charles T. Brooks III made, executed and delivered unto Sumter National Bank a certain Note ("Note") in the principal sum of One Hundred Twelve Thousand and 00/100 (\$112,000.00) Dollars, payable in monthly installments of principal and

interest of \$1,044.94 beginning on June 10, 2005 and one balloon payment of \$88,637.11 due on May 10, 2010. Thereafter, on June 28, 2006, Charles T. Brooks, III cross-pledged an existing debt to the property mortgaged May 12, 2005 by and through a commercial security agreement and note in the amount of \$30,000.00 (hereinafter referred to as "the Commercial Note"), with varying monthly payments of accrued interest on the amount of outstanding credit beginning on August 2, 2006 and principal due on June 28, 2007; which was thereafter renewed with Community Resource Bank f/k/a Sumter National Bank on July 27, 2007 in the amount of \$30,150, with varying monthly payments of accrued interest on the amount of outstanding credit beginning on September 2, 2007 and principal due on August 2, 2008, copies of which are attached hereto as Exhibit "A" and made a part hereof by reference.

8. In order to secure the payment of the Note according to the terms and conditions thereof, Charles T. Brooks III made, executed and delivered unto Sumter National Bank a certain real estate mortgage ("Mortgage") covering the following described property:

All that lot of land with the improvements thereon, situate in Sumter County, South Carolina, represented as .26 acres on a plat of Ben J. Makela, RLS, dated June 12, 1998, and recorded in the Office of the Register of Deeds for Sumter County in Plat Book 98, at Page 853. This property is represented as Tax Map Parcel #22914-02-002 on the Sumter County tax records. This property address is known as 309 Broad Street, Sumter, South Carolina, 29150.

This being the identical property conveyed unto Charles T. Brooks, III by Special Warranty Deed of Wells Fargo Bank, N.A., as successor by merger with Norwest Bank Minnesota, N.A., as Trustee of Solomon Brothers Mortgage Securities VII, Inc., Floating Rate Mortgage Pass-Through Certificates, Series 1999-AQ1 Under Pooling and Services Agreement Dated as of March 1, 1999 Without Recourse, dated August 27, 2002, and recorded in the Office of the Register of Deeds for Sumter County in Deed Book 854, at Page 1995 on August 30, 2002.

TMS No. 229-14-02-002

Property Address: 309 Broad Street, Sumter, SC 29150

9. The Mortgage was signed, witnessed and probated; thereafter the Mortgage was recorded in the public records of Sumter County on May 12, 2005, in Book 980 at Page 770. Thereafter, on October 1, 2006, Sumter National Bank merged into and subsequently operated as part of Community Resource Bank, National Association; thereafter, on November 1, 2008, Community Resource Bank, National Association, merged into and subsequently operated as part of First Citizens Bank and Trust Company, Inc., leaving First Citizens Bank and Trust

Company, Inc. as the surviving entity. A copy of the Plaintiff's Mortgage is attached hereto as Exhibit "D" and made a part hereof by reference.

10. The Mortgage evidences and secures the repayment of money advanced by the Plaintiff, or its predecessor in interest, to, or on behalf of, the mortgagor(s) and constitutes a first mortgage lien on the mortgaged premises.

11. The loan evidenced by the Note, Commercial Note and Mortgage is not owned, securitized or guaranteed by Fannie Mae or Freddie Mac, and is not serviced by a servicer participating in the Home Affordable Modification Program (HMP).

FOR A FIRST CAUSE OF ACTION
(Foreclosure of Mortgage)

12. The Plaintiff incorporates the allegations of the preceding Paragraphs as if repeated verbatim.

13. Prior to the commencement of this action, the Plaintiff has complied with its obligation(s) as required under the terms of the Note, Commercial Note and Mortgage and/or any Federal or State statutes or regulations including, but not limited to, the furnishing of any notices required to the obligator(s) giving to such person(s) the right to cure any default under the terms of the Note, Commercial Note and Mortgage that may exist.

14. The installments of principal and interest on the Note became due on March 02, 2009, and have not been paid although demand for the payment thereof has been made by the Plaintiff, as the holder of the Note and Mortgage. The Plaintiff elects to and does declare the entire balance of said principal and interest due and payable at once, and that there is now due and owing and unpaid upon the said Note and Mortgage the sum of Ninety-Five Thousand Five Hundred Sixty Seven and 01/100 (\$95,567.01) Dollars as of April 10, 2009, together with interest thereon at the rate of 7.50% per annum from March 10, 2009, together with reasonable attorney's fees and the costs and disbursements of this action, plus all moneys, if any, advanced by the Plaintiff under the terms of the Note, Commercial Note and Mortgage for the payment of ad valorem taxes and/or insurance premiums, property maintenance, and securing thereof or otherwise.

15. In addition, the installments of principal and interest on the commercial note which became due on August 2, 2008 have not been paid although demand for the payment thereof has been made and the Plaintiff, as holder of the Commercial Note. The Plaintiff elects to

and does declare the entire balance of said principal and interest due and owing and unpaid upon the said Commercial Note the sum of Twenty-Seven Thousand One Hundred Twenty-Eight and 75/1000 (\$27,128.75) dollars as of February 2, 2009, together with interest thereon at the rate of 4.25% per annum adjusted to 1.00% plus the Wall Street Journal Prime Rate, together with reasonable attorney fees and costs and disbursements of this action.

16. Pursuant to the terms of the Mortgage, Plaintiff has employed counsel to prosecute this action, and under the terms of the Note, Commercial Note and Mortgage, Plaintiff's counsel is entitled to reasonable attorney's fees and costs of this action.

17. Plaintiff may be forced to pay sums for taxes, insurance and costs for securing the property, which sums, according to the terms of the Mortgage, should be added to the amount of the debt.

18. Plaintiff's right to a personal or deficiency judgment pursuant to S.C. Code Ann. §§29-3-650 and 29-3-660 is expressly demanded against Charles T. Brooks, III.

WHEREFORE, having fully set forth its Complaint, Plaintiff prays that this Honorable Court inquire into the matters as set forth herein and:

(1) Ascertain and determine the amount due upon the Note, Commercial Note and Mortgage held by Plaintiff together with attorney's fees and costs of this action.

(2) Declare Plaintiff's Mortgage a first mortgage lien on the subject property, and render judgment of foreclosure for the amount so found to be due and owing thereon, together with any taxes or insurance premiums which may be due, with a reasonable sum as attorney's fees, the costs of maintaining the property or securing and inspecting the property, if any, incurred as a result of this delinquency, and for the costs of this action.

(3) If necessary, appoint a Receiver to collect the rents, issues, profits or designated sums from the mortgagor(s), and/or the grantee(s) of the mortgagor(s), and/or tenant(s) occupying or exercising control over the mortgaged premises and hold the same subject to the further order of this Court.

(4) Sell the mortgaged premises, bar any equity of redemption, and apply the proceeds of sale as follows:

First, to the costs and expenses of the within action and sale;

Second, to the payment and discharge of the amount due on Plaintiff's Note and Mortgage, together with attorney's fees as aforesaid; and

Third, to the distribution of any surplus pursuant to Rule 71, SCRCF.

(5) Issue an order directing the Sheriff of Sumter County, South Carolina, to place the successful purchaser at said foreclosure sale in possession of the property should the same become necessary.

(6) Grant judgment against the Defendant(s) Charles T. Brooks, III pursuant to S.C. Code Ann. §§29-3-650 and 29-3-660.

(7) Order such other and further relief as may be just and proper.

RILEY POPE & LANEY, LLC



T. Lowndes Pope, SC Bar 66507
Roy F. Laney, SC Bar 64279
Heidi B. Carey, SC Bar 7020
Heath M. Stewart, III, SC Bar 74190
2838 Devine Street
Post Office Box 11412 (29211)
Columbia, South Carolina 29205
(803) 799-9993
Attorneys for Plaintiff

October 29, 2009
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

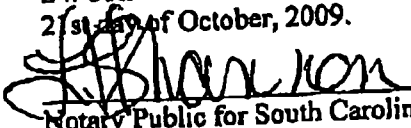
PERSONALLY appeared before me the undersigned, who, being duly sworn, says that he is the attorney of and makes this Affidavit upon behalf of the said Plaintiff; that he has read the foregoing Complaint and that the allegations therein contained are true of his own knowledge, except those matters therein contained on information and belief, and as to those, he believes them to be true; deponent further states that the reason why this verification is not made by the plaintiff is that the action is bounded upon written instruments for the payment of money only and such instruments are in the possession of deponent, which said instruments, together with an examination of records on file in the Office of the Clerk of Court and/or R.M.C. for Sumter County, from the source of deponent's information and the grounds of his belief; and also based upon information furnished to your deponent by the plaintiff.

RILEY POPE & LANEY, LLC



T. Lowndes Pope, SC Bar 66507
Roy F. Laney, SC Bar 64279
Heidi B. Carey, SC Bar 7020
Heath M. Stewart, III, SC Bar 74190
2838 Devine Street
Post Office Box 11412 (29211)
Columbia, South Carolina 29205
(803) 799-9993
Attorneys for Plaintiff

SWORN to before me this
21st day of October, 2009.



Notary Public for South Carolina

My Commission Expires: 01/15/2013

(L.S.)

**NOTICE REQUIRED BY THE FAIR DEBT
COLLECTION PRACTICES ACT
15 U.S.C. Section 1601, As Amended**

1. As of October 21, 2009, the principal amount of the debt you owe for the Note and Commercial Note is \$122,695.76. Because of interest, late charges, and other charges that may vary from day to day, the amount due on the day you pay may be greater. Hence, if you pay the amount shown above, an adjustment may be necessary after we receive your check, in which event we will inform you before depositing the check for collection. For further information, write or call as directed in Paragraph 6 of this Notice.
2. First Citizens Bank and Trust Company, Inc. is the Creditor to whom the debt is owed.
3. If the Creditor named in this notice is not the original Creditor, and if you make a request to the Creditor's law firm within thirty (30) days of the receipt of this notice, the name and address of the original Creditor will be mailed to you by the Creditor's law firm.
4. The debt described in the Complaint attached hereto and evidenced by the Note, Commercial Note and Mortgage described therein will be assumed to be valid by the Creditor's law firm unless you, the Debtor, within thirty (30) days after the receipt of this notice, dispute, in writing, the validity of the debt or some portion thereof.
5. If you, the Debtor, notify the Creditor's law firm in writing within thirty (30) days of the receipt of this notice that the debt or any portion thereof is disputed, the Creditor's law firm will obtain a verification of the debt, and a copy of the verification will be mailed to the Debtor by the Creditor's law firm.
6. Written requests should be addressed to Riley Pope & Laney, LLC, Post Office Box 11412, Columbia, SC 29211.
7. This notice should not be construed as a thirty (30) grace period. Creditor may pursue collection efforts immediately and not wait thirty (30) days.

**THIS IS AN ATTEMPT TO COLLECT A DEBT, AND ANY INFORMATION
OBTAINED WILL BE USED FOR THAT PURPOSE.**

STATE OF SOUTH CAROLINA RECORDED IN THE CIRCUIT COURT
COUNTY OF SUMTER 2009 NOV 24 PM 2:19 No.: 2009-CP-43-2538
THIRD JUDICIAL CIRCUIT
First Citizens Bank & Trust Co., James O. Campbell
Plaintiff, CLERK OF COURT
SUMTER COUNTY, S.C.
vs.)
) ANSWER
) (JURY TRIAL REQUESTED)
))
Charles T. Brooks III,)
Defendant,)
_____)

THE DEFENDANT, CHARLES T. BROOKS, III, ANSWERS THE PLAINTIFF'S
COMPLAINT AS FOLLOWS:

1. That said Defendant admits the paragraphs 1 through 13 of the Plaintiff's Complaint.
2. That said Defendant denies paragraphs 14 through 18 of the Plaintiff's Complaint and denies strict proof thereof.

WHEREFORE, after having fully answered the Plaintiff's Complaint, the Defendant prays for the following:

- A. That the Plaintiff's Complaint be dismissed; and
- B. That the Defendant be entitled to an award of attorney's fees and costs in this matter; and
- C. For any such other relief as this Honorable Court may deem just and proper.

By:


Charles T. Brooks, III
Defendant
309 Broad Street
Post Office Box 8512
Sumter, South Carolina 29161
803-418-5708

11/3 2009
Sumter, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

First Citizens Bank and Trust Company, Inc ,

Plaintiff,

vs.

Charles T. Brooks, III and the South Carolina
Department of Revenue,

Defendant(s).

(File No 4026 00709)

IN THE COURT OF COMMON PLEAS

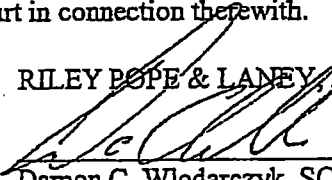
C/A NO.: 2009-CP-43-2538

NOTICE OF MOTION
AND
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

YOU WILL PLEASE TAKE NOTICE that the undersigned as attorney for the Plaintiff will appear before the Master in Equity for Sumter County, ten (10) days after service hereof at 10:00 a.m., or at such other time and place as the Court may direct, and move for an order pursuant to Rule 56 of the South Carolina Rules of Civil Procedure granting to the Plaintiff Summary Judgment on the grounds that there is no genuine issue as to any material fact and the Plaintiff is entitled an Order for Foreclosure and Sale as a matter of law.

Said motion shall be based upon the statute and case law of the State of South Carolina, upon the pleadings and other evidence developed in discovery and upon the affidavits attached hereto and other material properly received by the Court in connection therewith.

RILEY POPE & LANEY, LLC


Damon C. Wlodarczyk, SC Bar 70460
2838 Devine Street
Post Office Box 11412 (29211)
Columbia, South Carolina 29205
(803) 799-9993
Attorneys for Plaintiff

August 8, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

First Citizens Bank and Trust Company, Inc.,

Plaintiff,

vs.

Charles T. Brooks, III and the South Carolina
Department of Revenue,

Defendant(s).

(File No 4026 00709)

IN THE COURT OF COMMON PLEAS

C/A NO.: 2009-CP-43-2538

AFFIDAVIT

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

PERSONALLY appeared before me Dave Davies, who being duly sworn, says:

1. That he is an employee and authorized representative of First Citizens Bank and Trust Company, Inc., the Plaintiff in this action.
2. That he is familiar with the policies and procedures regarding records kept in the ordinary course of Plaintiff's regularly conducted business activities regarding the creation and servicing of mortgage notes and mortgages.
3. That he has reviewed the documents relating to the loan history that is the subject of this foreclosure action.
4. The loan evidenced by the Commercial Note and Mortgage is serviced by a servicer not participating in the Home Affordable Modification Program (HMP) and, therefore, this loan is not HMP eligible.
5. That Plaintiff is the owner and holder of a Note which is dated May 12, 2005, between Charles T. Brooks III and delivered unto Sumter National Bank in the principal sum of One Hundred Twelve Thousand and 00/100 (\$112,000 00) Dollars, payable in monthly installments of principal and interest of \$1,044.94 beginning on June 10, 2005 and one balloon payment of \$88,637.11 due on May

10, 2010. Thereafter, on June 28, 2006, Charles T. Brooks, III cross-pledged an existing debt to the property mortgaged May 12, 2005 by and through a commercial security agreement and note in the amount of \$30,000.00 (hereinafter referred to as "the Commercial Note"), with varying monthly payments of accrued interest on the amount of outstanding credit beginning on August 2, 2006 and principal due on June 28, 2007; which was thereafter renewed with Community Resource Bank f/k/a Sumter National Bank on July 27, 2007 in the amount of \$30,150, with varying monthly payments of accrued interest on the amount of outstanding credit beginning on September 2, 2007 and principal due on August 2, 2008, copies of which are attached hereto as Exhibit "A" and made a part hereof by reference.

6. That Plaintiff is the owner and holder of a Mortgage used to secure the debt referenced above between Charles T. Brooks III and delivered unto Sumter National Bank covering the following described property:

All that lot of land with the improvements thereon, situate in Sumter County, South Carolina, represented as .26 acres on a plat of Ben J. Makela, RLS, dated June 12, 1998, and recorded in the Office of the Register of Deeds for Sumter County in Plat Book 98, at Page 853. This property is represented as Tax Map Parcel #22914-02-002 on the Sumter County tax records. This property address is known as 309 Broad Street, Sumter, South Carolina, 29150.

This being the identical property conveyed unto Charles T. Brooks, III by Special Warranty Deed of Wells Fargo Bank, N.A., as successor by merger with Norwest Bank Minnesota, N.A., as Trustee of Solomon Brothers Mortgage Securities VII, Inc., Floating Rate Mortgage Pass-Through Certificates, Series 1999-AQ1 Under Pooling and Services Agreement Dated as of March 1, 1999 Without Recourse, dated August 27, 2002, and recorded in the Office of the Register of Deeds for Sumter County in Deed Book 854, at Page 1995 on August 30, 2002.
TMS No. 229-14-02-002

Property Address: 309 Broad Street, Sumter, SC 29150

7. The Mortgage was signed, witnessed and probated; thereafter the Mortgage was recorded in the public records of Sumter County on May 12, 2005, in Book 980 at Page 770. On October 1, 2006, Sumter National Bank merged into and subsequently operated as part of Community Resource Bank, National Association, thereafter, on November 1, 2008, Community Resource Bank, National Association, merged into and subsequently operated as part of First Citizens Bank and Trust Company, Inc., leaving First Citizens Bank and Trust Company, Inc. as the surviving entity. A copy of the Plaintiff's Mortgage is attached hereto as Exhibit "B" and made a part hereof by reference.

8. The installments of principal and interest on the Note became due on March 02, 2009, and have not been paid although demand for the payment thereof has been made by the Plaintiff, as the holder of the Note and Mortgage. The Plaintiff elects to and does declare the entire balance of said principal and interest due and payable at once, and that there is now due and owing and unpaid upon the said Note and Mortgage the sum of Ninety-Five Thousand Five Hundred Sixty Seven and 01/100 (\$95,567.01) Dollars as of April 10, 2009, together with interest thereon at the rate of 7.50% per annum from March 10, 2009, together with reasonable attorney's fees and the costs and disbursements of this action, plus all moneys, if any, advanced by the Plaintiff under the terms of the Note, Commercial Note and Mortgage for the payment of ad valorem taxes and/or insurance premiums, property maintenance, and securing thereof or otherwise.

9. On March 7, 2010, Charles T. Brooks entered into a Settlement Agreement with the Plaintiff in which for valuable consideration, Plaintiff agreed to allow Mr. Brooks to enter into a forbearance agreement on the above referenced defaulted Note and Mortgage. The Settlement Agreement attached hereto as Exhibit "C" and Forbearance Agreement attached hereto as Exhibit "D" are incorporated by reference as if fully set forth verbatim. The terms of the Settlement Agreement provided in part that Charles T. Brooks agreed to withdraw his Answer in the above captioned case. Charles T. Brooks has failed to comply with the provisions of the Settlement Agreement.

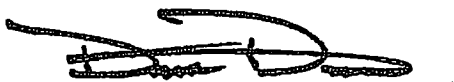
9. The amount due and owing on the Note, with interest at the rate provided in the Note, excluding an attorney's fee and other costs and expenses of the within action, secured by the Note and Mortgage, is as follows:

LOAN # 232259-1232545	
Principal amount due	\$87,440.98
Interest to August 27, 2012	\$5,225.18
Advances -	
Appraisals	\$3,750.00
Property Taxes	\$1,153.53
Late charges	\$140.09

LOAN #232259-1232370	
Principal amount due	\$27,754.76
Interest to August 27, 2012	\$857.12
Late charges	\$15 14

10. The total debt secured by the Note and Mortgage as set forth in paragraph 9, will continue to accrue a *per diem* charge for LOAN # 232259-1232545 at \$19.31 and LOAN #232259-1232370 at \$3.28 for interest.

Affiant further sayeth not.



Dave Davies

Special Assets Officer
Title/Position

SWORN to before me this

2nd day of August, 2012.

Annette Bright (L.S.)

Notary Public for South Carolina

My Commission expires: ANNETTE BRIGHT
My Commission Expires June 16, 2020

CHARLES T BROOKS III 309 BROAD ST SUMTER, SC 29150	SUMTER NATIONAL BANK 883 BULTMAN DRIVE POST OFFICE DRAWER 1629 SUMTER, SC 29151	CUST # 249-08-2530 Loan Number 11107118 Date 05-12-2005 Maturity Date 05-10-2010 Loan Amount \$ 112,000.00 Renewal Of CODES 5-11-27
BORROWER'S NAME AND ADDRESS "I" includes each borrower, jointly and severally	LENDER'S NAME AND ADDRESS "You" means the lender, its successors and assigns.	

For value received, I promise to pay to you, or your order, at your address listed above the PRINCIPAL sum of ONE HUNDRED TWELVE THOUSAND AND NO/100 Dollars \$ 112,000.00

☒ **Single Advance.** I will receive all of this principal sum on 05-12-2005. No additional advances are contemplated under this note.

☐ **Multiple Advance:** The principal sum shown above is the maximum amount of principal I can borrow under this note. On _____ I will receive the amount of \$ _____ and future principal advances are contemplated.

Conditions: The conditions for future advances are _____

☐ **Open End Credit:** You and I agree that I may borrow up to the maximum amount of principal more than one time. This feature is subject to all other conditions and expires on _____.

☐ **Closed End Credit:** You and I agree that I may borrow up to the maximum only one time (and subject to all other conditions).

INTEREST: I agree to pay interest on the outstanding principal balance from 05-12-2005 at the rate of 7.500% per year until 05-10-2010.

☐ **Variable Rate:** This rate may then change as stated below.

☐ **Index Rate:** The future rate will be _____ the following index rate: _____

☐ **No Index:** The future rate will not be subject to any internal or external index. It will be entirely in your control.

☐ **Frequency and Timing:** The rate on this note may change as often as _____.

A change in the interest rate will take effect _____.

☐ **Limitations:** During the term of this loan, the applicable annual interest rate will not be more than _____ % or less than _____ %.

The rate may not change more than _____ % each _____.

Effect of Variable Rate: A change in the interest rate will have the following effect on the payments:

☐ The amount of each scheduled payment will change. ☐ The amount of the final payment will change.

☐ _____

ACCURAL METHOD: Interest will be calculated on a ACTUAL/360 basis.

POST MATURITY RATE: I agree to pay interest on the unpaid balance of this note owing after maturity, and until paid in full, as stated below:

☒ on the same fixed or variable rate basis in effect before maturity (as indicated above).

☐ at a rate equal to _____.

☒ **LATE CHARGE:** If a payment is not made within 10 days after it is due, I agree to pay a late charge of 5.000% OF THE LATE AMOUNT WITH A MAX OF \$100.00.

☐ **ADDITIONAL CHARGES:** In addition to interest, I agree to pay the following charges which ☐ are ☐ are not included in the principal amount above: _____.

PAYMENTS: I agree to pay this note as follows: 59 MONTHLY PAYMENTS OF \$1,944.94 BEGINNING 05-10-2005 AND 1 BALLOON PAYMENT OF \$89,837.11 ON 05-10-2010.

ADDITIONAL TERMS:

*560 - fee
400 - net
Term - 60
OK 5/18/05*

☒ **SECURITY.** This note is separately secured by (describe separate document by type and date) MORTGAGE DATED 5/12/2005 ON 309 BROAD ST, SUMTER, SC

(This section is for your internal use. Failure to file a separate security document does not mean the agreement will not secure this note.)

Signature for Lender:

CHRIS L. LEE, SENIOR VICE PRESIDENT

PURPOSE: The purpose of this loan is RENEW AND INCREASE

SIGNATURES. I AGREE TO THE TERMS OF THIS NOTE INCLUDING THOSE ON PAGE 21. I have received a copy on today's date.

CHARLES T. BROOKS III



CHARLES T. BROOKS III 402 FETTERBUSH ROAD ELGIN, SC 29045	COMMUNITY RESOURCE BANK N.A. SUMTER REGION POST OFFICE DRAWER 1129 SUMTER, SC 29151	Loan Number <u>11106374</u> Date <u>07-27-2007</u> Maturity Date <u>08-02-2008</u> Loan Amount <u>\$ 30,150.00</u> Renewal Of <u>11106374</u>
BORROWER'S NAME AND ADDRESS "I" includes each borrower above, jointly and severally	LENDER'S NAME AND ADDRESS "You" means the lender, its successors and assigns.	

For value received, I promise to pay to you, or your order, at your address listed above the PRINCIPAL sum of THIRTY THOUSAND ONE HUNDRED FIFTY AND NO/100 Dollars \$ 30,150.00

☐ Single Advance: I will receive all of this principal sum on _____ No additional advances are contemplated under this note.

☒ Multiple Advances: The principal sum shown above is the maximum amount of principal I can borrow under this note. On 07-27-2007

I will receive the amount of \$ _____ and future principal advances are contemplated.

Conditions. The conditions for future advances are UPON REQUEST BY THE BORROWER AND APPROVAL OF A CRR LOAN OFFICER

☒ Open End Credit: You and I agree that I may borrow up to the maximum amount of principal more than one time. This feature is subject to all other conditions and expires on 08-02-2008

☐ Closed End Credit: You and I agree that I may borrow up to the maximum only one time (and subject to all other conditions)

INTEREST: I agree to pay interest on the outstanding principal balance from 07-27-2007 at the rate of 9.250% per year until 07-28-2007

☒ Variable Rate: This rate may then change as stated below.

☒ Index Rate: The future rate will be 1.000 PERCENT ABOVE the following index rate THE BASE RATE ON CORPORATE LOANS POSTED BY AT LEAST 75% OF THE NATION'S 30 LARGEST BANKS KNOWN AS THE WALL STREET JOURNAL PRIME RATE. THE RESULT OF THIS CALCULATION WILL BE ROUNDED TO THE NEAREST 0.001

☐ No Index: The future rate will not be subject to any internal or external index. It will be entirely in your control

☒ Frequency and Timing: The rate on this note may change as often as EVERY DAY BEGINNING 07-28-2007

A change in the interest rate will take effect ON THE SAME DAY

☒ Limitations: During the term of this loan, the applicable annual interest rate will not be more than 50.000 % or less than 5.000%. The rate may not change more than _____ % each _____

Effect of Variable Rate: A change in the interest rate will have the following effect on the payments:

☒ The amount of each scheduled payment will change.

☒ The amount of the final payment will change

☐ _____

ACCURAL METHOD: Interest will be calculated on a ACTUAL/DAY basis.

POST MATURITY RATE: I agree to pay interest on the unpaid balance of this note starting after maturity, and until paid in full, as stated below

☐ on the same fixed or variable rate basis in effect before maturity (as indicated above).

☐ at a rate equal to _____

☒ LATE CHARGE. If a payment is not made within 30 days after it is due, I agree to pay a late charge of 5.000% OF THE LATE AMOUNT WITH A MAX OF \$100.00

☒ ADDITIONAL CHARGES: In addition to interest, I agree to pay the following charges which ☒ are ☐ are not included in the principal amount above:

PAYMENTS: I agree to pay this note as follows.

MONTHLY PAYMENTS OF ACCRUED INTEREST CALCULATED ON THE AMOUNT OF CREDIT OUTSTANDING BEGINNING ON 08-02-2007 AND PRINCIPAL DUE ON 08-02-2008. THIS IS A VARIABLE RATE LOAN AND THE PAYMENT AMOUNTS MAY CHANGE. THE FINAL PAYMENT MAY ALSO CHANGE.

ADDITIONAL TERMS.

☒ SECURITY: This note is separately secured by (describe separate document by type and date) PREVIOUSLY PLEDGED MORTGAGE EXECUTED AND RECORDED 5/12/05 AT SUMTER, SC

(This section is for your internal use. Failure to file a separate security document does not mean the agreement will not secure this note.)

Signature for Lender

MARK MOSSELL, ASSISTANT VICE PRESIDENT

PURPOSE: The purpose of this loan is LOC FOR WORKING CAPITAL

SIGNATURES: I AGREE TO THE TERMS OF THIS NOTE (INCLUDING THOSE ON PAGE 2) I have received a copy on today's date.

Charles T. Brooks III
CHARLES T. BROOKS III

CHARLES T BROOKS III 402 FETTERBUSH ROAD ELGIN, SC 29045	COMMUNITY RESOURCE BANK N.A. SUMTER REGION POST OFFICE DRAWER 1629 SUMTER, SC 29151	Line of Credit No. 11106374 Date 07-27-2007 Max. Credit Amt. 30,150.00 Loan Ref. No. 11106374
BORROWER'S NAME AND ADDRESS "I" includes each borrower above, jointly and severally.	LENDER'S NAME AND ADDRESS "You" means the lender, its successors and assigns.	

You have extended to me a line of credit in the
AMOUNT of THIRTY THOUSAND ONE HUNDRED FIFTY AND NO/100 \$ 30,150.00
 You will make loans to me from time to time until 12:00 P.m. on 08-02-2008. Although the line of credit expires on that date, I will remain obligated to perform all my duties under this agreement so long as I owe you any money advanced according to the terms of this agreement, as evidenced by any note or notes I have signed promising to repay these amounts.
 This line of credit is an agreement between you and me. It is not intended that any third party receive any benefit from this agreement, whether by direct payment, reliance for future payment or in any other manner. This agreement is not a letter of credit.

1. AMOUNT: This line of credit is:

- ☒ **OBLIGATORY:** You may not refuse to make a loan to me under this line of credit unless one of the following occurs:
- a. I have borrowed the maximum amount available to me;
 - b. This line of credit has expired;
 - c. I have defaulted on the note (or notes) which show my indebtedness under this line of credit;
 - d. I have violated any term of this line of credit or any note or other agreement entered into in connection with this line of credit;

e. _____

☐ **DISCRETIONARY:** You may refuse to make a loan to me under this line of credit once the aggregate outstanding advances equal or exceed \$ _____.

Subject to the obligatory or discretionary limitations above, this line of credit is:

- ☒ **OPEN-END (Business or Agricultural only):** I may borrow up to the maximum amount of principal more than one time.
☐ **CLOSED-END:** I may borrow up to the maximum only one time.

2. PROMISSORY NOTE: I will repay any advances made according to this line of credit agreement as set out in the promissory note, I signed on 07-27-2007, or any note(s) I sign at a later time which represent advances under this agreement. The note(s) set(s) out the terms relating to maturity, interest rate, repayment and advances. If indicated on the promissory note, the advances will be made as follows:
UPON REQUEST BY THE BORROWER AND APPROVAL OF A CRB LOAN OFFICER

3. RELATED DOCUMENTS: I have signed the following documents in connection with this line of credit and note(s) entered into in accordance with this line of credit.

- ☐ security agreement dated _____
☒ mortgage dated 05-12-2005
☐ guaranty dated _____

4. REMEDIES: If I am in default on the note(s) you may:

- a. take any action as provided in the related documents;
 - b. without notice to me, terminate this line of credit.
- By selecting any of these remedies you do not give up your right to later use any other remedy. By deciding not to use any remedy should I default, you do not waive your right to later consider the event a default, if it happens again.

5. COSTS AND FEES: If you hire an attorney to enforce this agreement I will pay your reasonable attorney's fees, where permitted by law. I will also pay your court costs and costs of collection, where permitted by law.

6. COVENANTS: For as long as this line of credit is in effect or I owe you money for advances made in accordance with the line of credit, I will do the following:

- a. maintain books and records of my operations relating to the need for this line of credit;
- b. permit you or any of your representatives to inspect and/or copy these records;
- c. provide to you any documentation requested by you which support the reason for making any advance under this line of credit;
- d. permit you to make any advance payable to the seller (or seller and me) of any items being purchased with that advance;

e. _____

7. NOTICES: All notices or other correspondence with me should be sent to my address stated above. The notice or correspondence shall be effective when deposited in the mail, first class, or delivered to me in person.

8. MISCELLANEOUS: This line of credit may not be changed except by a written agreement signed by you and me. The law of the state in which you are located will govern this agreement. Any term of this agreement which is contrary to applicable law will not be effective, unless the law permits you and me to agree to such a variation.

FOR THE LENDER

MARK MOSSELL

Title ASSISTANT VICE PRESIDENT

SIGNATURES: I AGREE TO THE TERMS OF THIS LINE OF CREDIT. I HAVE RECEIVED A COPY ON TODAY'S DATE.

CHARLES T BROOKS III

BOOK=980 PAGE=00770

FILED, RECORDED, INDEXED
 05/12/2005 02:23:04 PM
 REC. FEE: 15.00 CO FEE:
 STATE FEE: .00 TOTAL FEES: 15.
 PAGES: 9
 VICKI M. MCCARTHY - REGISTER OF DEEDS
 SUMTER COUNTY

This document was prepared by (name, address, phone).

SUMTER NATIONAL BANK
 683 BULTMAN DRIVE
 SUMTER, SC 29151
 (803) 775-7701

1110716

State of South Carolina _____ Space Above This Line For Recording Data _____

REAL ESTATE MORTGAGE (With Future Advance Clause)

1. DATE AND PARTIES. The date of this Mortgage is 05-12-2005 and the parties and their addresses are as follows:

MORTGAGOR: CHARLES T. BROOKS III, AN INDIVIDUAL
 309 BROAD ST
 SUMTER, SC 29150

☐ Refer to the Addendum which is attached and incorporated herein for additional Mortgages.

LENDER: SUMTER NATIONAL BANK
 ORGANIZED AND EXISTING UNDER THE LAWS OF THE UNITED STATES OF AMERICA
 683 BULTMAN DRIVE
 POST OFFICE DRAWER 1629 SUMTER, SC 29151

2. MORTGAGE. For good and valuable consideration, the receipt and sufficiency of which is acknowledged, and to secure the Secured Debt (hereafter defined), Mortgagor grants, bargains, conveys and mortgages to Lender the following described property:
 SEE ATTACHED EXHIBIT "A"

The property is located in SUMTER at 309 BROAD ST
 (County)
SUMTER, South Carolina 29150
 (Address) (City) (Zip Code)

Together with all rights, easements, appurtenances, royalties, mineral rights, oil and gas rights, crops, timber, all diversion payments or third party payments made to crop producers, and all existing and future improvements, structures, fixtures, and replacements that may now, or at any time in the future, be part of the real estate described above (all referred to as "Property"). The term Property also includes, but is not limited to, any and all water wells, water, ditches, reservoirs, reservoir sites and dams located on the real estate and all riparian and water rights associated with the Property, however established.

SOUTH CAROLINA - AGRICULTURAL/COMMERCIAL REAL ESTATE SECURITY INSTRUMENT (NOT FOR FIDUCIARY, FIA OR VA USE, AND NOT FOR CONSUMER PURPOSES)

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3. **MAXIMUM OBLIGATION LIMIT.** The total principal amount of the Secured Debt (hereafter defined) secured by this Mortgage at any one time shall not exceed \$ 112,000.00. This limitation of amount does not include interest, loan charges, commitment fees, brokerage commissions, attorneys' fees and other charges validly made pursuant to this Mortgage and does not apply to advances (or interest accrued on such advances) made under the terms of this Mortgage to protect Lender's security and to perform any of the covenants contained in this Mortgage. Interest under the Note will be deferred, accrued or capitalized; however, Mortgagee shall not be required to defer, accrue or capitalize any interest except as provided in the Note. Future advances are contemplated and, along with other future obligations, are secured by this Mortgage even though all or part may not yet be advanced. Nothing in this Mortgage, however, shall constitute a commitment to make additional or future loans or advances in any amount. Any such commitment would need to be agreed to in a separate writing.

4. **SECURED DEBT DEFINED.** The term "Secured Debt" includes, but is not limited to, the following:

A. The promissory note(s), contract(s), guaranty(ies) or other evidence of debt described below and all extensions, renewals, modifications or substitutions (Evidence of Debt) (e.g., *borrower's name, note amount, interest rate, maturity date*):

\$112,000.00 REAL ESTATE NOTE DATED 5/12/2005 IN/TO CHARLES T. BROOKS III

- B. All future advances from Lender to Mortgagor or other future obligations of Mortgagor to Lender under any promissory note, contract, guaranty, or other evidence of debt existing now or executed after this Mortgage whether or not this Mortgage is specifically referred to in the evidence of debt
- C. All obligations Mortgagor owes to Lender, which now exist or may later arise, to the extent not prohibited by law, including, but not limited to, liabilities for overdrafts relating to any deposit account agreement between Mortgagor and Lender.
- D. All additional sums advanced and expenses incurred by Lender for insuring, preserving or otherwise protecting the Property and its value and any other sums advanced and expenses incurred by Lender under the terms of this Mortgage, plus interest at the highest rate in effect, from time to time, as provided in the Evidence of Debt.
- E. Mortgagor's performance under the terms of any instrument evidencing a debt by Mortgagor to Lender and any Mortgage securing, guarantying, or otherwise relating to the debt.

If more than one person signs this Mortgage as Mortgagor, each Mortgagor agrees that this Mortgage will secure all future advances and future obligations described above that are given to or incurred by any one or more Mortgagor, or any one or more Mortgagor and others. This Mortgage will not secure any other debt if Lender fails, with respect to such other debt, to make any required disclosure about this Mortgage or if Lender fails to give any required notice of the right of rescission.

- 5. **PAYMENTS.** Mortgagor agrees to make all payments on the Secured Debt when due and in accordance with the terms of the Evidence of Debt or this Mortgage
- 6. **WARRANTY OF TITLE.** Mortgagor covenants that Mortgagor is lawfully seized of the estate conveyed by this Mortgage and has the right to grant, bargain, convey, sell, and mortgage the Property and warrants that the Property is unencumbered, except for encumbrances of record.
- 7. **CLAIMS AGAINST TITLE.** Mortgagor will pay all taxes, assessments, liens, encumbrances, lease payments, ground rents, utilities, and other charges relating to the Property when due. Lender may require Mortgagor to provide to Lender copies of all notices that such amounts are due and the receipts evidencing Mortgagor's payment. Mortgagor will defend title to the Property against any claims that would impair the lien of this Mortgage. Mortgagor agrees to assign to Lender, as requested by Lender, any rights, claims or defenses which Mortgagor may have against parties who supply labor or materials to improve or maintain the Property
- 8. **PRIOR SECURITY INTERESTS.** With regard to any other mortgage, deed of trust, security agreement or other lien document that created a prior security interest or encumbrance on the Property and that may have priority over this Mortgage, Mortgagor agrees:
 - A. To make all payments when due and to perform or comply with all covenants.
 - B. To promptly deliver to Lender any notices that Mortgagor receives from the holder.
 - C. Not to make or permit any modification or extension of, and not to request or accept any future advances under any note or agreement secured by, the other mortgage, deed of trust or security agreement unless Lender consents in writing
- 9. **DUE ON SALE OR ENCUMBRANCE.** Lender may, at its option, declare the entire balance of the Secured Debt to be immediately due and payable upon the creation of any lien, encumbrance, transfer, or sale, or contract for any of these on the Property. However, if the Property includes Mortgagor's residence, this section shall be subject to the restrictions imposed by federal law (12 C.F.R. 591), as applicable. For the purposes of this section, the term "Property" also includes any interest to all or any part of the Property. This covenant shall run with the Property and shall remain in effect until the Secured Debt is paid in full and this Mortgage is released.

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EXHIBIT "A" (Legal Description)
309 Broad Street, Sumter, SC

All that lot of land with the improvements thereon, situate in Sumter County, South Carolina, represented as .26 acres on a plat of Ben J. Makela, RLS, dated June 12, 1998, and recorded in the Office of the Register of Deeds for Sumter County in Plat Book 98, at Page 853. This property is represented as Tax Map Parcel #229-14-02-002 on the Sumter County tax records. This property address is known as 309 Broad Street, Sumter, South Carolina, 29150.

This being the identical property conveyed unto the mortgagor by Special Warranty Deed of Wells Fargo Bank, N.A., as successor by merger with Norwest Bank Minnesota, N.A., as Trustee of Solomon Brothers Mortgage Securities VII, Inc., Floating Rate Mortgage Pass-Through Certificates, Series 1999-AQ1 Under Pooling and Servicing Agreement Dated as of March 1, 1999 Without Recourse, dated August 27, 2002, and recorded in the Office of the Register of Deeds for Sumter County in Deed Book 854, at page 1995 on August 30, 2002.

Initials CB

10. TRANSFER OF AN INTEREST IN THE MORTGAGOR. If Mortgagor is an entity other than a natural person (such as a corporation or other organization), Lender may demand immediate payment if (1) a beneficial interest in Mortgagor is sold or transferred; (2) there is a change in either the identity or number of members of a partnership or similar entity; or (3) there is a change in ownership of more than 25 percent of the voting stock of a corporation or similar entity. However, Lender may not demand payment in the above situations if it is prohibited by law as of the date of this Mortgage.

11. ENTITY WARRANTIES AND REPRESENTATIONS. If Mortgagor is an entity other than a natural person (such as a corporation or other organization), Mortgagor makes to Lender the following warranties and representations which shall be continuing as long as the Secured Debt remains outstanding:

- A. Mortgagor is an entity which is duly organized and validly existing in the Mortgagor's state of incorporation (or organization). Mortgagor is in good standing in all states in which Mortgagor transacts business. Mortgagor has the power and authority to own the Property and to carry on its business as now being conducted and, as applicable, is qualified to do so in each state in which Mortgagor operates.
- B. The execution, delivery and performance of this Mortgage by Mortgagor and the obligation evidenced by the Evidence of Debt are within the power of Mortgagor, have been duly authorized, have received all necessary governmental approval, and will not violate any provision of law, or order of court or governmental agency.
- C. Other than disclosed in writing Mortgagor has not changed its name within the last ten years and has not used any other trade or fictitious name. Without Lender's prior written consent, Mortgagor does not and will not use any other name and will preserve its existing name, trade names and franchises until the Secured Debt is satisfied.

12. PROPERTY CONDITION, ALTERATIONS AND INSPECTION. Mortgagor will keep the Property in good condition and make all repairs that are reasonably necessary. Mortgagor will give Lender prompt notice of any loss or damage to the Property. Mortgagor will keep the Property free of noxious weeds and grasses. Mortgagor will not initiate, join in or consent to any change in any private restrictive covenant, zoning ordinance or other public or private restriction limiting or defining the uses which may be made of the Property or any part of the Property, without Lender's prior written consent. Mortgagor will notify Lender of all demands, proceedings, claims, and actions against Mortgagor or any other owner made under law or regulation regarding use, ownership and occupancy of the Property. Mortgagor will comply with all legal requirements and restrictions, whether public or private, with respect to the use of the Property. Mortgagor also agrees that the nature of the occupancy and use will not change without Lender's prior written consent.

No portion of the Property will be removed, demolished or materially altered without Lender's prior written consent except that Mortgagor has the right to remove items of personal property comprising a part of the Property that become worn or obsolete, provided that such personal property is replaced with other personal property at least equal in value to the replaced personal property, free from any title retention device, security agreement or other encumbrance. Such replacement of personal property will be deemed subject to the security interest created by this Mortgage. Mortgagor shall not partition or subdivide the Property without Lender's prior written consent. Lender or Lender's agents may, at Lender's option, enter the Property at any reasonable time for the purpose of inspecting the Property. Any inspection of the Property shall be entirely for Lender's benefit and Mortgagor will in no way rely on Lender's inspection.

13. AUTHORITY TO PERFORM. If Mortgagor fails to perform any of Mortgagor's duties under this Mortgage, or any other mortgage, deed of trust, security agreement or other lien document that has priority over this Mortgage, Lender may, without notice, perform the duties or cause them to be performed. Mortgagor appoints Lender as attorney in fact to sign Mortgagor's name or pay any amount necessary for performance. If any construction on the Property is discontinued or not carried on in a reasonable manner, Lender may do whatever is necessary to protect Lender's security interest in the Property. This may include completing the construction.

Lender's right to perform for Mortgagor shall not create an obligation to perform, and Lender's failure to perform will not preclude Lender from exercising any of Lender's other rights under the law or this Mortgage. Any amounts paid by Lender for insuring, preserving or otherwise protecting the Property and Lender's security interest will be due on demand and will bear interest from the date of the payment until paid in full at the interest rate in effect from time to time according to the terms of the Evidence of Debt.

14. ASSIGNMENT OF LEASES AND RENTS. Mortgagor assigns, grants, bargains, conveys and mortgages to Lender as additional security all the right, title and interest in the following (Property):

- A. Existing or future leases, subleases, licenses, guaranties and any other written or verbal agreements for the use and occupancy of the Property, including but not limited to, any extensions, renewals, modifications or replacements (Leases).
- B. Rents, issues and profits, including but not limited to, security deposits, minimum rents, percentage rents, additional rents, common area maintenance charges, parking charges, real estate taxes, other applicable taxes, insurance premium contributions, liquidated damages following default, cancellation premiums, "loss of rents" insurance, guest receipts, revenues, royalties, proceeds, bonuses, accounts, contract rights, general intangibles, and all rights and claims which Mortgagor may have that in any way pertain to or are on account of the use or occupancy of the whole or any part of the Property (Rents).

In the event any item listed as Leases or Rents is determined to be personal property, this Assignment will also be regarded as a security agreement.

Mortgagor will promptly provide Lender with copies of the Leases and will certify these Leases are true and correct copies. The existing Leases will be provided on execution of the Assignment, and all future Leases and any other information with respect to these Leases will be provided immediately after they are executed. Mortgagor may collect, receive, enjoy and use the Rents so long as Mortgagor is not in default. Mortgagor will not collect in advance any Rents due in future lease periods, unless Mortgagor first obtains Lender's written consent. Upon default, Mortgagor will receive

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any Rents in trust for Lender and Mortgagor will not commingle the Rents with any other funds. When Lender so directs, Mortgagor will endorse and deliver any payments of Rents from the Property to Lender. Amounts collected will be applied at Lender's discretion to the Secured Debts, the costs of managing, protecting and preserving the Property, and other necessary expenses. Mortgagor agrees that this Security Instrument is immediately effective between Mortgagor and Lender and effective as to third parties on the recording of this Assignment.

As long as this Assignment is in effect, Mortgagor warrants and represents that no default exists under the Leases, and the parties subject to the Leases have not violated any applicable law on leases, licenses and landlords and tenants. Mortgagor, at its sole cost and expense, will keep, observe and perform, and require all other parties to the Leases to comply with the Leases and any applicable law. If Mortgagor or any party to the Lease defaults or fails to observe any applicable law, Mortgagor will promptly notify Lender. If Mortgagor neglects or refuses to enforce compliance with the terms of the Leases, then Lender may, at Lender's option, enforce compliance.

Mortgagor will not sublet, modify, extend, cancel, or otherwise alter the Leases, or accept the surrender of the Property covered by the Leases (unless the Leases so require) without Lender's consent. Mortgagor will not assign, compromise, subordinate or encumber the Leases and Rents without Lender's prior written consent. Lender does not assume or become liable for the Property's maintenance, depreciation, or other losses or damages when Lender acts to manage, protect or preserve the Property, except for losses and damages due to Lender's gross negligence or intentional torts. Otherwise, Mortgagor will indemnify Lender and hold Lender harmless for all liability, loss or damage that Lender may incur when Lender opts to exercise any of its remedies against any party obligated under the Leases.

15. CONDOMINIUMS; PLANNED UNIT DEVELOPMENTS. If the Property includes a unit in a condominium or a planned unit development, Mortgagor will perform all of Mortgagor's duties under the covenants, by-laws, or regulations of the condominium or planned unit development.

16. DEFAULT. Mortgagor will be in default if any of the following occur:

- A. Any party obligated on the Secured Debt fails to make payment when due;
- B. A breach of any term or covenant in this Mortgage, any prior mortgage or any construction loan agreement, security agreement or any other document evidencing, guarantying, securing or otherwise relating to the Secured Debt;
- C. The making or furnishing of any verbal or written representation, statement or warranty to Lender that is false or incorrect in any material respect by Mortgagor or any person or entity obligated on the Secured Debt;
- D. The death, dissolution, or insolvency of, appointment of a receiver for, or application of any debtor relief law to, Mortgagor or any person or entity obligated on the Secured Debt;
- E. A good faith belief by Lender at any time that Lender is insecure with respect to any person or entity obligated on the Secured Debt or that the prospect of any payment is impaired or the value of the Property is impaired;
- F. A material adverse change in Mortgagor's business including ownership, management, and financial conditions, which Lender in its opinion believes impairs the value of the Property or repayment of the Secured Debt; or
- G. Any loan proceeds are used for a purpose that will contribute to excessive erosion of highly erodible land or to the conversion of wetlands to produce an agricultural commodity, as further explained in 7 C.F.R. Part 1940, Subpart G, Exhibit M.

17. REMEDIES ON DEFAULT. In some instances, federal and state law will require Lender to provide Mortgagor with notice of the right to cure, mediation notices or other notices and may establish time schedules for foreclosure actions. Subject to these limitations, if any, Lender may accelerate the Secured Debt and foreclose this Mortgage in a manner provided by law if this Mortgage is in default.

At the option of Lender, all or any part of the agreed fees and charges, accrued interest and principal shall become immediately due and payable, after giving notice if required by law, upon the occurrence of a default or anytime thereafter. In addition, Lender shall be entitled to all the remedies provided by law, the Evidence of Debt, other evidences of debt, this Mortgage and any related documents. All remedies are distinct, cumulative and not exclusive, and the Lender is entitled to all remedies provided at law or equity, whether expressly set forth or not. The acceptance by Lender of any sum in payment or partial payment on the Secured Debt after the balance is due or is accelerated or after foreclosure proceedings are filed shall not constitute a waiver of Lender's right to require full and complete cure of any existing default. By not exercising any remedy on Mortgagor's default, Lender does not waive Lender's right to later consider the event a default if it continues or happens again.

18. EXPENSES; ADVANCES ON COVENANTS; ATTORNEYS' FEES; COLLECTION COSTS. Except when prohibited by law, Mortgagor agrees to pay all of Lender's expenses if Mortgagor breaches any covenant in this Mortgage. Mortgagor will also pay on demand all of Lender's expenses incurred in collecting, insuring, preserving or protecting the Property or in any inventories, audits, inspections or other examination by Lender in respect to the Property. Mortgagor agrees to pay all costs and expenses incurred by Lender in enforcing or protecting Lender's rights and remedies under this Mortgage, including, but not limited to, attorneys' fees, court costs, and other legal expenses. Once the Secured Debt is fully and finally paid, Lender agrees to release this Mortgage and Mortgagor agrees to pay for any recordation costs. All such amounts are due on demand and will bear interest from the time of the advance at the highest rate in effect, from time to time, as provided in the Evidence of Debt and as permitted by law.

19. ENVIRONMENTAL LAWS AND HAZARDOUS SUBSTANCES. As used in this section, (1) "Environmental Law" means, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, 42 U.S.C. 9601 et seq.), all other federal, state and local laws, regulations, ordinances, court orders, attorney general opinions or interpretive letters concerning the public health, safety, welfare, environment or a hazardous substance, and (2) "Hazardous Substance" means any toxic, radioactive or hazardous material, waste, pollutant or contaminant which has

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characteristics which render the substance dangerous or potentially dangerous to the public health, safety, welfare or environment. The term includes, without limitation, any substances defined as "hazardous material," "toxic substances," "hazardous waste" or "hazardous substance" under any Environmental Law. Mortgagor represents, warrants and agrees that, except as previously disclosed and acknowledged in writing:

- A. No Hazardous Substance has been, is, or will be located, transported, manufactured, treated, refined, or handled by any person on, under or about the Property, except in the ordinary course of business and in strict compliance with all applicable Environmental Law.
- B. Mortgagor has not and will not cause, contribute to, or permit the release of any Hazardous Substance on the Property.
- C. Mortgagor will immediately notify Lender if (1) a release or threatened release of Hazardous Substance occurs on, under or about the Property or migrates or threatens to migrate from nearby property; or (2) there is a violation of any Environmental Law concerning the Property. In such an event, Mortgagor will take all necessary remedial action in accordance with Environmental Law.
- D. Mortgagor has no knowledge of or reason to believe there is any pending or threatened investigation, claim, or proceeding of any kind relating to (1) any Hazardous Substance located on, under or about the Property; or (2) any violation by Mortgagor or any tenant of any Environmental Law. Mortgagor will immediately notify Lender in writing as soon as Mortgagor has reason to believe there is any such pending or threatened investigation, claim, or proceeding. In such an event, Lender has the right, but not the obligation, to participate in any such proceeding including the right to receive copies of any documents relating to such proceedings.
- E. Mortgagor and every tenant have been, are and shall remain in full compliance with any applicable Environmental Law.
- F. There are no underground storage tanks, private dumps or open wells located on or under the Property and no such tank, dump or well will be added unless Lender first consents in writing.
- G. Mortgagor will regularly inspect the Property, monitor the activities and operations on the Property, and confirm that all permits, licenses or approvals required by any applicable Environmental Law are obtained and complied with.
- H. Mortgagor will permit, or cause any tenant to permit, Lender or Lender's agent to enter and inspect the Property and review all records at any reasonable time to determine (1) the existence, location and nature of any Hazardous Substance on, under or about the Property; (2) the existence, location, nature, and magnitude of any Hazardous Substance that has been released on, under or about the Property; or (3) whether or not Mortgagor and any tenant are in compliance with applicable Environmental Law.
- I. Upon Lender's request and at any time, Mortgagor agrees, at Mortgagor's expense, to engage a qualified environmental engineer to prepare an environmental audit of the Property and to submit the results of such audit to Lender. The choice of the environmental engineer who will perform such audit is subject to Lender's approval.
- J. Lender has the right, but not the obligation, to perform any of Mortgagor's obligations under this section at Mortgagor's expense.
- K. As a consequence of any breach of any representation, warranty or promise made in this section, (1) Mortgagor will indemnify and hold Lender and Lender's successors or assigns harmless from and against all losses, claims, demands, liabilities, damages, cleanup, response and remediation costs, penalties and expenses, including without limitation all costs of litigation and attorneys' fees, which Lender and Lender's successors or assigns may sustain; and (2) at Lender's discretion, Lender may release this Mortgage and in return Mortgagor will provide Lender with collateral of at least equal value to the Property secured by this Mortgage without prejudice to any of Lender's rights under this Mortgage.
- L. Notwithstanding any of the language contained in this Mortgage to the contrary, the terms of this section shall survive any foreclosure or satisfaction of this Mortgage regardless of any passage of title to Lender or any disposition by Lender of any or all of the Property. Any claims and defenses to the contrary are hereby waived.

20. CONDEMNATION. Mortgagor will give Lender prompt notice of any action, real or threatened, by private or public entities to purchase or take any or all of the Property, including any easements, through condemnation, eminent domain, or any other means. Mortgagor further agrees to notify Lender of any proceedings instituted for the establishment of any sewer, water, conservation, ditch, drainage, or other district relating to or binding upon the Property or any part of it. Mortgagor authorizes Lender to intervene in Mortgagor's name in any of the above described actions or claims and to collect and receive all sums resulting from the action or claim. Mortgagor assigns to Lender the proceeds of any award or claim for damages connected with a condemnation or other taking of all or any part of the Property. Such proceeds shall be considered payments and will be applied as provided in this Mortgage. This assignment of proceeds is subject to the terms of any prior mortgage, deed of trust, security agreement or other lien document.

21. INSURANCE. Mortgagor agrees to maintain insurance as follows:

- A. Mortgagor shall keep the Property insured against loss by fire, theft and other hazards and risks reasonably associated with the Property due to its type and location. Other hazards and risks may include, for example, coverage against loss due to floods or flooding. This insurance shall be maintained in the amounts and for the periods that Lender requires. What Lender requires pursuant to the preceding three sentences can change during the term of the Secured Debt. The insurance carrier providing the insurance shall be chosen by Mortgagor subject to Lender's approval, which shall not be unreasonably withheld. If Mortgagor fails to maintain the coverage described above, Lender may, at Lender's option, obtain coverage to protect Lender's rights in the Property according to the terms of this Mortgage.

All insurance policies and renewals shall be acceptable to Lender and shall include a standard "mortgage clause" and, where applicable, "lender loss payee clause." Mortgagor shall immediately notify Lender of cancellation or termination of the insurance. Lender shall have the right to hold the policies and renewals. If Lender requires, Mortgagor shall immediately give to Lender all receipts of paid premiums and renewal notices. Upon loss, Mortgagor shall give immediate notice to the insurance carrier and Lender. Lender may make proof of loss if not made immediately by Mortgagor.

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Unless Lender and Mortgagor otherwise agree in writing, insurance proceeds shall be applied to restoration or repair of the Property damaged if the restoration or repair is economically feasible and Lender's security is not lessened. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the Secured Debt, whether or not then due, with any excess paid to Mortgagor. If Mortgagor abandons the Property, or does not answer within 30 days a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may collect the insurance proceeds. Lender may use the proceeds to repair or restore the Property or to pay the Secured Debt whether or not then due. The 30-day period will begin when the notice is given.

Unless Lender and Mortgagor otherwise agree in writing, any application of proceeds to principal shall not extend or postpone the due date of scheduled payments or change the amount of the payments. If the Property is acquired by Lender, Mortgagor's right to any insurance policies and proceeds resulting from damage to the Property before the acquisition shall pass to Lender to the extent of the Secured Debt immediately before the acquisition.

- B. Mortgagor agrees to maintain comprehensive general liability insurance naming Lender as an additional insured in an amount acceptable to Lender, insuring against claims arising from any accident or occurrence in or on the Property.
- C. Mortgagor agrees to maintain rental loss or business interruption insurance, as required by Lender, in an amount equal to at least coverage of one year's debt service, and required escrow account deposits (if agreed to separately in writing), under a form of policy acceptable to Lender.

22. **NO ESCROW FOR TAXES AND INSURANCE.** Unless otherwise provided in a separate agreement, Mortgagor will not be required to pay to Lender funds for taxes and insurance in escrow.

23. **FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS.** Mortgagor will provide to Lender upon request, any financial statement or information Lender may deem necessary. Mortgagor warrants that all financial statements and information Mortgagor provides to Lender are, or will be, accurate, correct, and complete. Mortgagor agrees to sign, deliver, and file as Lender may reasonably request any additional documents or certifications that Lender may consider necessary to perfect, continue, and preserve Mortgagor's obligations under this Mortgage and Lender's lien status on the Property. If Mortgagor fails to do so, Lender may sign, deliver, and file such documents or certificates in Mortgagor's name and Mortgagor hereby irrevocably appoints Lender or Lender's agent as attorney in fact to do the things necessary to comply with this section.

24. **JOINT AND INDIVIDUAL LIABILITY; CO-SIGNERS; SUCCESSORS AND ASSIGNS BOUND.** All duties under this Mortgage are joint and individual. If Mortgagor signs this Mortgage but does not sign the Evidence of Debt, Mortgagor does so only to mortgage Mortgagor's interest in the Property to secure payment of the Secured Debt and Mortgagor does not agree to be personally liable on the Secured Debt. Mortgagor agrees that Lender and any party to this Mortgage may extend, modify or make any change in the terms of this Mortgage or the Evidence of Debt without Mortgagor's consent. Such a change will not release Mortgagor from the terms of this Mortgage. The duties and benefits of this Mortgage shall bind and benefit the successors and assigns of Mortgagor and Lender.

If this Mortgage secures a guaranty between Lender and Mortgagor and does not directly secure the obligation which is guaranteed, Mortgagor agrees to waive any rights that may prevent Lender from bringing any action or claim against Mortgagor or any party indebted under the obligation including, but not limited to, anti-deficiency or one-action laws.

25. **APPLICABLE LAW; SEVERABILITY; INTERPRETATION.** This Mortgage is governed by the laws of the jurisdiction in which Lender is located, except to the extent otherwise required by the laws of the jurisdiction where the Property is located. This Mortgage is complete and fully integrated. This Mortgage may not be amended or modified by oral agreement. Any section or clause in this Mortgage, attachments, or any agreement related to the Secured Debt that conflicts with applicable law will not be effective, unless that law expressly or impliedly permits the variations by written agreement. If any section or clause of this Mortgage cannot be enforced according to its terms, that section or clause will be severed and will not effect the enforceability of the remainder of this Mortgage. Whenever used, the singular shall include the plural and the plural the singular. The captions and headings of the sections of this Mortgage are for convenience only and are not to be used to interpret or define the terms of this Mortgage. Time is of the essence in this Mortgage.

26. **NOTICE.** Unless otherwise required by law, any notice shall be given by delivering it or by mailing it by first class mail to the appropriate party's address on page 1 of this Mortgage, or to any other address designated in writing. Notice to one mortgagor will be deemed to be notice to all mortgagors.

27. **WAIVER OF HOMESTEAD.** Except to the extent prohibited by law, Mortgagor waives all homestead exemption rights relating to the Property.

28. **U.C.C. PROVISIONS.** If checked, the following are applicable to, but do not limit, this Mortgage:

- ☐ **Construction Loan.** This Mortgage secures an obligation incurred for the construction of an improvement on the Property.
- ☐ **Fixture Filing.** Mortgagor grants to Lender a security interest in all goods that Mortgagor owns now or in the future and that are or will become fixtures related to the Property.
- ☐ **Crops; Timber; Minerals; Rents, Issues and Profits.** Mortgagor grants to Lender a security interest in all crops, timber, and minerals located on the Property as well as all rents, issues, and profits of them including, but not limited to, all Conservation Reserve Program (CRP) and Payment in Kind (PIK) payments and similar governmental programs (all of which shall also be included in the term "Property")

(page 6 of 8)

BOOK: 980 PAGE:0777

- ☐ **Personal Property.** Mortgagor grants to Lender a security interest in all personal property located on or connected with the Property. This security interest includes all farm products, inventory, equipment, accounts, documents, instruments, chattel paper, general intangibles, and all other items of personal property Mortgagor owns now or in the future and that are used or useful in the construction, ownership, operation, management, or maintenance of the Property. The term "personal property" specifically excludes that property described as "household goods" secured in connection with a "consumer" loan as those terms are defined in applicable federal regulations governing unfair and deceptive credit practices.
- ☐ **Filing As Financing Statement.** Mortgagor agrees and acknowledges that this Mortgage also suffices as a financing statement and as such, may be filed of record as a financing statement for purposes of Article 9 of the Uniform Commercial Code. A carbon, photographic, image or other reproduction of this Mortgage is sufficient as a financing statement.

29. OTHER TERMS. If checked, the following are applicable to this Mortgage:

- ☐ **Line of Credit.** The Secured Debt includes a revolving line of credit provision. Although the Secured Debt may be reduced to a zero balance, this Mortgage will remain in effect until released
- ☐ **Waiver of Appraisal Rights.** The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may, within thirty days after the sale of the mortgaged property, apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. THE UNDERSIGNED HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY.
- ☐ **Separate Assignment.** The Mortgagor has executed or will execute a separate assignment of leases and rents. If the separate assignment of leases and rents is properly executed and recorded, then the separate assignment will supersede this Security Instrument's "Assignment of Leases and Rents" section.
- ☐ **Additional Terms.**

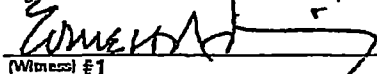
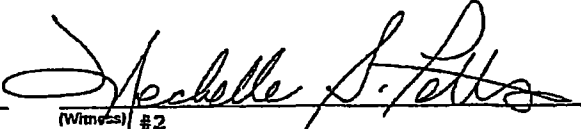
SIGNATURES: By signing below, Mortgagor agrees to the terms and covenants contained in this Mortgage and in any attachments. Mortgagor also acknowledges receipt of a copy of this Mortgage on the date stated above on Page 1.

☐ Actual authority was granted to the parties signing below by resolution signed and dated _____.

Entity Name _____

 5/12/05 (Date) (Seal)
(Signature) CHARLES T. BROOKS III (Date)

Signed, Sealed and delivered in the presence of

 #1  #2
(Witness) #1 (Witness) #2

☐ Refer to the Addendum which is attached and incorporated herein for additional Mortgagors, signatures and acknowledgments

BOOK: 980 PAGE:0778

PROBATE:

STATE OF SOUTH CAROLINA, COUNTY OF SUMTER) ss

Personally appeared before me the undersigned witness who, being duly sworn, deposed and said that (s)he saw the Mortgagor (and each Mortgagor if more than one) sign, seal and deliver the foregoing Mortgage and that (s)he, together with the other witness whose name appears as a witness, witnessed the execution thereof.

Sworn to and subscribed before me this 12TH dayof MAY, 2005


Notary Public for South Carolina


WITNESS #1

My commission expires: August 14, 2013

RELEASE AND SETTLEMENT AGREEMENT

This Agreement is hereby entered into on this 7 day of ^{April} March 2010 by and between Charles T. Brooks, III ("Brooks") and First Citizens Bank and Trust Company, Inc., ("First Citizens").

COPY

RECITALS

WHEREAS, Brooks mortgaged property located at 309 Broad Street, Sumter, South Carolina 29150 to Sumter National Bank by mortgage dated May 12, 2005 and recorded in the Sumter County Office of the Register of Deeds on May 12, 2005 in Book 980 at page 770. Thereafter, on October 1, 2006, Sumter National Bank merged into and subsequently operated as part of Community Resource Bank, National Association; thereafter, on November 1, 2008, Community Resource Bank, National Association, merged into and subsequently operated as part of First Citizens Bank and Trust Company, Inc., who assigned such mortgage a loan number of 1232370 & 1232545 ("Office Mortgage").

WHEREAS, First Citizens instituted a foreclosure action of such mortgage entitled First Citizens Bank and Trust Company, Inc., Inc. vs. Charles T. Brooks, III, et al. by filing a Summons and Complaint on November 2, 2009 in the Sumter County Clerk of Court's office (Case Number 2009-CP-43-2538).

WHEREAS, Brooks filed an answer in such foreclosure action on November 3, 2009.

WHEREAS, Brooks mortgaged property located at 161 Carolina Avenue, Sumter, South Carolina 29150 to Sumter National Bank by mortgage dated September 30, 2004 and recorded in the Sumter County Office of the Register of Deeds on September 30, 2004 in Book 954 at page 1870. Thereafter, on October 1, 2006, Sumter National Bank merged into and subsequently operated as part of Community Resource Bank, National Association; thereafter, on November 1, 2008, Community Resource Bank, National Association, merged into and subsequently operated as part of First Citizens Bank and Trust Company, Inc., who assigned such mortgage a loan number of 1239458 ("Mortgage 1").

WHEREAS, First Citizens instituted a foreclosure action of such mortgage entitled First Citizens Bank and Trust Company, Inc., Inc. vs. Charles T. Brooks, III, et al. by filing a Summons and Complaint on October 30, 2009 in the Sumter County Clerk of Court's office (Case Number 2009-CP-43-2525).

WHEREAS, Brooks filed an answer in such foreclosure action on November 3, 2009.

WHEREAS, Brooks mortgaged property located at 122 East Carolina Avenue, Sumter, South Carolina 29150 to Sumter National Bank by mortgage dated August 4, 2004 and recorded in the Sumter County Office of the Register of Deeds on August 10, 2004 in Book 949 at page 470. Thereafter, on October 1, 2006, Sumter National Bank merged into and subsequently operated as part of Community Resource Bank, National Association; thereafter, on November 1, 2008, Community Resource Bank, National Association, merged into and subsequently operated as part of First Citizens Bank and Trust Company, Inc., who assigned such mortgage a loan number of 1233162 ("Mortgage 2").

WHEREAS, First Citizens instituted a foreclosure action of such mortgage entitled First Citizens Bank and Trust Company, Inc., Inc. vs. Charles T. Brooks, III, et al. by filing a Summons and Complaint on October 30, 2009 in the Sumter County Clerk of Court's office (Case Number 2009-CP-43-2526).

WHEREAS, Brooks filed an answer in such foreclosure action on November 3, 2009.

WHEREAS, Brooks mortgaged property located at 983 Industrial Road Sumter, South Carolina 29150 to Sumter National Bank by mortgage dated March 18, 2005 and recorded in the Sumter County Office of the Register of Deeds on April 8, 2005 in Book 975 at page 183. Thereafter, on October 1, 2006, Sumter National Bank merged into and subsequently operated as part of Community Resource Bank, National Association; thereafter, on November 1, 2008, Community Resource Bank, National Association, merged into and subsequently operated as part of First Citizens Bank and Trust Company, Inc., who assigned such mortgage a loan number of 11239557 ("Mortgage 3").



WHEREAS, First Citizens instituted a foreclosure action of such mortgage entitled First Citizens Bank and Trust Company, Inc., Inc. vs. Charles T. Brooks, III, et al. by filing a Summons and Complaint on October 30, 2009 in the Sumter County Clerk of Court's office (Case Number 2009-CP-43-2527).

WHEREAS, Brooks filed an answer in such foreclosure action on November 3, 2009.

WHEREAS, Brooks mortgaged property located at 328 Enter Street, Sumter, South Carolina 29150 to Sumter National Bank by mortgage dated March 9, 2007 and recorded in the Sumter County Office of the Register of Deeds on April 7, 2007 in Book 1072 at page 730. Thereafter, on October 1, 2006, Sumter National Bank merged into and subsequently operated as part of Community Resource Bank, National Association; thereafter, on November 1, 2008, Community Resource Bank, National Association, merged into and subsequently operated as part of First Citizens Bank and Trust Company, Inc., who assigned such mortgage a loan number of 1240092 ("Mortgage 4").

WHEREAS, First Citizens instituted a foreclosure action of such mortgage entitled First Citizens Bank and Trust Company, Inc., Inc. vs. Charles T. Brooks, III, et al. by filing a Summons and Complaint on November 12, 2009 in the Sumter County Clerk of Court's office (Case Number 2009-CP-43-2620).

WHEREAS, Brooks filed an answer in such foreclosure action on November 3, 2009.

WHEREAS, Brooks and First Citizens now desire to settle, compromise, and resolve the foreclosure action pursuant to the terms and conditions hereinafter set forth in this settlement agreement.

NOW, THEREFORE, in consideration of the premises and covenants contained herein, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. **Settlement Terms.** Brooks shall (1) sign a separate forbearance agreement on the Office Mortgage to resume payments plus arrearage for a period of 12 months, at the conclusion of which a balloon payment will be due for the entire amount due; (2) give deeds in lieu of foreclosure to First Citizens for the properties serving as collateral for Mortgage 1, Mortgage 2, Mortgage 3 and Mortgage 4 (collectively referred to herein as the "Investment Properties"); (3) sign a confession of judgment for the deficiency, if any, resulting from each sale of the Investment Properties; (4) refinance the Office Mortgage to include the deficiency amounts once all Investment Properties have sold and the deficiency amounts are fixed; (5) sign this Settlement Agreement; and (6) sign a Stipulation of Dismissal for the foreclosure actions of the Investment Properties; in consideration for First Citizens to (1) hold the foreclosure on the Office Mortgage as long as the Court will allow or until Brooks defaults on any portion of this Agreement; (2) dismiss the foreclosures on the Investment Properties.
2. **General Release of Claims by Brooks.** In consideration of the settlement terms outlined in Paragraph 1 of this Agreement, Brooks hereby releases and forever discharges FIRST CITIZENS BANK AND TRUST COMPANY, INC., its subsidiaries, business units, affiliates, parent companies, past and present, its predecessors and successors and their respective officers, directors, employees, agents, mortgage servicers, legal counsel, successors and assigns, past and present (collectively "FIRST CITIZENS BANK AND TRUST COMPANY, INC.") from any and all known and unknown claims, demands and causes of action that Brooks may have as of this date against FIRST CITIZENS BANK AND TRUST COMPANY, INC. arising from or in connection with the Mortgage. This release includes any future claim for attorney's fees.
3. **Covenant Not To Sue.** Brooks agrees to withdraw his Answers in the current litigation (Case #'s 2009-CP-43-2620, 2009-CP-43-2525, 2009-CP-43-2526, 2009-CP-43-2527, & 2009-CP-43-2538), and agrees to take any actions necessary to facilitate the dismissal of the foreclosure. Brooks agrees not to file, commence or initiate any suits, demands or causes of action against FIRST CITIZENS BANK AND TRUST COMPANY, INC. based upon or relating to any of the claims released and forever discharged pursuant to Paragraph 2 of this Settlement Agreement. If Brooks breaches this covenant, he hereby agrees to pay all of the reasonable costs and attorneys' fees actually incurred by FIRST CITIZENS BANK AND TRUST COMPANY, INC. in defending against the claims, demands or causes of action, together with such and further damages as may result, directly or indirectly, from the breach. Moreover, Brooks agrees that he will not cooperate with or encourage any person to file a suit or claim against FIRST CITIZENS BANK AND TRUST

COMPANY, INC. or voluntarily provide documents or information in support of such an action, unless compelled to do so by process of law.

4. **No Admission of Wrongdoing or Liability.** Nothing contained in this Settlement Agreement shall constitute, or be construed as or is intended to be an admission concerning the validity or invalidity of any claim or defense by any party, or an acknowledgment by any party of any wrongdoing or liability, all such wrongdoing and liability being expressly denied, except as the same may result from a breach of any provision of this Agreement. Both parties understand and agree that this Agreement shall not be admissible before any tribunal in any proceeding for any purpose, except in a proceeding to enforce its terms.

5. **Confidentiality.** Brooks agrees that he will keep the terms and conditions of this Agreement confidential and that he will not, without compulsion of legal process, disclose, publish, or disseminate the terms and conditions of this Agreement to any person or any entity, except family, financial advisers, or attorneys, on a "need to know" basis, all of whom shall be advised of and bound by this confidentiality provision.

6. **Warranties/Representations.** The parties to this settlement agreement hereby warrant and represent that:

A. They have carefully read and fully understand the comprehensive terms and conditions of this Settlement Agreement and the releases set forth herein;

B. They are executing this Settlement Agreement knowingly and voluntarily, without any duress, coercion or undue influence;

C. They have been advised to consult with an attorney before signing this Agreement and have had ample opportunity to consult with legal counsel of their own choice before executing this Agreement and, in fact, have done so;

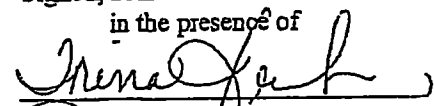
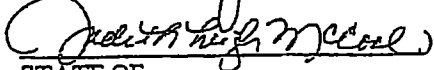
D. They have filed no charge, claim, complaint (other than these actions, Case #'s 2009-CP-43-2620, 2009-CP-43-2525, 2009-CP-43-2526, 2009-CP-43-2527, & 2009-CP-43-2538) or any document with any federal or state agency or any court complaining of unlawful treatment by the other party;

E. They are fully satisfied with the terms and conditions of this Settlement Agreement including, without limitation, the consideration paid to them as part of this comprehensive settlement;

F. They are receiving payment and other consideration under this Agreement that they would not otherwise be entitled to.

7. **Severability of Terms.** If any provision of this Settlement Agreement is determined to be invalid or otherwise unenforceable, then that invalidity or unenforceability shall not affect any other provisions of this Settlement Agreement, which shall continue and remain in full force and effect.

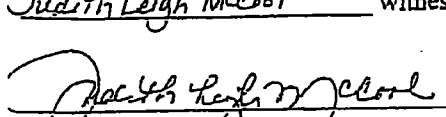
Signed, Sealed and Delivered)
in the presence of)

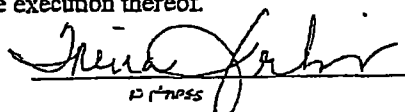



STATE OF)
COUNTY OF)


Charles T. Brooks, III

PERSONALLY appeared Trina Jenkins and made oath that s/he saw the within-named Charles T. Brooks, III sign, seal and as his act and deed, deliver the within document, and that s/he with Judith Leigh McCoil witnessed the execution thereof.


Notary Public for SC
My Comm Exp: July 1-2010


WITNESS

FORBEARANCE AGREEMENT - IN FORECLOSURE

OBGOR: 232259 OBGAT: 1232370

OBGOR: 232259 OBGAT: 1232545

COI

This Agreement, made as of the ____ day of March, 2010, by First Citizens Bank and Trust Company, Inc., (hereinafter referred to as "Lender"), and Charles T. Brooks III (hereinafter collectively referred to as "Borrower").

WITNESSED THAT:

WHEREAS, Lender is the owner and holder of a certain note dated May 12, 2005, executed and delivered by Borrower in the original principal amount of \$112,000.00 and a second note dated July 27, 2007 executed and delivered by Borrower in the original principal amount of \$30,150.00 ("the Notes"), both of which are secured by that certain mortgage (the "Mortgage") on property located at 309 Broad Street, Sumter, SC 29150 (the "Premises") (the Notes and Mortgage any other documents executed in connection therewith are hereinafter collectively referred to as the "Loan Documents");

WHEREAS, Borrower is in default in the payment of monthly installments of principal, interest, escrow, and other payments called for under the Loan Documents (the "Payments") for the period commencing on May 10, 2009 (the "Arrears")

WHEREAS, as a result of the Arrears, Lender has the right to require that Borrower make immediate payment in full of all monies remaining unpaid under the Loan Documents, and has already commenced foreclosure proceedings to foreclose the Mortgage;

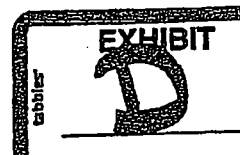
WHEREAS, Borrower is not currently involved in a bankruptcy proceeding at any place in the United States;

WHEREAS, Borrower has advised Lender that he has suffered financial setbacks and has requested Lender's forbearance in exercising its rights and remedies under the default provisions of the Loan Documents and with regard to the ongoing foreclosure action, as well as requested certain debt relief; and

WHEREAS, Lender is willing to honor Borrower's requests by granting forbearance on the terms set forth herein.

NOW, THEREFORE, in consideration of the premises and mutual covenants herein contained, the Parties hereto agree as follows:

1. Lender's Forbearance. Lender shall forbear from exercising any and all of its rights and remedies presently existing or arising during the term of this Agreement under the Loan Documents, the ongoing foreclosure action or this Agreement, provided that there exists no Event of Default as such term is defined herein at Paragraph 5;



2. Borrower's Admissions. Borrower admits the amounts owing to Lender under the Loan Documents as indicated in this Agreement, and represents and acknowledges that there are no defenses, offsets or counterclaims of any nature whatsoever to any of the Loan Documents. Borrower acknowledges valid service of the Summons and Complaint in the foreclosure action, that Borrower does not intend to enter any answer or defenses therein, and specifically waives any rights Borrower might otherwise have to do so. If Borrower has already answered, Borrower hereby withdraws its answer and defenses with prejudice;

3. Borrower's Payment of the Arrears. THIS FORBEARANCE AGREEMENT IS NOT DESIGNED TO CURE THE ARREARAGE. The intent of this agreement is to provide time for the Lender to sell other properties deeded to it from Borrower as part of a separate Settlement and Release Agreement dated March __, 2010. At the conclusion of this agreement the Loan shall be refinanced to include any deficiency from the sale of the other properties. This must be accomplished no later than March 1, 2011. Borrower shall comply with this agreement in the following manner:

- a. By paying to Lender the sum of \$5,000.00, in certified funds, no later than March 15, 2010; this payment is to be applied to the arrearage;
- b. By paying to Lender the sum of \$1,500.00, in certified funds, due the first day of each month beginning April 1, 2010, and ending March 1, 2011.
- c. On March 1, 2011 the balance of the loan will become immediately due and payable, should Borrower and Lender fail to enter a separate agreement by that date to cure the arrearage or pay off this loan. The balance of the loan will include the capitalization of all accrued interest on the principal, fees, and other amounts as they become due during the course of this Agreement because the payments specified hereunder are not designed to cure the arrearage.
- d. If this is an escrowed loan, the regular monthly payment amount may change during the term of this agreement. If so, the Borrower will be required to pay the new regular monthly payment amount in addition to the monthly amount designed to cure the arrearage.
- e. By paying to Lender any additional default and/or foreclosure costs which may be incurred by Lender during the course of this Agreement.

4. Borrower's Payment of Payments Coming Due. Commencing with the regular payment due (next regular payment date), Borrower shall make all future Payments as they become due, which Payments may change in accordance with the terms of the Notes and Mortgage.

5. Events of Default. If Borrower fails to make any of the payments of the Arrears as specified herein on the due date thereof; if the Borrower fails to make any of the Payments pursuant to the terms of the Notes and Mortgage; or if Borrower fails to keep a promise or agreement or perform or discharge any agreement, covenant, obligation or undertaking created or agreed to by Borrower in the Loan Documents and this Agreement, same shall constitute an event of default ("Event of Default") hereunder and under the Loan Documents.

6. Lender's Rights and Remedies Upon Events of Default. Upon and after the occurrence of an Event of Default all amounts then remaining unpaid under the Loan Documents and this Agreement shall be immediately due and payable and Lender shall be free to exercise any or all rights and remedies provided for under the Loan Documents, including, but not limited to, continuance of the foreclosure action, which rights and remedies are incorporated herein by reference as if fully set forth herein. By entering into this Agreement, Lender shall in no way be considered to have waived or have been estopped from exercising any or all of its rights and remedies under the Loan Documents. Noting contained herein shall constitute a waiver of any or all of the Lender's rights or remedies including the right to proceed with the foreclosure action. This Agreement shall not be construed as a discontinuance of the foreclosure action and any forbearance by the Lender and acceptance of monies hereunder shall not be deemed an estoppel, prejudice or waiver of Lender's right to proceed with the foreclosure action.

It is also agreed that the Lender, may without further notice to the Borrower, proceed ex parte with all further proceedings in the foreclosure action, inclusive of the order of reference, appointment of a referee, preparing a referee's oath and report and entering final judgment of foreclosure and sale, except that the Lender agrees to forbear in scheduling the foreclosure sale as long as an Event of Default does not exist. In the event there is an Event of Default, the Premises will be sold at a foreclosure sale for the unpaid balance of the monies due Lender. In such event, notice of sale and notice of surplus monies shall be given to the Borrower.

7. Limited Modification. Except as modified herein, the Loan Documents are ratified and confirmed and shall remain in full force and effect.

8. Method of Making Payments and Arrears Payments. All Payments and payments of Arrears payable to Lender by Borrower hereunder and under the loan documents shall be made by bank check or certified check payable to the order of First Citizens Bank and Trust Company, Inc., attn: Dave Davies, 1314 Park Street, P. O. Box 29, Columbia, SC 29202.

9. Application of Payments. Unless the law requires otherwise, Lender may, apply all sums received from Borrower during the term hereof, whether on account of payments of Arrears or Payments, to any sums of money due Lender from Borrower hereunder or under the Loan Documents, in any order, at its sole discretion.

10. Assignment by Borrower Prohibited. This Agreement shall be non-transferable by the Borrower.

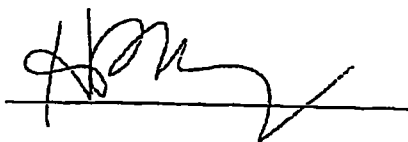
11. Entire Agreement. This Agreement sets forth all of the promises, covenants, agreements, conditions and understanding between the parties hereto with respect to the subject matter hereof, and supersedes all prior and contemporaneous agreements and understandings, inducements or conditions, express or implied, oral or written, with respect thereto, except as contained or referred to herein. This Agreement may not be amended, waived, discharged or terminated orally, but only by an instrument in writing signed by the party against whom enforcement of such amendment, waiver, discharge or termination is sought.

12. Severability. If any term or provision of this Agreement or the application thereof to any person or circumstance, shall, to any extent, be invalid or unenforceable, the remainder of this Agreement, or the application of such term or provision to persons or circumstances other than those as to which it is held invalid unenforceable, shall not be affected thereby, and each term and provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

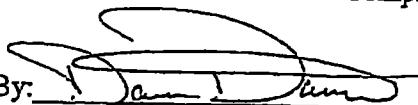
13. Reinstatement. In the event Borrower cures the Arrears by making all payments required under paragraphs 3, is current with the Payments then due, and no Event of Default exists under the Loan Documents and this Agreement, Lender shall reinstate the Notes and Mortgage according to its original terms and conditions.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date first above written.

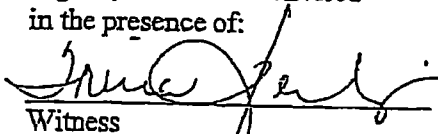
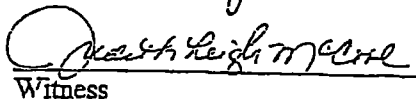
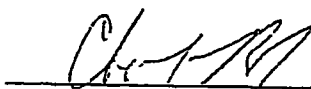
Signed, sealed and delivered
in the presence of:



First Citizens Bank and Trust Company, Inc.

By: 
Its: Special Assets Officer

Signed, sealed and delivered
in the presence of:


Witness
Witness
Charles T. Brooks, III

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

First Citizens Bank and Trust Company, Inc.,

Plaintiff,

vs

Charles T. Brooks, III and the South Carolina
Department of Revenue,

Defendant(s).

(File No 4036.00709)

IN THE COURT OF COMMON PLEAS

C/A NO.: 2009-CP-43-2538-

CERTIFICATE OF MAILING

I hereby certify that I served the Notice of Motion and Plaintiff's Motion for Summary Judgment and Affidavit upon the defendants herein by depositing a copy of same, this date, in the U.S. Mails, first class postage prepaid, and addressed as follows:

Charles T. Brooks, III
309 Broad Street
Sumter, SC, 29150
Pro Se

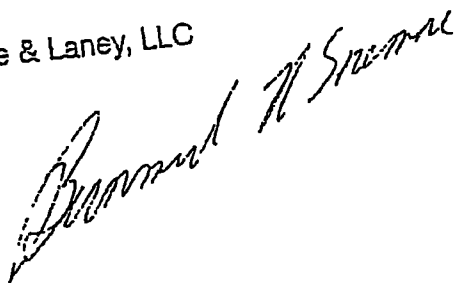
Ronald W. Urban, Esq., Esquire
Attorney for South Carolina Department of Revenue
301 Gervais Street
POB 125
Columbia, SC 29201

Riley Pope & Laney, LLC
Attorneys for Plaintiff

Bernard R. Sizemore
File and Copy Clerk

AUG 09 2012

Riley Pope & Laney, LLC



STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMTER

2012 OCT -9

AM 10:49

CASE NO. 2009-CP-43-2538

First Citizens Bank and Trust Company, Inc.,

Plaintiff,

vs.

Charles T. Brooks, III and the South Carolina Department of Revenue,

Defendants.

AFFIDAVIT OF
CHARLES T. BROOKS, III

Personally appeared before me Charles T Brooks, III, who, first being duly sworn, deposes and says as follows:

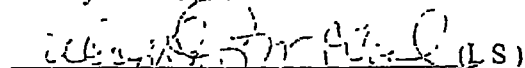
1. My name is Charles T. Brooks, III. I have personal knowledge of the facts set forth in this affidavit and am competent to testify about them.
2. Up to around Christmas of 2011, I continued to make the monthly forbearance payments to First Citizens in the monthly payment amounts. First Citizens always accepted those payments.
3. After I fell behind in those payments, I asked First Citizens, through its counsel, to provide me with a reinstatement figure to bring those payments current. As the attached emails show, First Citizens would not provide that to me.
4. At the time I requested the reinstatement figure, I could have brought the monthly payments current; however, First Citizens would not provide me with a reinstatement figure, much less accept a payment to bring the loan current.

FURTHER AFFIANT SAYETH NOT.



Charles T. Brooks, III

SWORN to before me this
9th day of October, 2012.



Notary Public for South Carolina

My Commission Expires: 12/31/2012

Charles Brooks

From: Heidi Carey [HCarey@rplfirm.com]
Sent: Thursday, March 08, 2012 12:21 PM
To: Charles Brooks
Subject: RE: Curing the default

Hello Charles –

I am working up a payoff of the 2 loans to send to you shortly. As stated in my letter, the agreement has expired.

I'll get back to you shortly with the numbers –

Heidi B. Carey, Attorney
Riley Pope & Laney, LLC
2838 Devine Street
P.O. Box 11412 (29211)
Columbia, SC 29205
(803)799-9993
(803)239-1414 (fax)
hcarey@rplfirm.com
www.rplfirm.com

**THIS IS AN ATTEMPT TO COLLECT A DEBT, AND ANY INFORMATION OBTAINED BY
THIS OFFICE WILL BE USED FOR THAT PURPOSE.**

This e-mail message is confidential. It may contain information that is privileged or subject to other confidentiality requirements and exemptions from disclosure under applicable law. It is intended solely for the use of the intended recipient. If you are not the intended recipient, notify sender immediately. Any distribution or copying of this communication is strictly prohibited.

From: Charles Brooks [mailto:cbrooks@ctbrooks.com]
Sent: Thursday, March 08, 2012 12:15 PM
To: Heidi Carey
Subject: Curing the default

Heidi, I received your letter and I called and left a message. Can you please tell me how much is needed to cure my default per the agreement I have with the bank?

Charles Brooks, III
cbrooks@ctbrooks.com

Charles Brooks

From: Heidi Carey [HCarey@rplfirm.com]
Sent: Thursday, March 08, 2012 5:28 PM
To: Charles Brooks
Subject: RE: Curing the default

The bank wants you to pay the entire loan off. The only exception would be if you could make a significant payment to principal (at least \$10,000). Is that something you can do?

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From: Charles Brooks [mailto:cbrooks@ctbrooks.com]
Sent: Thursday, March 08, 2012 12:27 PM
To: Heidi Carey
Subject: RE: Curing the default

Is it possible that I can just reinstate/ catch up what I am behind or is the bank going to want me to pay the entire loan off?

From: Heidi Carey [mailto:HCarey@rplfirm.com]
Sent: Thursday, March 08, 2012 12:21 PM
To: Charles Brooks
Subject: RE: Curing the default

Hello Charles –

I am working up a payoff of the 2 loans to send to you shortly. As stated in my letter, the agreement has expired.

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Charles Brooks, III
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Richard L. Booth, Master-in-Equity

Case No. 2009-CP-43-2538

First Citizens Bank and Trust Company, Inc., ...Respondent,

v.

Charles T. Brooks, III and the South Carolina Department of Revenue, Defendants,

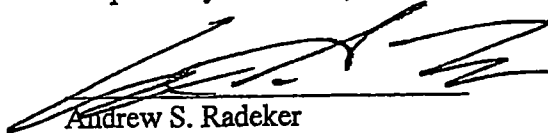
Of Whom Charles T. Brooks, III, is, ...Appellant.

NOTICE OF APPEAL

Charles T. Brooks, III, appeals the Order of the Honorable Richard L. Booth dated January 15, 2013, and filed January 23, 2013, a copy of which is attached hereto. Appellant received written notice of the entry of this Order on February 4, 2013.

February 5, 2013

Respectfully submitted,



Andrew S. Radeker
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellant

Other Counsel of Record:

Damon C. Wlodarczyk, Esq.
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Post Office Box 11412
Columbia, South Carolina 29211
(803) 799-9993
Attorney for Respondent

FILED

FEB 6 2013

CLERK

Ronald W. Urban, Esq.
Post Office Box 125
Columbia, SC 29201
Attorney for South Carolina Department of Revenue

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Richard L. Booth, Master-in-Equity

Common Pleas Case No. 2009-CP-43-2538
Appellate Case No 2013-000255

First Citizens Bank and Trust Company, Inc, ... Respondent,

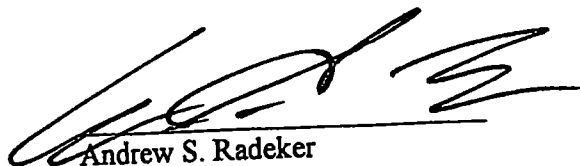
v.

Charles T. Brooks, III and the South Carolina Department of Revenue, Defendants,
Of Whom Charles T. Brooks, III, is Appellant

CERTIFICATE OF COUNSEL

I certify that the Record on Appeal contains all material proposed to be
included by any of the parties and not any other material

Respectfully submitted,



Andrew S. Radeker
Harrison & Radeker, P A
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellant

August 26, 2013