

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 2010-CP-32-05481

Hook Point, LLC.....Respondent,

v.

Branch Banking and Trust Company, First Reliance Bank,
and Allan Risinger, Defendants,
of whom Branch Banking and Trust Company is.....Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the circuit court abuse its discretion by issuing a temporary injunction where it found evidence that: (1) there would be irreparable harm to the plaintiff if the injunction was not granted; (2) the plaintiff was likely to be successful on the merits of its claims; and (3) the plaintiff did not have an adequate remedy at law?

STATEMENT OF THE CASE

1. Procedural history

This action arises from the development of a residential subdivision on Lake Murray and loans issued to finance that project. This action was commenced by a summons and complaint filed by Hook Point, LLC (“Hook Point”) on December 23, 2010 with seven causes of action alleging typical lender liability claims. Compl. (ROA pp.18-50). On the same day Plaintiff Hook Point sought and obtained a temporary restraining order pursuant to the Order of the Hon. R. Knox McMahon, which prevented the Defendant Branch Banking and Trust (“BB&T”) from drawing on a letter of credit (the “Letter of Credit”) issued by First Reliance Bank (“First Reliance”). Order Granting TRO (ROA pp. 3-6). The Order also provided, *inter alia*, for a hearing on Hook Point’s motion for a preliminary injunction on Friday, December 31, 2010, which was continued until Tuesday, January 4, 2011 by agreement of the parties. Order Granting TRO (ROA pp. 3-6). On Tuesday, January 4, 2011, the Hon. William P. Keesley heard the Hook Point’s motion for a preliminary injunction. Order Granting Preliminary Injunction (ROA pp. 7-17). Judge Keesley accepted affidavits and briefs from Hook Point and BB&T, and heard oral testimony from Hook Point member Albert J. Dooley, Jr. Order Granting Preliminary Injunction (ROA pp. 7-17). After extensive review, Judge Keesley issued an order granting Hook Point’s motion. Order Granting Preliminary Injunction (ROA pp. 7-17).

The order also provided that Hook Point and First Reliance allow BB&T a \$70,000 draw on the Letter of Credit for the interest due as of the date of the order, that the Letter of Credit be extended for one year, and that Hook Point post a bond for

\$50,000. Order Granting Preliminary Injunction (ROA pp. 7-17). Subsequent to receiving the order, the Letter of Credit has been extended an additional year, BB&T has collected at least two draws amounting to over \$70,000 on the Letter of Credit, and Hook Point has posted a \$50,000 cash bond with the court. (ROA p. 179-207). BB&T now appeals the circuit court's order granting the preliminary injunction. (ROA pp. 131-132).

2. Facts

Hook Point is operated for the purpose of establishing a residential subdivision. Compl. ¶ 5 (ROA p. 18). Hook Point is the developer of a single residential subdivision located on approximately nineteen acres fronting on Lake Murray and S.C. Highway #378 known as "Panama Pointe." Compl. ¶ 5 (ROA pp. 18-19). In order to finance the required subdivision improvements and to retire a prior acquisition loan, Hook Point sought a loan from BB&T. Compl. ¶ 6 (ROA p. 19). On or about September 6, 2007, BB&T issued a Commitment Letter to Hook Point. Compl. ¶ 6 (ROA p. 19). The Commitment Letter agreed to lend Hook Point \$5,100,000 for the completion of "development and residential lots at Panama Pointe" and to provide a line of credit in the amount of \$2,000,000 for the construction of houses upon certain terms and conditions. Compl. ¶¶ 6 & 10 (ROA pp. 19 & 20). The Commitment Letter listed the collateral for the loan as:

3. Collateral: *The Loan will be secured by a first lien mortgage (the "Mortgage") on Panama Pointe with all lots and improvements near Lexington, South Carolina and an assignment of all architectural/engineering documents and construction contracts. (the "Collateral").*

Compl. Ex. A (ROA p. 28).

In addition, the Commitment Letter required a \$1,500,000 letter of credit approved by BB&T as follows:

23. Covenants: *The Borrower shall adhere to the following covenants, which shall be included, along with other covenants, in a loan agreement to be executed by the Bank and the Borrower at or prior to the Loan closing:*

(A) *Other: Collateral/Interest Reserve Option:*

Presales of 50% \$750,000 L/C, Presales of 40% \$900,000 L/C, Presales of 30% \$1,050,000 L/C, Presales of 20% \$1,200,000 L/C. \$1,500,000 L/C with less than 20% presales. 10% deposit required on all pre sales

Letter of Credit approved by BB&T and issuing bank with unconditional draws. Maturity of letter to extend 90 days after loan maturity. Letter of credit to be used as last resort for interest carry.

Compl. Ex. A (ROA p. 31) (emphasis added). Subsequently, on November 16, 2007, Hook Point and BB&T entered into a formal loan agreement (the "Loan Agreement"). Compl. ¶ 7 (ROA p. 19). On the same day, First Reliance Bank issued the Letter of Credit which is the subject of this action (the "Letter of Credit"). Compl. Ex. C (ROA pp. 45-49). The Letter of Credit allows draws and partial draws on presentation of a draft accompanied by:

1) The original letter of credit. 2) A notarized, sworn statement by the Beneficiary, or an officer thereof, that a) The Borrower has failed to perform its obligations to the Beneficiary under the Loan Agreement and Promissory Note dated November 16, 2007, executed by and between Hook Point, LLC as Borrower and Branch Banking & Trust Company as Lender b) The amount of the draft does not exceed the amount due to the Beneficiary under the obligation; and; c) The signer has the authority to act for the Beneficiary with regards to the Letter of Credit.

Compl. Ex. C (ROA p. 48). The Letter of Credit is secured by a deposit of roughly \$310,000 in cash on deposit with First Reliance, and several real properties owned by an affiliate of Hook Point. Hook Point Supplemental Aff. ¶ 2 (ROA p. 128-129). In the event of a draw on the Letter of Credit, First Reliance has the right to foreclose on these properties and take the cash deposit. Hook Point Supplemental Aff. ¶ 2 (ROA p. 128-129).

On December 21, 2010, BB&T delivered to First Reliance a demand letter seeking to draw the full amount of the Letter of Credit, i.e. \$1,500,000. Compl. ¶ 14 (ROA p. 20-21). The demand states that its presentment is accompanied by:

1. *The Sight Draw as required by the Letter of Credit;*
2. *The original Letter of Credit; and*
3. *A notarized statement from BB&T officer that (a) Hook Point, LLC ("Borrower") has failed to perform its obligations under the Loan Agreement and Promissory Note dated November 16, 2007, (b) the draw amount does not exceed the obligations of Borrower to BB&T and (c) as signor, I have authority to act for BB&T as it relates to the Letter of Credit.*

Compl. Ex. C (ROA p. 45). The Letter of Credit expires, by its terms, on February 13, 2011. Compl. Ex. C (ROA p. 48). But First Reliance has now extended the Letter of Credit until February 13, 2012. (ROA pp. 206-207).

At the time of the preliminary injunction hearing, Hook Point and BB&T differed in numerous respects as to their relative culpability and the status of the Loan; however, they agreed that there was approximately \$70,000 in interest due and owing under the terms of the Loan Documents. Order Granting Preliminary Injunction (ROA pp. 7-17). BB&T has now received at least two draws amounting to over \$70,000 on the Letter of Credit pursuant to the order of the circuit court. (ROA pp. 200-207).

According to the affidavit of Hook Point, it will be irreparably harmed if the injunction is not issued because: (1) The Letter of Credit is secured by certain cash, real property, and other collateral, and if BB&T draws upon the Letter of Credit, in excess of the approximately \$70,000 of interest owed, the collateral referenced above will be taken by First Reliance Bank, thereby effectively putting Hook Point, LLC out of business and bankrupting the limited liability company; (2) if Hook Point, LLC is put out of business and/or bankrupted by a \$1,500,000 draw on the Letter of Credit, as stated heretofore, it

will cost Hook Point, LLC and its members an equity investment of approximately \$1,600,000; (3) payment of the Letter of Credit will have a negative domino effect on the guarantors, likely causing other lenders to refuse to renew loans and lines of credit with the result that the undersigned's other businesses will be required to lay-off several employees and face other significant financial difficulties; and (4) if BB&T is permitted to draw upon the Letter of Credit, as it claims it is entitled to do, Hook Point, LLC will be financially ruined, will not be able to continue as a going concern, and will likely face bankruptcy. Hook Point Supplemental Aff. ¶ 2 (ROA pp. 128-129).

At the hearing on Tuesday, January 4, 2011, Hook Point member Albert J. Dooley, Jr. ("Mr. Dooley") testified that the Letter of Credit was always intended to be used as a last resort for interest. Tr. pp. 55-56 (ROA p. 187, l. 23 – p. 188, l.3). Mr. Dooley testified that during negotiations with BB&T, the letter of credit was a substantial issue that was discussed at length. Tr. pp. 53-55 (ROA p.185, l. 16 – p. 187, l. 22). Hook Point was led to believe, and the commitment letter stated, that the Letter of Credit was to be used only as a last resort for interest. Tr. pp. 54-55 (ROA p. 186, l. 12 – p. 187, l. 22). This was a material fact that induced Hook Point into entering the loan and obtaining the Letter of Credit. Compl. ¶¶ 33-36 (ROA p. 23). It was not until 2010 that Hook Point became aware that BB&T intended to draw on the Letter of Credit for more than just interest. Tr. p. 55 (ROA p. 187, ll. 5-18).

Standard of Review

“The grant of an injunction is within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion.” *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 49, 674 S.E.2d 505, 507 (Ct. App. 2009) (citing *City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 282, 531 S.E.2d 518, 520-21 (2000); *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 454, 626 S.E.2d 34, 36 (Ct. App. 2005)), *holding modified by Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010)). “An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law.” *Id.* (quoting *Peek*, 367 S.C. at 454, 626 S.E.2d at 36; *County of Richland v. Simpkins*, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002)), *holding modified by Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010)). When this standard is applied to the facts of this case, it is clear that the trial court did not abuse its discretion in issuing the preliminary injunction.

ARGUMENT

THE ORDER GRANTING HOOK POINT'S MOTION FOR A TEMPORARY INJUNCTION SHOULD BE UPHeld BECAUSE THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN FINDING EVIDENCE THAT: (1) HOOK POINT WOULD SUFFER IRREPARABLE HARM WITHOUT THE INJUNCTION; (2) HOOK POINT SHOWED A LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS CLAIMS; AND (3) HOOK POINT DOES NOT HAVE AN ADEQUATE REMEDY AT LAW.

Introduction

Injunctive relief dealing with a letter of credit is governed by S.C. Code Ann. § 36-5-109(b) (1976), which provides:

If an applicant claims that a required document is forged or materially fraudulent or that honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant, a court of competent jurisdiction may temporarily or permanently enjoin the issuer from honoring a presentation or grant similar relief against the issuer or other persons only if the court finds that:

- (1) the relief is not prohibited under the law applicable to an accepted draft or deferred obligation incurred by the issuer;
- (2) a beneficiary, issuer, or nominated person who may be adversely affected is adequately protected against loss that it may suffer because the relief is granted;
- (3) all of the conditions to entitle a person to the relief under the law of this State have been met; and
- (4) on the basis of the information submitted to the court, the applicant is more likely than not to succeed under its claim of forgery or material fraud and the person demanding honor does not qualify for protection under subsection (a)(1).

S.C. Code Ann. § 36-5-109(b) provides that a court may issue an injunction when an applicant makes a claim of fraud and certain criteria are met. In this case, Hook Point has alleged fraud in both its complaint and its affidavits.

Hook Point sought a preliminary injunction to prevent BB&T from drawing on the Letter of Credit, and from First Reliance paying on the Letter of Credit, in excess of the outstanding interest. Mot. Preliminary Injunction (ROA p. 51-53). On appeal, BB&T only challenges the circuit court's ruling on the third element of S.C. Code Ann. § 36-5-109(b). Initial Br. Appellant, p. 7.

The third element of 36-5-109(b) requires that all of the conditions necessary for injunctive relief have been met under state laws. In South Carolina, an injunction is a remedy that is issued in the court's discretion to prevent irreparable harm to the plaintiff. *See Scratch Golf Co. v. Dunes W. Residential Golf Properties, Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). "To establish a cause of action for injunction, the plaintiff must show '(1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law.'" *Peek*, 367 S.C. at 454-55, 626 S.E.2d at 36 (quoting *Scratch Golf*, 361 S.C. at 121, 603 S.E.2d at 908).

Therefore, the sole issue on appeal is whether the circuit court abused its discretion in granting Hook Point preliminary injunctive relief until the merits of its case could be heard. In its appeal, BB&T has only challenged the circuit court's ruling on the three South Carolina common law elements required for injunctive relief. Initial Br. Appellant, p. 1). Appellant contends that Hook Point has not met the requirements of these elements. Initial Br. Appellant, p. 7). However, Hook Point properly demonstrated all of these elements, and the circuit court did not abuse its discretion in finding evidence of each of these elements.

1. Hook Point Properly Demonstrated That It Would Suffer Irreparable Harm Without the Temporary Injunction.

Irreparable harm means that the injunction is reasonably necessary to protect the rights of the plaintiff pending the litigation. *Johnson v. Phillips*, 315 S.C. 407, 433 S.E.2d 895 (Ct. App. 1993) *aff'd in part, rev'd in part sub nom. Smith v. Phillips*, 318 S.C. 453, 458 S.E.2d 427 (1995). It does not mean that the injury is beyond the possibility of compensation in damages. Flanagan, James F., *South Carolina Civil Procedure*, 508 (2nd ed. 1996) (citing *Bethel M. E. Church v. City of Greenville*, 211 S.C. 442, 45 S.E.2d 841 (1947)). “Whether ‘a wrong is irreparable, in the sense that equity may intervene, and whether there is an adequate remedy at law, are questions that are not decided by narrow and artificial rules.’” *Peek*, 367 S.C. at 455, 626 S.E.2d at 36 (quoting *Kirk v. Clark*, 191 S.C. 205, 211, 4 S.E.2d 13, 16 (1939)).

In this case, the circuit court correctly found that Hook Point would be significantly and irreparably harmed if the injunction was not granted. The Letter of Credit with First Reliance is secured by certain cash and real property. If the Letter of Credit is fully drawn upon, First Reliance will foreclose on the properties securing the Letter of Credit. Once the properties are foreclosed on and/or sold, those properties are lost to Hook Point. Additionally, Hook Point will lose any money or other deposits it has with First Reliance.

The affidavit provided by Hook Point also provides testimony that the individual members of Hook Point will suffer irreparable harm if the injunction is not granted. Hook Point Supplemental Aff. ¶ 2 (ROA p. 128-129). The success of several other businesses

and entities are tied to the Letter of Credit and the viability of Hook Point, and if the injunction is not granted they will also face irreparable harm.

On the other hand, BB&T has failed to show any harm from the granting of the injunction. As previously stated, First Reliance has extended the Letter of Credit for one year. (ROA p. 206-207). This effectively removes all risk to BB&T. With the Letter of Credit still in place, BB&T remains as secure as it was prior to any injunction. In fact, BB&T is now more secure than it was prior to the issuance of the injunction as Hook Point has now posted an additional \$50,000 cash bond with the court. (ROA p. 199). BB&T suffers no harm and can still collect on the \$1,500,000 Letter of Credit should it prevail on the merits.

In its brief, BB&T argues that the question of irreparable harm is simply a math problem. Initial Br. Appellant, p. 8. BB&T argues that a debt due to First Reliance is the same as a debt due to BB&T. Initial Br. Appellant, pp. 8-9. However, BB&T is mixing apples and oranges. BB&T fails to recognize that while Hook Point has significant defenses to the debt due to it, as well as significant lender liability claims stated in its complaint against BB&T, Hook Point probably has no defenses to the debt due to First Reliance under the Letter of Credit.

Hook Point initiated this action against BB&T because it claimed there were significant fraud and other lender liability theories related to the debt owed to BB&T and the handling of that debt. This action presents several issues of fact that must be determined by a court. On the other hand, if the Letter of Credit is fully drawn upon, Hook Point probably has no defenses and will be forced to pay the debt to First Reliance causing financial ruin and otherwise to Hook Point, its members, and its related entities.

BB&T is essentially asking the court to convert a disputed debt into an undisputed debt. This so called “math problem” is simply a tactic to circumvent the current litigation and cause the exact irreparable harm which the circuit court sought to enjoin. The circuit court did not abuse its discretion in finding evidence that Hook Point would be irreparably harmed if the injunction was not granted, and thus the injunction should be upheld.

2. Hook Point Has Demonstrated a Likelihood of Success on the Merits.

The second element required for an injunction provides that a plaintiff must show a likelihood of success on the merits. *Scratch Golf*, 361 S.C. at 121, 603 S.E.2d at 908. “When seeking a preliminary injunction, the plaintiff need not prove an absolute legal right; the plaintiff need only present ‘a fair question to raise as to the existence of such a right.’” *Peek*, 367 S.C. at 456, 626 S.E.2d at 37 (quoting *Williams v. Jones*, 92 S.C. 342, 347, 75 S.E. 705, 710 (1912)). “The determination of whether to grant an injunction should not be based on the merits of the underlying case except insofar as the merits may assist the trial court in determining whether a prima facie showing has been made.” *Id.* (citing *MailSource, L.L.C. v. M.A. Bailey & Assocs.*, 356 S.C. 363, 368, 588 S.E.2d 635, 638 (Ct.App.2003) *holding modified by Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010)). “Once a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits.” *Id.* (quoting *Helsel v. City of North Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992)).

In this case, Hook Point has a document signed by the bank which contains the express condition that the Plaintiff alleges fraudulently induced them into the transaction.

Compl. Ex. A (ROA p. 28-32). This is not a mere allegation, but is in black and white, in a document drafted by the bank that was used to induce the Plaintiff into the Loan Agreement. The commitment letter expressly provided that “Letter of credit to be used as last resort for interest carry.”

Additionally, Mr. Dooley provided testimony at the hearing that this language was included in the commitment letter specifically as a last resort for interest. Tr. pp. 55-56 (ROA p. 187, l. 23 – p. 188, l. 3). During their negotiations, Hook Point and BB&T talked at length about the Letter of Credit and its use for interest only. Tr. pp. 53-55 (ROA p. 185, l. 16 – p. 187, l. 22). As such, this was a material provision of the commitment letter that induced Hook Point into entering the loan and having the Letter of Credit issued. Compl. ¶¶ 33-36 (ROA p. 23). Indeed, courts have held that “fraud in the inducement of the issuance of a letter of credit is grounds for a court to grant injunctive relief against the payment of such letter of credit to the beneficiary who perpetrated such fraud.” *Mid-America Tire, Inc. v. PTZ Trading Ltd.*, 768 N.E.2d 619, 628 (Ohio 2002). This fraudulent inducement is directly related to the entire loan transaction, including any documents related to the Letter of Credit. Accordingly, any documents presented to First Reliance were tainted by fraud.

Additionally, there was fraud in the underlying transaction which would also warrant an injunction against a payment on the Letter of Credit. The Letter of Credit provides that BB&T must confirm that “[t]he amount of the draft does not exceed the amount due to the Beneficiary under the obligations.” Compl. Ex. C (ROA p. 48). BB&T provided a fraudulent affidavit that incorrectly confirmed the amount of the draft did not exceed the amount due under the obligations, despite the commitment letter which

specifically provides that the Letter of Credit will only be used as a last resort for interest payments. Thus, the presentation of the Letter of Credit was fraudulent and Hook Point is likely to succeed on the merits. The circuit court did not abuse its discretion in finding that there was evidence that Hook Point had a likelihood of success on the merits.

3. Hook Point Does Not Have an Adequate Remedy at Law.

As a third element for an injunction, a plaintiff must show that it does not have an adequate remedy at law. *Scratch Golf*, 361 S.C. at 121, 603 S.E.2d at 908. The purpose of an injunction is to preserve the status quo. *Peek*, 367 S.C. at 457, 626 S.E.2d at 37; *MailSource*, 356 S.C. at 368, 588 S.E.2d at 638. “A temporary injunction is used to preserve the subject of controversy in the condition which it is at the time of the [o]rder until opportunity is offered for full and deliberate investigation and to preserve the existing status during litigation.” *MailSource*, 356 S.C. at 368, 588 S.E.2d at 638.

As discussed above and supported by the affidavit of Hook Point, Hook Point, its members, and its related entities face financial ruin, bankruptcy, and the inability to continue as a going concern should BB&T be allowed to fully draw on the letter of credit. Hook Point Supplemental Aff. ¶ 2 (ROA pp. 128-129). BB&T contends that these are all monetary damages for which Hook Point can be compensated. Initial Br. Appellant, p. 15. However, it is clear that the destruction of an LLC, its members, and related entities cannot be fully compensated for with money. If Hook Point can no longer operate as a going concern, it has lost far more than simply the money related to this action and these loans. In fact, the circuit court correctly found that the inability to continue business showed that there was no adequate remedy at law.

The purpose of the injunction was to prevent the damages that are likely to occur if it was not issued. The injunction preserved the status quo between the parties and allowed them to proceed to a trial court to determine the merits of their claims. The circuit court did not abuse its discretion in finding that Hook Point did not have an adequate remedy at law, and the injunction should be affirmed.

CONCLUSION

The Order granting Hook Point's motion for temporary injunction should be affirmed. The circuit court did not abuse its discretion in finding evidence to support the elements of a preliminary injunction. Hook Point has properly demonstrated all of the required elements to support injunctive relief: (1) Hook Point will suffer irreparable harm if the injunction is dissolved: Hook Point probably has no defenses to the Letter of Credit and the claims by First Reliance while it does have several defenses to the debt claimed by BB&T; (2) Hook Point has demonstrated a likelihood of success on the merits: Hook Point has evidence in writing and the Testimony of Albert Dooley which directly supports its theory that the Letter of Credit was to be used for interest only; and (3) the injury caused to Hook Point and its members goes beyond financial compensation, as evidenced by the affidavit of Hook Point, and therefore Hook Point does not have an adequate remedy at law.

Respectfully submitted,



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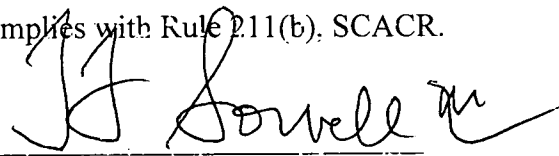
v.

Branch Banking and Trust Company, First Reliance Bank,
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of whom Branch Banking and Trust Company is.....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

July 18, 2011



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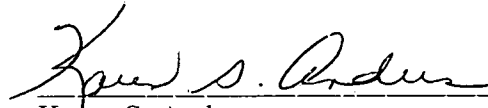
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of whom Branch Banking and Trust Company is.....Appellant.

PROOF OF SERVICE

I, the undersigned Paralegal of the law firm of Sowell Gray Stepp & Laffitte, LLC, attorneys for the Respondent in the above-referenced matter, certify that I have served the Final Brief of Respondent on the persons named below by placing a copy of same in the United States Mail on July 18, 2011, postage prepaid, addressed as follows:

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