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SC Court of Appeals

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2013 CP-07 90349

CAROLINA FIRST BANK, ET AL.

WILBERT ROLLER, JR., ET AL.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: BEAUFORT COUNTY MASTER IN EQUITY

Attorney for : Plaintiff Defendant
or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON): Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

THIS CAME BEFORE ME 11/19/2014 ON DEFENDANT'S MOTION FOR RECONSIDERATION, FILED 7/11/2014. AFTER HEARING FROM PARTIES, I HEREBY DENY THE MOTION.

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

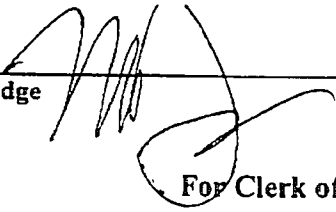
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge



3069
Judge Code

11/17/14
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

MATTHEW TILLMAN

THOMAS R. GOLDSTEIN

ROBERT V. MATHISON, JR.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: N/A

On January 14, 2011, the plaintiff filed a summons and complaint, seeking foreclosure of the property commonly referred to as the Roller tract. On March 23, 2011, the Rollers filed an Answer to the Complaint and on December 8, 2011, the Rollers filed an Answer to the First Amended Complaint. These pleadings interposed several defenses, novation, fraud in the inducement, and tortious interference with prospective business relations. The defendants, Rollers, also demanded an appraisal as provided for by § 29-3-680, S. C. Code, ann. (“In any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked, whether he has theretofore appeared in the action or not, may within thirty days after the sale of the mortgaged property apply by verified petition to the clerk of court in which the decree or order of sale was taken for an order of appraisal.”)

Benjamin Roper Jenkins, III, testified on behalf of the plaintiff, and Wilbert Roller testified on behalf of the defendants. The Court also reviewed the documentary evidence produced by the parties. Based on this evidence, I find and conclude as follows:

FINDINGS OF FACT

1. The Home Affordable Modification Program does not apply because this foreclosure action involves a mortgage encumbering commercial real estate. As commercial real estate, the mortgaged property is not an owner-occupied dwelling as defined in the Administrative Order issued by the South Carolina Supreme Court on May 2, 2011 (the “Administrative Order”). As a result, the Administrative Order does not apply to this foreclosure action as evidenced by the Certificate of Exemption filed on August 1, 2011.

2. The plaintiff filed the *Lis Pendens*, Civil Action Coversheet, Certificate of Exemption from ADR, Summons and Complaint, with Exhibits in the office of the Clerk of Court for Beaufort County on January 24, 2011.

3. The plaintiff thereafter filed the Certificate of Exemption from May 2, 2011 Administrative Order ("Certificate of Exemption") in the office of the Clerk of Court for Beaufort County on August 1, 2011.

4. After the plaintiff discovered there might exist a claim as to a portion of the property, the plaintiff amended its complaint and filed the Summons and First Amended Complaint in the office of the Clerk of Court for Beaufort County on October 26, 2011. The plaintiff filed the Second *Lis Pendens* in the office of the Clerk of Court on November 7, 2011. For the convenience of the reader, the Court refers to the *Lis Pendens*, Civil Action Coversheet, Summons, Complaint, and the Second *Lis Pendens*, Second Summons and First Amended Complaint collectively as the "Pleadings."

5. The plaintiff served these Pleadings on Simon Fraser, an attorney for the Roller Defendants, on February 2, 2011. (See the Acceptance of Service filed in the office of the Clerk of Court for Beaufort County, South Carolina on May 6, 2011.)

6. The plaintiff served these Pleadings personally on the defendant, James Williams, on December 9, 2011. The plaintiff filed this Affidavit of Personal Service in the office of the Clerk of Court for Beaufort County, South Carolina on December 28, 2011.

7. The Roller Defendants timely filed and served an answer and counterclaim to the original Complaint on March 23, 2011 and to the First Amended Complaint on December 8, 2011.

8. The Roller Defendants are not individuals entitled to protection under the Service Members Civil Relief Act, 50 USCS §§ 501 *et seq.*

9. For value received, on or about August 9, 2007, the Roller Defendants executed and delivered to Carolina First Bank a promissory note in the original principal amount of Two Million Three Hundred Thousand and 00/100ths (\$2,300,000.00) Dollars (the "Original Note").

10. To secure payment of the Original Note and the debt evidenced thereby, the Roller Defendants executed and delivered to Carolina First Bank a Mortgage dated August 9, 2007 (“Original Mortgage”), whereby the Roller Defendants mortgaged to Plaintiff the property described in Exhibit 1 (the “Subject Property” or the “Roller tract”).¹ Carolina First Bank recorded this mortgage on August 14, 2007 in the Beaufort County Register of Deeds (“ROD”) at Mortgage Book 2612, at Pages 521-529.

11. On or about September 23, 2008, the Roller Defendants executed a renewal promissory note in favor of Carolina First Bank in the amount of One Million Eight Hundred Fifty Thousand and 00/100ths (\$1,850,000.00) Dollars (“First Renewal Note”), under which the Roller Defendants promised to pay the amounts outstanding under the Original Note on terms set forth in the First Renewal Note. Pursuant to the First Renewal Note and the Original Mortgage, the Roller Defendants agreed that their payment obligations under the First Renewal Note would continue to be secured by the Original Mortgage.

12. On or about April 10, 2009, the Roller Defendants executed a renewal promissory note in favor of Carolina First Bank in the amount of One Million Eight Hundred Fifty Thousand and 00/100ths (\$1,850,000.00) Dollars (the “Second Renewal Note”), under which the Roller Defendants promised to pay the amounts outstanding under the Original Note, as amended by the First Renewal Note, on terms set forth in the Second Renewal Note. Pursuant to the Second Renewal Note and the Original Mortgage, the Roller Defendants agreed that their payment obligations under the Second Renewal Note would continue to be secured by the Original Mortgage.

¹ The Court will determine the exact description of the property to be sold at the subsequent foreclosure sale following the May 30, 2014, hearing on Plaintiff’s quiet title action. Therefore, the property description is subject to modification.

13. On or about November 27, 2009, the Roller Defendants executed a renewal promissory note in favor of Carolina First Bank in the amount One Million Eight Hundred Fifty Thousand and 00/100ths (\$1,850,000.00) Dollars (the "Third Renewal Note"), under which the Roller Defendants promised to pay the amounts outstanding under the Original Note, as amended by the First Renewal Note and Second Renewal Note, on terms set forth in the Third Renewal Note. Pursuant to the Third Renewal Note and the Original Mortgage, the Roller Defendants agreed that their payment obligations under the Third Renewal Note would continue to be secured by the Original Mortgage.

14. Under the terms of the Third Renewal Note, and to further secure payment of the Third Renewal Note and the debt evidenced thereby, the Roller Defendants executed and delivered to Carolina First Bank a Mortgage dated November 27, 2009, additional security secured by a separate parcel of real property. (For convenience, the Court will refer to this additional security as the "Additional Mortgage"). The Roller Defendants mortgaged to Plaintiff additional property ("Second Mortgaged Tract"). The Additional Mortgage was recorded in the ROD in Mortgage Book 2912, at Pages 291-299.

15. Thereafter, on or about December 14, 2012, the Rollers paid to Carolina First a lump sum payment of \$100,000 to be applied to principal and interest. In exchange for this payment, the Plaintiff executed and delivered a Release of the Additional Mortgage, by which it released and satisfied its encumbrance on the Second Mortgaged Tract. The plaintiff recorded this Release of Mortgage in the ROD on January 11, 2013 at Book 3206, Pages 1692-1694.

16. At the close of the plaintiff's case, the defendants, Rollers moved for an Involuntary Non-Suit with or without prejudice under Rule 41(b) of the *South Carolina Rules of Civil Procedure* on the ground that the plaintiff failed to demonstrate that it had standing to bring

the action.² The plaintiff's witness, Benjamin R. Jenkins, III, testified that Carolina First merged with the plaintiff on June 17, 2010. He claimed that the new entity holds the Notes. In response the defendants, Rollers, argued that the plaintiff failed to produce the best evidence of the Notes under Rule 1002 of the South Carolina Rules of Evidence. ("To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided these rules or statute.") The Court agrees with the defendants that the best evidence of a Note is always the original, but also notes that the inquiry does not stop there as the following Rule, Rule 1003, provides that the admissibility of a duplicate is proper unless (1) a genuine question is raised as to the authenticity of the original, or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. For this reason, the Court overruled the objection to the failure to produce the originals.

17. The standing issue is more difficult. Nationwide this issue has come up frequently in the wake of the collapse of the housing market in 2008, brought about by unscrupulous transactions on Wall Street. It is true that the plaintiff failed to produce any documentary evidence of the merger, relying instead on the testimony of its witness. When faced with this exact question, the Court of Appeals of Indiana found that the witness's testimony was sufficient. *CFS, LLC v. Bank of America*, N.E.2d (2012). On the same issue, the Supreme Court of Maine went in the opposite direction, holding that without documentary proof showing the plaintiff held the Note, the Bank could not foreclose on the property. See *Wells Fargo Bank, N.A. v. deBree*, 2012 ME 34 (Me. 2012). The Supreme Court of South Carolina has not determined this issue. This Court concludes that the witness's testimony is

² "After the plaintiff in an action tried by the court without a jury has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief."

sufficient to establish the standing of the plaintiff to foreclose and therefore denies the defendants', Rollers', motion for involuntary non-suit under Rule 41(b).³

18. The plaintiff is entitled to its reasonable attorneys' fees and costs of collection under the term of the Third Renewal Note. Due to the existence of the title issue and the work associated with it, the parties agreed to confer after the hearing to determine a fair amount of attorneys' and costs to assign to plaintiff's collection efforts and add to the judgment in this matter. The parties have informed the court that they agreed that \$25,000.00 is an appropriate amount to assign for attorneys' fees and costs.

19. The Original Mortgage constitutes a valid first priority mortgage lien covering the Subject Property.

20. Plaintiff is the current holder as the successor to Carolina First Bank of all notes and the Original Mortgage.⁴

21. Payments due on the Third Renewal Note have not been made as provided for therein, and the Plaintiff, as the holder thereof, has elected to require immediate payment of the entire amounts due thereon and has placed the Third Renewal Note and Original Mortgage in the hands of its attorneys for collection.

22. The following amounts are due and owing on the Notes and Mortgage as of April 29, 2014, including costs and expenses of collection and attorneys' fees:

Principal	\$1,762,913.86
Interest	\$744,469.04
Late Charges	\$28,453.34
Fees	\$2,560.00
Escrow Tax	\$0.00

³ Both parties timely renewed motions at the close of the case. The Court granted plaintiff's motion on defendants' causes of action for fraud in the inducement and novation for failure to prove the elements by a preponderance of the evidence.

⁴ As set forth above, the Court appreciates the defendants', Rollers', argument that merger must be proved to obtain standing to foreclose, but the Court finds plaintiff's witness is competent to testify as to the merger and that plaintiff acquired all assets of Carolina First Bank, including the Note that is the subject of this action.

Escrow	
Insurance	\$0.00
Escrow MPP	\$0.00
Attorneys' Fees and Costs	\$25,000.00
Total Net Payoff	\$2,563,396.24

Interest continues to accrue after April 29, 2014 at the default rate of 10.00% per annum, as set forth in the Third Renewal Note (which is a *per diem* of \$489.69829).

23. Plaintiff seeks to foreclose the Original Mortgage and does not waive the right to a personal or deficiency judgment against the Roller Defendants for the full amount found to be due to Plaintiff under the Third Renewal Note and Original Mortgage, with the right to enter a personal deficiency judgment against the Roller Defendants for any deficiency in this action remaining after the sale of the Subject Property. The amount of any deficiency, if any, will be calculated after appraisal by the method set forth in § 29-3-700, S. C. Code, ann.

24. The defendants, Rollers, previously demanded an appraisal by their verified pleading, and the Court finds that this verified prayer for appraisal contained in their verified answer is sufficient under § 29-3-680. Should the property fail to bring at judicial sale sufficient to satisfy the amount of the debt, the Court will determine whether appraisal is warranted under the facts of the case and, if so, appoint three appraisers using the procedure required by § 29-3-700, S. C. Code, ann.

CONCLUSIONS OF LAW

I conclude that the Original Mortgage is not subject to modification under the Home Affordable Modification Program, that this foreclosure proceeding is exempt from the Administrative Order, that the Plaintiff should have judgment of foreclosure of the Original Mortgage and the Subject Property should be ordered sold at public auction after due

advertisement. The Subject Property shall be sold at the foreclosure sale conducted by the Master in Equity for Beaufort County at a date to be determined.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The Court shall hold a hearing on ^{June 26th 3:00} ~~May 30~~, 2014, at ~~1:00~~ PM for the purpose of ruling on Plaintiff's quiet title cause of action against James Williams. The order issued at or shortly after this hearing shall establish the property description of the Subject Property to be sold.
2. The Home Affordable Modification Program does not apply because this foreclosure action involves a mortgage encumbering commercial real estate.
3. The Subject Property is not an owner-occupied dwelling as defined in the Administrative Order, and the Administrative Order does not apply to this foreclosure action as evidenced by the Certificate of Exemption.
4. There is due to the Plaintiff on the Third Renewal Note set forth in the First Amended Complaint the sum of \$2,563,396.24, including attorneys' fees and costs, as of April 29, 2014, and Plaintiff is entitled to judgment for this amount.
5. The amount due in the preceding paragraph shall bear interest hereafter until paid on the Third Renewal Note at the rate of 10.00% *per annum* (*per diem* of \$489.69829) from April 29, 2014 until the entry of judgment and at the statutory post-judgment rate thereafter. Further, to the extent Plaintiff advances money for insurance or other expenses to preserve the Subject Property after April 29, 2014 and before the sale of the Subject Property, these advances may be added to the total judgment debt.
6. The Roller Defendants are liable for the aforesaid debt. On or before the date of sale of the Subject Property the Roller Defendants may pay to the Plaintiff's attorneys the amount of Plaintiff's debt as aforesaid, together with the costs and disbursements of this action.

7. On default of payment at or before the time herein indicated, the Subject Property ⁽³⁾ will be sold by the Beaufort County Master in Equity or his agent, at public auction, at the Beaufort County Courthouse, Beaufort, South Carolina on some convenient sales day hereafter on the following terms:

The sale shall be for cash, and the highest bidder shall be required to make a cash deposit of five (5%) percent on the bid as earnest money and as evidence of good faith. If the Plaintiff is the successful bidder at the sale, the Plaintiff may, after paying the costs of the sale, apply the debt due upon its Mortgage against its bid in lieu of cash. Should the person making the highest bid at the sale fail to comply with the terms of his bid by depositing the said five (5%) percent in cash, then the property shall be sold at the risk of such bidder on the same sales date or some subsequent date as the selling officer may find convenient and advantageous. Should the last and highest bidder fail to comply with the terms of his bid within thirty (30) days of the final acceptance of his bid, then the selling officer shall re-advertise and resell the property on the same terms on a subsequent date at the risk of such bidder. Persons submitting additional bids after the initial sale shall deposit five (5%) percent of their bids in cash as prescribed above. The Beaufort Master in Equity, or his designated representative, shall promptly return all deposits except the deposit securing the highest bid. The sale shall be subject to taxes, to existing easements and restrictions, and to homeowners association assessments. Purchaser shall pay all costs of recording the deed.

8. Plaintiff seeks to foreclose the Original Mortgage and does not waive the right to a personal or deficiency judgment against the Roller Defendants.

9. After advertisement according to law, giving notice of the time and place of such sale, and the terms thereof, the Beaufort County Master in Equity will convey to the purchaser, or purchasers, a deed to the Subject Property; and that the Plaintiff, or any other party to this action, may become a purchaser at such sale, and that if, upon such sale being made, the purchaser or purchasers should fail to comply with the terms thereof, the Court may advertise the said premises of sale on the next, or some other subsequent sales day, at the risk of the former highest bidder, and so from time to time thereafter until a compliance shall be secured. The deed will be taken subject to payment by grantee of any taxes or special assessments constituting a lien against the Subject Property sold under this Report and hereinafter more fully described.

Under South Carolina Code § 12-24-40(13), the successful bidder other than Plaintiff shall pay the cost of deed stamps on said deed.

10. The proceeds of the sale will be applied as follows:

FIRST, to payment of the amount of the costs and expenses of this action, including the Master in Equity fee and the costs of advertising the Notice of Sale, and any taxable disbursements by the attorneys in the action.

SECOND, to the payment of the Plaintiff or Plaintiff's attorney of the amount of Plaintiff's debt and interest, or so much thereof as the purchase money will pay on the same; and

THIRD, any surplus proceeds to be held subject to further order of the Court.

11. Upon the making of the sale of the Subject Property, as hereby ordered, and the execution and delivery to the purchaser of a deed to the premises, the purchaser or purchasers will be let into possession of the premises on production of the deed, and Sheriff or Beaufort County shall put the holder of the deed into possession of the premises.

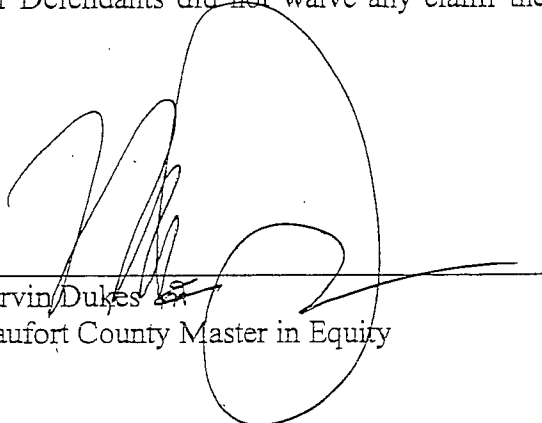
12. Each defendant and all persons whosoever claiming under any of them will be forever barred and foreclosed of all right, title and interest and equity of redemption in the Subject Property so sold, or any part thereof.

13. The undersigned Master in Equity will retain jurisdiction to do all necessary acts incident to this foreclosure, including, but not limited to, the issuance of a Writ of Assistance, adjusting the judgment in light of the appraisal, if necessary, and disposing of any surplus funds pursuant to Rule 71(c), SCRPC.

14. If the Plaintiff or the Plaintiff's representative does not appear at the scheduled sale of the above-referenced property, then the sale of the property will be null, void and of no force and effect. In such event, the sale will be rescheduled for the next available sales date.

15. The Court further acknowledges that the Roller Defendants repeatedly sought to rezone the Subject Property.⁵ The rezoning request may have led to an increased value of the Subject Property, such that the Roller Defendants could have sold the Subject Property for an amount close to or exceeding the outstanding debt. However, the Town of Bluffton denied the rezoning request on multiple occasions. The Roller Defendants did not waive any claim they may have against the Town of Bluffton.

May 30, 2014
Beaufort, South Carolina



Marvin Dukes
Beaufort County Master in Equity

⁵ When the Rollers acquired the tract, the property was in Beaufort County and zoned commercial. While they were in Texas, the Town of Bluffton annexed the property and downzoned it to residential.

EXHIBIT 1

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ALL those certain pieces, tracts or parcels of land situate, lying and being within Bluffton Township, Beaufort County, South Carolina, shown and described as Phase 2A, 16.698 Ac., Power Line R/W, 2.686 Ac. (Proposed), and Power Line R/W 2.267 Ac. (Existing), on a plat entitled "Windtree Subdivision", prepared by Carol B. Baughman, RLS# 3717, dated February 11, 1986, and revised on March 26, 1986, and recorded in the Office of the Register of Deeds for Beaufort County, South Carolina in Plat Book 33 at Page 193. For a more detailed description as to location, courses, metes, bounds, distances, etc., reference to the said recorded plat may be had.

This being a portion of the same property conveyed by Deeds recorded in the Office of the Register of Deeds for Beaufort County, South Carolina, in Record Book 228 at Page 1549 and Deed Book 256 at Page 579.

Beaufort County PIN Number: R610-031-000-0002-0000

② see footnote 2, page 10

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