

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

The Honorable Charles B. Simmons, Special Referee

Case No. 2011-CP-30-00583

Certus Bank, N.A. Appellant,

v.

Kenneth E. Bennett, Twin Rivers Resort, LLC and
Bennett of Greenwood, LLC Defendants.

Of whom Twin Rivers Resort, LLC is Respondent.

Appellate Case No. 2014-001248

**RESPONDENT'S RETURN TO APPELLANT'S PETITION
FOR WRIT OF SUPERSEDEAS**

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SC Court of Appeals

Pursuant to Rule 240, SCACR, Respondent Twin Rivers Resort, LLC (“TRR”) responds to Appellant Certus Bank, N.A. (“Certus”) and its Petition for Writ of Supersedeas and asks this Honorable Court to deny Certus’s Petition and to stay this appeal until the conclusion of the trial of this action. Trial is currently scheduled for November 20-21, 2014 before the Honorable Charles B. Simmons, Jr., Special Referee.

I. BRIEF BACKGROUND OF THE CASE

Certus Bank’s predecessor in interest Community South Bank entered into a transaction with Kenneth Bennett on November 1, 2007 in which Community South Bank refinanced a mortgage on property located in Laurens County. Community South Bank entered the agreement thinking Kenneth Bennett was the owner of the property when in actuality he was not. On February 22, 2008 the subject property was transferred to an entity called Bennett of Greenwood who then transferred the property to Respondent TRR on September 14, 2010.

After acquiring Community South Bank, Certus Bank learned that Kenneth Bennett, who had defaulted on the mortgage, did not actually own the subject property. It then brought suit against TRR, alleging equitable lien, mortgage reformation and ratification as its causes of action. TRR moved for summary judgment on all causes of action. At the hearing, the Honorable Charles B. Simmons, Jr., Special Referee, denied TRR’s motion in regards to the causes of action for equitable lien and mortgage reformation, but granted summary judgment in regards to the ratification cause of action.

II. TRIAL COURT'S ORDER IS INTERLOCUTORY AND NOT IMMEDIATELY APPEALABLE.

The Special Referee noted in his Order that the doctrine of ratification had no application to the case. (**Order, Exhibit "A", p. 1**). The Special Referee went on to say, "It is undisputed that the original borrower and mortgagor, Defendant Kenneth E. Bennett, was not the record owner of the mortgaged property at the time Bennett executed the note and mortgage involved herein. This defect in the original mortgage is more than a 'technical defect' and I find and conclude that the doctrine of ratification has no application given this undisputed fact. Neither the law nor the facts give rise to a cause of action for ratification against Twin Rivers Resort, LLC." The Special Referee granted summary judgment only on the ratification cause of action, leaving the equitable lien and mortgage reformation causes of action to be determined at trial.

In the case of *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993), the South Carolina Supreme Court stated that an interlocutory appeal is when there is some further act which must be done by the court prior to a determination of the rights of the parties. The Court went on to say, "If a judgment determines the applicable law while leaving open questions of fact, it is not a final judgment." *Id.* See also *Olson v. Faculty House of Carolina, Inc.*, 344 S.C. 194, 212, 544 S.E.2d 38, 48 (Ct. App. 2001)(Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory.)

In this case Certus Bank still has two viable causes of action: mortgage reformation and equitable lien. It is not the end of the road for Certus Bank and it still remains to be determined what the parties' rights are concerning the remaining causes of action. For this reason, Certus Bank's petition should be denied.

III. BANK IS NOT HURT IF APPEAL IS STAYED UNTIL THE CONCLUSION OF TRIAL.

Certus Bank will not lose any right to appeal the summary judgment order if the appeal is stayed until the conclusion of the trial. S.C. Code Ann. § 14-3-330(1) states as follows:

Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; *provided*, that is no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from.

Thus Certus Bank will not lose the right to appeal the summary judgment order if the appeal is stayed until the outcome of the trial. Further, the South Carolina Supreme Court in the case of *Link v. School Dist. of Pickens County*, 302 S.C. 1, 393 S.E.2d 176 (1990) also held that the right to appeal the granting of partial summary judgment is preserved until the final adjudication of the case. Therefore, Certus Bank's petition should be denied because it can still appeal the partial summary judgment decision after the conclusion of the trial.

IV. APPEAL SHOULD BE STAYED FOR REASONS OF JUDICIAL ECONOMY.

This case was filed on June 16, 2011. It has been a long and involved case, involving attorneys from four different law firms. If the lower court action is stayed until the pendency of Certus Bank's appeal, the case could potentially be delayed for at least one or two more years. By then witnesses will have ceased to remember the facts of the case or have moved away. Some may even die by the time the appeal is completed. The

delay caused by Certus Bank's appeal would only insure that neither party would receive a fair trial once the appeal was concluded due to the unavailability of witnesses.

Further, one or both parties may need to appeal the Special Referee's decision after the trial of the equitable lien and reformation causes of action. This means that this case could very well be appealed twice, leading to piecemeal litigation.

However, if Certus Bank's appeal is stayed pending the outcome of trial, then only one trip to the appellate courts would be needed. This would cut the time spent on appeals in half and would be less of a drain on judicial resources. As Certus Bank noted in its Petition, piecemeal litigation is to be avoided. That can best be accomplished if Certus Bank's appeal is stayed pending the outcome of the trial. Trial is currently scheduled for November 20-21, 2014, which is less than two months away. From a practical standpoint, it makes sense to stay the appeal until the conclusion of trial.

CONCLUSION

Certus Bank's appeal should be stayed pending the outcome of trial, which is scheduled for November 20-21, 2014. The trial court's order is interlocutory because the trial court still needs to make a determination on the parties' rights. Further, Certus Bank will not lose any privilege or right if the appeal is stayed pending the outcome of trial. Finally, staying the appeal makes sense from the standpoint of judicial economy and avoids piecemeal litigation. For these reasons, Respondent TRR respectfully requests that this Court deny Certus Bank's Petition.

Respectfully submitted.

COVINGTON, PATRICK, HAGINS,
STERN & LEWIS, P.A.



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October 1, 2014

STATE OF SOUTH CAROLINA
COUNTY OF LAURENS

IN THE COURT OF COMMON PLEAS

Certus Bank, N.A.,

10 P 4:45
CASE NO. 2011-CP-30-00583

Plaintiff(s),

v.

**ORDER PARTIALLY GRANTING
DEFENDANT TWIN RIVERS RESORT,
LLC'S MOTION FOR SUMMARY
JUDGMENT**

Kenneth E. Bennett, Twin Rivers Resort,
LLC and Bennett of Greenwood, LLC,

Defendant(s).

This matter is before me on Defendant Twin Rivers Resort, LLC's ("Twin Rivers") motion for summary judgment pursuant to SCRPC 56. Twin Rivers claims that there is no issue of material fact and that Plaintiff Certus Bank, N.A.'s ("Certus") three causes of action for equitable lien, reformation and ratification fail as a matter of law. Having reviewed the parties' briefs and heard the arguments of counsel, I deny Twin Rivers' motion as to Certus's causes of action for equitable lien and reformation, but grant the motion as to Certus's cause of action for ratification.

The equitable doctrine of ratification provides that "[a] defect in a mortgage may be cured by the subsequent act of the mortgagor in ratifying it and acknowledging its validity". 59 CJS § 160. Courts have applied the doctrine in a variety of settings finding that subsequent acts of its mortgager ratified technical defects such as lack of capacity and lack of authenticity. *Id.* (See, e.g. *Scottish-American Mortgage Co. v. Deas*, 35 S.C. 42, 14 S.E. 486 (1892)). I find and conclude that the doctrine has no application here. It is undisputed that the original borrower and mortgagor, Defendant Kenneth E. Bennett, was not the record owner of the mortgaged property at the time Bennett executed the note and mortgage involved herein. This defect in the original mortgage is more than a "technical" defect and I find and conclude that the doctrine of

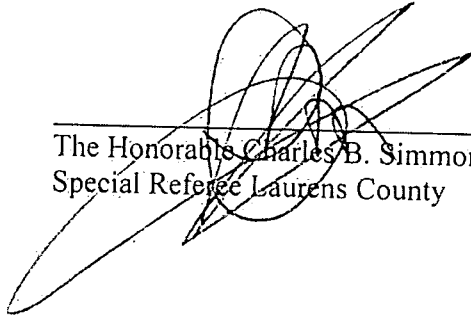


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**RESPONDENT
EXHIBIT**
"A"
10/01/2014

ratification has no application given this undisputed fact. Neither the law nor the facts give rise to a cause of action for ratification against Twin Rivers Resort, LLC.

For the reasons set forth, I grant the motion as to Certus's third cause of action for ratification but deny the motion as to the causes of action for equitable lien and reformation.

IT IS SO ORDERED.



The Honorable Charles B. Simmons, Jr.
Special Referee Laurens County

Greenville, South Carolina
April 14, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

The Honorable Charles B. Simmons, Special Referee

Case No. 2011-CP-30-00583

Certus Bank, N.A.....Appellant,

v.

Kenneth E. Bennett, Twin Rivers Resort, LLC and
Bennett of Greenwood, LLCDefendants.

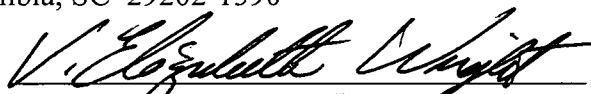
Of whom Twin Rivers Resort, LLC isRespondent.

Appellate Case No. 2014-001248

PROOF OF SERVICE

I certify that on this 1st day of **OCTOBER, 2014** I served copies of **RESPONDENT'S RETURN TO APPELLANT'S PETITION FOR WRIT OF SUPERSEDEAS** by mailing same, postage prepaid, U.S. Mail, addressed to the following:

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October 1, 2014

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
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Columbia, SC 29211

**RE: Certus Bank, N.A., Appellant v. Kenneth E. Bennett, Twin Rivers, LLC and
Bennett of Greenwood, LLC of whom Twin Rivers Resort, LLC is
Respondent
Appellate Case No. 2014-001248**

Dear Ms. Kitchings:

Enclosed for filing please find the original and seven copies of the *Respondent's Return to Appellant's Petition for Writ of Supersedeas* and *Proof Service* in connection to the above-referenced matter. I would appreciate it if you would return a clocked-in copy to me in the enclosed self-addressed, stamped envelope.

By copy of this correspondence, I am serving all counsel of record. Please do not hesitate to contact me if you have any questions or comments.

Very truly yours,

COVINGTON, PATRICK, HAGINS,
STERN & LEWIS, P.A.



V. Elizabeth Wright
Associate Attorney to T.S. Stern, Jr.

VEW/kmb
Enclosure(s)

cc: Louis H. Lang, Esq.

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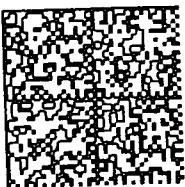
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