THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Judge

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Appellate Case No. 2014-001384
Common Pleas Case No. 2012-CP-32-2816

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FV-I, Inc. in trust for Morgan Stanley Mortgage Capital Holdings LLC,...Respondent,

v.

Bryon J. Dolan; Lisa S. Dolan; First Citizens Bank and Trust Company, Inc.; Wells Fargo Bank, N.A.; Branch Banking and Trust Company, Defendants,

Of Bryon J. Dolan and Lisa S. Dolan are the.....Appellants.

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# APPELLANTS' RETURN TO RESPONDENT'S MOTION TO LIFT STAY UNDER RULE 42b), SCRCP

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Appellants hereby submit this return to the Respondent's motion "to lift the stay in this matter imposed by the Master-in-Equity" in the above-captioned case. The Respondent's motion mischaracterizes what has occurred in this case, misstates the law, and puts before this court no factual record in support of the Respondent's contention that this court should lift the automatic appellate stay. The Respondent's motion should be denied.

This is a case in which the Respondent seeks mortgage foreclosure and the Appellants asserted both legal and equitable counterclaims. The Respondent moved to strike the Appellants' jury demand, and the Honorable Edgar W. Dickson, in deciding that the Appellants' breach of contract counterclaim is compulsory, ruled that "[i]f what the [Appellants] allege is true, then they are not in default of the note and mortgage, and the [Respondent] thus cannot enforce the note or be granted foreclosure of the mortgage." (Order filed Oct. 10, 2013.)

This case was bifurcated by consent order on the cusp of the jury trial, with the Appellants' at-law counterclaims tried to a jury on April 17, 2014, and the foreclosure claim and the Appellants' claim for an accounting referred to the master-in-equity to be tried later. The jury returned a verdict for the Respondent on the at-law counterclaims, and the Appellants moved for an order granting them a new trial as to the claims subject of the jury trial (the Appellants' counterclaims for breach of contract and violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*).

The Appellants moved for reconsideration of the order denying their motion for a new trial. That motion was denied, and the Appellants appealed the orders denying the motion for a new trial and motion to reconsider. The Respondent moved this court to dismiss the appeal, arguing that the orders were not immediately appealable. This court denied that motion.

Concurrently with its motion to this court to dismiss this appeal, the Respondent moved in the lower court, before the master-in-equity, for a determination that this appeal did not stay the trial of the foreclosure claim. The master-in-equity denied that motion by order filed November 21, 2014, of which the

Respondent received written notice on December 1, 2014. The Respondent did not move for reconsideration of that order but has directly appealed it to this court. (Appellate Case No. 2014-002710.)

Now, the Respondent asks this court "to lift the stay in this matter imposed by the Master-in-Equity[,]" even though the master-in-equity did not impose a stay; he ruled that the automatic stay invoked by this appeal prevents the foreclosure claim from being tried during the pendency of this appeal.

**The master-in-equity did not impose a stay; rather, the Respondent did not convince him that he should lift the appellate stay that is already in effect.**

The order of the Honorable James O. Spence that denied the Respondent's motion to proceed with trial of the foreclosure claim during the pendency of this appeal is attached to this return and is incorporated herein by reference as if here set forth verbatim. As Judge Spence ruled, even if Judge Dickson had been wrong (and he was not wrong) to rule that the merits of the Appellants' breach of contract claim necessarily implicate the merits of the Respondent's foreclosure claim, on which the Respondent cannot succeed if the Appellants prevail on the breach of contract claim, Judge Dickson's ruling is the law of the case. Ulmer v. Ulmer, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006); Cherry v. Myers Timber Co., Inc., 404 S.C. 596, 598 n. 3, 745 S.E.2d 405, 406 n. 3 (Ct. App. 2013). Further, the opening statements and closing arguments attached to the Respondent's motion only buttress this conclusion, as they show that at the crux of the Appellants' breach of contract claim are factual issues about whether they were in default of the note and mortgage subject of the foreclosure claim. If the Appellants prevail in this appeal, have a new trial on the breach of contract claim, and win that claim at that trial, the Respondent *cannot* prevail on the foreclosure claim, since the jury will have *necessarily* decided that a set

of facts exist under which the Appellants are not in default of the note and mortgage. If this appeal did not affect the merits of the foreclosure claim, it would be difficult to imagine what would. Since the lower court may only proceed "with matters not affected by the appeal[,]" Rule 205, SCACR, the pendency of this appeal stays the trial of the Respondent's foreclosure claim.

**Consent to bifurcation is not to an admission that there are no overlapping factual matters between the claims subject of the jury trial and the foreclosure claim, and it is not tantamount to that.**

The Respondent argues that "[b]y consenting to bifurcating the case under Rule 42(b), SCRCP, the Appellants consented and acknowledged that the bifurcated claims have . . . no overlapping legal and factual questions[.]" (Respondent's motion to lift stay p. 4.) That is simply not true.

Our Supreme Court has set out the analysis for determining the trial of legal and equitable issues in complaints and counterclaims as follows:

> (1) If both the complaint and the counterclaim are in equity, the entire matter is triable by the court.
>
> (2) If both are at law, the issues are triable by a jury.
>
> (3) If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial.
>
> (4) If the complaint is equitable and the counterclaim legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim unless a valid jury trial waiver exists that encompasses the counterclaim. If such a waiver does not exist, the proper procedure for handling the counterclaims is as follows:
>
> > (a) The trial judge may, pursuant to Rule 42(b), order separate trials of the legal and equitable claims, or may order the claims tried in a single proceeding.

> (b) If separate trials are ordered, the judge must determine which issues are to be tried first. If there are factual issues common to both claims, absent the "most imperative circumstances," Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 79 S. Ct. 948, 3 L.Ed.2d 988 (1959), the "at law" claim must be tried first. If there are no common factual issues, it is within the trial judge's discretion which claim will be tried first.
>
> (c) If the claims are to be tried in a single proceeding and there are factual issues common to both claims, the jury shall first determine the legal issues. The court may then determine the equitable claims, but the jury's determination of common factual issues shall be binding upon the court.

Wachovia Bank, N.A. v. Blackburn, 407 S.C. 321, 330, 755 S.E.2d 437, 442 (2014); accord Johnson v. S.C. Natl. Bank, 292 S.C. 51, 55-56, 354 S.E.2d 895, 897 (1987) (same, except for lack of discussion about jury trial waiver in paragraph (4)).

The cases the Respondent cites in its argument about the effect of bifurcation simply dealt with bifurcation of a different sort, where bifurcation would result in two trials to a jury. Creighton v. Coligny Plaza Ltd., 334 S.C. 96, 108, 512 S.E.2d 510 (Ct. App. 1998); Fortune v. Gibson, 304 S.C. 279, 280-81, 403 S.E.2d 674, 675 (Ct. App. 1991).[1] What the Respondent seems to gloss over is that, in a case involving both at-law claims and equitable claims in which a jury trial is held, the at-law claims are *always* going to be tried to one fact-finder (a jury) and the equitable claims are *always* going to be tried to a different fact-finder (a judge). See id. Whether there is a bifurcation or not, the jury trial of the at-law claims will *always* be held before the

[1] Although Appellants view these cases as dealing with situations that are simply distinct and different from that present in this case, the Appellants do note that, if this court sees that differently, the Blackburn and Johnson decisions of the Supreme Court control over Creighton and Fortune to the extent of any inconsistency. The decisions of the Supreme Court bind the Court of Appeals as precedent. S.C. Const. Art. V, § 9; Daniels v. City of Goose Creek, 314 S.C. 494, 497, 431 S.E.2d 256, 260 (Ct. App. 1993).

judge decides the equitable claims if there factual issues common to both sets of claims. Id. A look at paragraphs (4)(a) and (b) from the Wachovia v. Blackburn quotation above quickly reveals that the bifurcation of the trial of at-law and equitable claims certainly does not preclude there being factual issues common to both claims; otherwise, the Supreme Court would not have expressly spoken to how to deal with the order of trials in such a bifurcated action where there are overlapping factual issues. 407 S.C. at 330.

Further, as discussed above, it is the law of the case that there are significantly overlapping factual matters between the breach of contract claim subject of the appeal and the Respondent's foreclosure claim.

Our courts have never held that consent to bifurcation of the trial of an at-law claim from the trial of an equitable claim is an acknowledgement that there are no factual issues common to both claims. That would be inconsistent with Supreme Court precedent. Id.

**The Respondent presents no facts to this court in support of its motion.**

The Respondent never put any factual record before the lower court about why a departure from the appellate stay is warranted in this case. It does not put any such factual record before this court now. The Appellate Court Rules appear to provide that the court's primary consideration in determining whether to lift the appellate stay is "whether such an order is necessary to preserve jurisdiction of the appeal" – which is more likely to be a consideration in determining whether to impose a supersedeas where one would otherwise not exist – "or to prevent a contested issue from becoming moot." Rule 241(c)(2), SCACR. The Respondent's motion does not speak to either of these things at all.

The Respondent cannot possibly meet its burden to persuade this court that the stay should be lifted where it has advanced *no* facts in support of that position.

**Rule 241(d)(2), SCACR, permits the Respondent to seek *review of* Judge Spence's order declining to lift the stay; however, the Respondent only makes new arguments to this court and does not seek review of Judge Spence's order.**

"After service of notice of appeal, any party may move for an order lifting the automatic stay in cases which involve the general rule." Rule 241(c)(1), SCACR. "After the lower court or administrative tribunal has ruled, any party may petition the appellate court where the appeal is pending or an individual judge or justice for *review of* this order. Rule 241(d)(2), SCACR (emphasis added).

The Respondent never actually sought for Judge Spence to lift the appellate stay. Instead, the Respondent sought for him to rule that the stay was not in effect. Further, the Respondent does not really seek *review of* Judge Spence's order; rather, it makes arguments to this court that it never advanced before Judge Spence, as comparison of the Respondent's motion to the attached transcript of the hearing held before Judge Spence shows.

**To lift the appellate stay would be unwise and maybe very problematic.**

Even if the Respondent had made a proper and properly supported motion for a lift of the appellate stay, wisdom would still caution most strongly against granting such a motion. Lifting the appellate stay in this case would be fraught with the potential to wreak havoc on the lower court's ability to deal fairly, efficiently, and lawfully with this case.

If the appellate stay were lifted, we would face the specter of this scenario: While the appeal is pending, the master-in-equity goes forward with the trial of the foreclosure claim. That trial is held with the master being bound to the jury's verdict

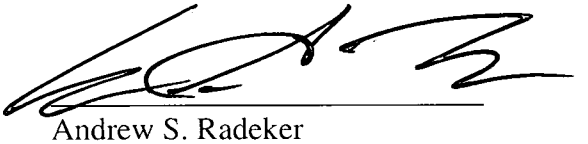
that decided the Appellants are not entitled to relief on their breach of contract counterclaim. The master finds for the Respondent on the foreclosure claim, a judgment of foreclosure is rendered, and the property subject of this case is sold. Afterward, the Appellants prevail on their appeal, and this court directs that a new jury trial be held. At that trial, the Appellants prevail on their breach of contract counterclaim, which necessarily decides, as Judge Dickson has ruled, that the Appellants "are not in default of the note and mortgage, and the [Respondent] thus cannot enforce the note or be granted foreclosure of the mortgage." (Order filed Oct. 10, 2013.) This would result in judgments that are irreconcilable with one another.

It is safer and more efficient to leave the stay in effect and have the trial of the foreclosure claim only if and when it is appropriate following the conclusion of the appeal.

**Conclusion**

The Respondent's motion mischaracterizes what has occurred in this case, misstates the law, and puts before this court no factual record in support of the Respondent's contention that this court should lift the appellate stay. The Respondent's motion should be denied.

Respectfully submitted,



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January 30, 2015

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

Case No. 2012-CP-32-2816

FV-I, Inc., in trust for Morgan Stanley Mortgage Capital Holdings LLC,

Plaintiff,

vs.

Bryon J. Dolan; Lisa S. Dolan; First Citizens Bank and Trust Company, Inc.; Wells Fargo Bank, N.A.; Branch Banking and Trust Company;

Defendants.

**ORDER ON PLAINTIFF'S MOTION TO STRIKE JURY DEMAND AND REFER CASE**

This matter came before me at a hearing on July 16, 2013, of the Plaintiff's motion to strike the jury demand of Defendants Bryon J. Dolan and Lisa S. Dolan (hereinafter "the Defendants") and to refer this case to the Lexington County Master-in-Equity. Charles S. Gwynne, Jr., Esquire, argued the motion for the Plaintiff, and Andrew S. Radeker, Esquire, did so for the Defendants. After due consideration, the Court denies the motion to refer the case to the Master-in-Equity and denies in part and grants in part the motion to strike the Defendants' jury demand.

This is a mortgage foreclosure action which the Defendants have asserted defenses and counterclaims. The Defendants pled three counterclaims: 1) for an accounting, 2) for violation of the South Carolina Unfair Trade Practices Act, and 3) for breach of contract. The Plaintiff and the Defendants agree that the claims for foreclosure and for an accounting sound in equity and, thus, that neither party has the right to a jury trial on those claims. The Plaintiff's motion thus concerns the at-law counterclaims, which are those for breach of contract and violation of the Unfair Trade Practices Act.

Exh. A

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In Johnson v. S.C. Natl. Bank, our Supreme Court set out "the proper analysis for determining the trial of legal and equitable issues in complaints and counterclaims" as follows:

> (1) If both the complaint and the counterclaim are in equity, the entire matter is triable by the court.
>
> (2) If both are at law, the issues are triable by a jury.
>
> (3) If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial.
>
> (4) If the complaint is equitable and the counterclaim legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim. In that case, the proper procedure is as follows:
>
> > (a) The trial judge may, pursuant to Rule 42(b), order separate trials of the legal and equitable claims, or may order the claims tried in a single proceeding.
> >
> > (b) If separate trials are ordered, the judge must determine which issues are to be tried first. If there are factual issues common to both claims, absent the "most imperative circumstances," Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 79 S. Ct. 948, 3 L.Ed.2d 988 (1959), the "at law" claim must be tried first. If there are no common factual issues, it is within the trial judge's discretion which claim will be tried first.
> >
> > (c) If the claims are to be tried in a single proceeding and there are factual issues common to both claims, the jury shall first determine the legal issues. The court may then determine the equitable claims, but the jury's determination of common factual issues shall be binding upon the court.

292 S.C. 51, 55-56, 354 S.E.2d 895, 897 (1987).

Accordingly, the Court's analysis for each of the two counterclaims at issue turns on whether the counterclaim is compulsory. As discussed below, the Court determines that the breach of contract counterclaim is compulsory and the Unfair Trade Practices Act claim is not.

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In June of 2012, the Court of Appeals in Wells Fargo Bank, N.A. v. Smith addressed whether three counterclaims at issue there – common law unconscionability, statutory unconscionability, and violation of the attorney preference statute – were compulsory counterclaims in a mortgage foreclosure action. 398 S.C. 487, 493-99, 730 S.E.2d 328, 331-35 (Ct. App. 2012). The Court of Appeals discussed the test for determining whether a counterclaim is compulsory as follows:

> "By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim." First-Citizens Bank & Trust Co. of S.C. v. Hucks, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991); see also Rule 13(a), SCRCP. The test for determining if a counterclaim is compulsory is whether there is a "logical relationship" between the claim and the counterclaim. Mullinax v. Bates, 317 S.C. 394, 396, 453 S.E.2d 894, 895 (1995). In N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989), our supreme court adopted the "logical relationship" test and held DAV's counterclaim was compulsory because "there [was] a logical relationship between the enforceability of the note which [was] the subject of the foreclosure action and the validity of the purported oral agreement which, if performed, would have avoided default on the note by the joint venture." In essence, the "logical relationship" determination is made by asking whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage. Advance Intern., Inc. v. N.C. Nat'l Bank of S.C., 316 S.C. 266, 269-70, 449 S.E.2d 580, 582 (Ct.App.1994), aff'd in part, vacated in part, 320 S.C. 532, 466 S.E.2d 367 (1996). Here, there is a "logical relationship" between the enforceability of the Note, which is the subject of the foreclosure action, and the allegation that the Mortgage between Wells Fargo and Smith is unconscionable. If Smith prevails on his unconscionability claim, it will affect Wells Fargo's right to enforce the Note and foreclose the Mortgage. Therefore, Smith's common law unconscionability counterclaim is compulsory under the "logical relationship" test.

Id. at 495-96.

The Wells Fargo v. Smith court determined that Smith's claim based on violation of the attorney preference statute – which apparently only sought relief under subsection (A) of S.C.

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Code Ann. § 37-10-105 – was an at-law claim but was not compulsory because the "counterclaim has no 'logical relationship' to the enforceability of the Note and Mortgage[,]" since, if he prevailed on the claim, "Smith would only be entitled to actual damages and a possible penalty between $1,500 and $7,500" and would not be entitled to "rescission of the Note and Mortgage[.]" Wells Fargo, 398 S.C. at 499.

The Defendants argue that, to the extent that the Court of Appeals stated in Wells Fargo v. Smith that a counterclaim in a mortgage foreclosure action is compulsory *only* if "the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage[,]" the Court of Appeals departed from precedent and is wrong. The Defendants argue the correct test is whether the counterclaims arises out of the same transactions or occurrences as the Plaintiff's claim. Regardless of the merits of the Defendants' argument on that point, however, this Court is constrained by precedent to follow Wells Fargo v. Smith, which holds that a counterclaim in a mortgage foreclosure action is compulsory only if it has a logical relationship to the enforceability of the note and mortgage. In other words, under the Wells Fargo v. Smith test, if success on the counterclaim would mean that the plaintiff *cannot* prevail on its foreclosure claim, then the counterclaim is compulsory.

The Defendants' breach of contract claim is compulsory. The gist of the claim is that the Plaintiff or a predecessor in interest entered into a settlement or modification of the loan at issue, that the Defendants performed their duties under that arrangement (until the Plaintiff prevented them from performing further), and that the Plaintiff breached its contractual duties to the Defendants under the note and mortgage as modified by the settlement. If what the Defendants allege is true, then they are not in default of the note and mortgage, and the Plaintiff thus cannot

enforce the note or be granted foreclosure of the mortgage. This is the essence of a compulsory counterclaim.

The Defendants argue that their Unfair Trade Practices Act claim is compulsory because it arises out of the same set of facts (i.e., transactions and occurrences) as do several of their defenses to the foreclosure claim, and because it arises out of the same set of facts as their compulsory breach of contract claim. They also argue that the claim is compulsory because it arises out of the administration of the loan, which is necessarily a part of the Plaintiff's case. The Court disagrees. Under the Wells Fargo v. Smith test, this counterclaim would be compulsory only if it would necessarily affect the Plaintiff's right to enforce the note and foreclose the mortgage. If the Defendants prevail on their Unfair Trade Practices Act claim, that will not necessarily mean that the Defendants have proven a set of facts that makes it impossible for the Plaintiff to succeed on its foreclosure claim. It would be possible both for the Defendants to prevail on this counterclaim and also for the Plaintiff to prevail on its claim at the same trial. Accordingly, the Defendants' Unfair Trade Practices Act counterclaim is permissive.

As the master-in-equity cannot conduct a jury trial, the entire case cannot be referred to the master-in-equity, which is what the Plaintiff sought in its motion. The Defendants noted at the hearing that they would not oppose this case being bifurcated, with the foreclosure claim being tried by the master-in-equity, so long as the jury issues are tried first. Therefore, the Plaintiff has until 45 days after the entry of this Order (to give time for any appeal) to elect that this case be bifurcated in that manner if it chooses to do so.

It is therefore hereby ORDERED as follows:

1. The Plaintiff's motion to refer this case to the master-in-equity is denied;

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2. The Plaintiff's motion to strike the Defendants' jury demand as to their breach of contract counterclaim is denied, and this counterclaim claim shall be tried by a jury;

3. The Plaintiff's motion to strike the Defendants' jury demand as to their Unfair Trade Practices Act counterclaim is granted, and this counterclaim shall be tried by the Court; and

4. The Plaintiff has until 45 days from the entry of this Order to elect that this case be bifurcated, with the foreclosure claim being tried by the master-in-equity, so long as the jury issues are tried first.

AND IT IS SO ORDERED.

The ~~Honorable~~ Edgar W. Dickson
Circuit Judge

September 26, 2013

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2012-CP-32-2816

FV-I, Inc. etc.,
PLAINTIFF(S)

Bryon J. Dolan, et al.,
DEFENDANT(S)

Submitted by: Andrew S. Radeker

Attorney for : ☐ Plaintiff X 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.

X **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), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____.

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ 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:** X See attached order ☐ Statement of Judgment by the Court:

**ORDER INFORMATION**

This order ☐ ends X does not end the case

Additional Information for the Clerk : **Plaintiff has 45 days to elect to bifurcate case if it so chooses.**

**INFORMATION FOR THE JUDGMENT 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) |
|---|---|---|
| N/A | N/A | N/A |
| | | |
| | | $ |

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

2153
Judge Code

9/26/13
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:

_____
_____
_____
ATTORNEY(S) FOR THE PLAINTIFF(S)

_____
_____
_____
ATTORNEY(S) FOR THE DEFENDANT(S)

_____
CLERK OF COURT

**Court Reporter:** _____

| STATE OF SOUTH CAROLINA | IN THE COURT OF COMMON PLEAS |
|---|---|
| COUNTY OF LEXINGTON | Case No. 2012-CP-32-2816 |

**FV-I, Inc., in trust for Morgan Stanley Mortgage Capital Holdings LLC,**

**Plaintiff,**

**vs.**

**Bryon J. Dolan; Lisa S. Dolan; First Citizens Bank and Trust Company, Inc.; Wells Fargo Bank, N.A.; Branch Banking and Trust Company;**

**Defendants.**

**ORDER ON PLAINTIFF'S MOTION TO PROCEED WITH TRIAL AND ON APPEAL BOND ISSUES**



This matter comes before me upon the Plaintiff's motion that the trial of the equitable claims in this case proceed while an appeal of the denial of Defendants Bryon J. Dolan and Lisa S. Dolan (hereinafter "the Defendants")'s motion for a new trial as to their at-law counterclaims is pending. For the reasons discussed below, the court denies the motion and declines to set any bond conditions for the Defendants to meet in order for the appellate stay to remain in effect.

## PROCEDURAL HISTORY

This is a case in which the Plaintiff seeks mortgage foreclosure and the Defendant asserted both legal and equitable counterclaims. This case was bifurcated by consent order on the cusp of trial, with the Defendants' at-law counterclaims tried to a jury on April 17, 2014, and the foreclosure claim and the Defendants' claim for an accounting referred to the undersigned master-in-equity to be tried later. The jury returned a verdict for the Plaintiff on the at-law counterclaims, and the Defendants moved for an order granting them a new trial as to the claims subject of the jury trial (the Defendants' counterclaims for breach of contract and violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*).



Exh. B

The Defendants moved for reconsideration of the order denying their motion for a new trial. That motion was denied, and the Defendants appealed the orders denying the motion for a new trial and motion to reconsider. The Plaintiff moved the Court of Appeals to dismiss the appeal, arguing that the orders were not immediately appealable. The Court of Appeals denied that motion to dismiss, but did grant leave to the parties to address the appealability of the legal counterclaims in their respective briefs.

## APPEALABILITY OF APPEALED ORDERS

The Plaintiff takes the position that because this case was bifurcated and the trial on some claims has not already occurred, the order denying the Defendants' motion for a new trial as to the claims that have been tried to a directed verdict and a jury verdict in this case is not appealable. The Plaintiff takes the position that the directed verdict and jury verdict were not final judgments in this case, arguing that only after the equitable claims have been tried would any appeal lie in this case. Accordingly, the Plaintiff argues, the Defendants' appeal does not stay anything, since it is an improper appeal of an unappealable order.

South Carolina law states that "[a]n order that grants or refuses a new trial affects a substantial right and is immediately appealable" pursuant to S.C. Code Ann. § 14-3-330(2)(b). Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 97 (2d ed. 2002) (citing S.C. Code Ann. § 14-3-330(2)(b) and S.C. State Hwy. Dept. v. Clarkson, 267 S.C. 121, 126-27, 226 S.E.2d 696, 697 (1976)). The statute that speaks generally to the appealability of orders, S.C. Code Ann. § 14-3-330, specifically lists an order that "grants or refuses a new trial" as appealable. S.C. Code Ann. § 14-3-330(2)(b). The order denying the Defendants' motion for a new trial that is subject of this appeal is immediately appealable because it is an order that refuses a new trial. Id.

Rule 54(a), SCRCP, provides that the definition of "judgment" under the Rules of Civil Procedure "includes any decree or order which dismisses the action as to any party or finally determines the rights of any party." The directed verdict at the jury trial as to one of the Defendants' causes of action tried in that trial and the jury verdict as to the other cause of action tried in that trial are final judgments, for appealability purposes, as they finally determined the rights of the parties with respect to those claims. Rule 54(a), SCRCP. The directed verdict ruling and jury verdict finally determined the rights of the parties as to the breach of contract and unfair trade practices claims.

The Supreme Court of South Carolina has held that an order that ends one of several claims in a case but leaves the other claims pending is an immediately appealable order, ruling against the argument that an aggrieved party must wait until all the causes of action have been finally determined in order to appeal. Link v. Sch. Dist. of Pickens County, 302 S.C. 1, 4 fn. 2, 393 S.E.2d 176, 178 fn. 2 (1990) (overruling Plaza Dev. Services v. Joe Harden Builder, Inc., 296 S.C. 115, 370 S.E.2d 893 (Ct. App. 1988), "to the extent that it holds that one may not appeal the granting of a 12(b)(6) motion under § 14-3-330 if the ruling affects some but not all of a party's causes of action"); Lebovitz v. Mudd, 289 S.C. 476, 479, 347 S.E.2d 94, 96 (1986) ("order granting a Rule 12(b) motion as to one of multiple claims is directly appealable under § 14-3-330(2) because it affects a substantial right and strikes out part of a pleading"; rejecting argument that circuit court had to make Rule 54(b) certification to make an order appealable where it is already appealable under S.C. Code Ann. § 14-3-330). The Plaintiff's argument that the Defendants' appeal is improper because there has been no final judgment in this case is against this precedent and fails.

The denial of the Defendants' motion for a new trial under Rule 59, SCRCP, with respect to the claims tried in the jury trial is, accordingly, immediately appealable under S.C. Code Ann. § 14-3-330(1), which provides for appeals from orders "involving the merits[,]" as well as under S.C. Code Ann. § 14-3-330(2)(b). "An order 'involves the merits,' as that term is used in Section 14-3-330(1) and is immediately appealable when it finally determines some substantial matter forming the whole or part of some cause of action or defense." Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 7, 630 S.E.2d 464, 467 (2006). The directed verdict and jury verdict here finally determined the causes of action tried in the jury trial, and the Defendants' new trial motion was a post-trial motion directed at those final judgments.

If a case is bifurcated into a jury trial on at-law claims and a bench trial on equitable claims, that does not mean that the result of the jury trial is not a final judgment. See Rule 54(a), SCRCP. The jury trial is no less a trial simply because it occurs before the bench trial. The verdict in the jury trial is the final judgment as to the at-law claims subject of that trial; otherwise, it would not be true that in a bifurcated case "the jury's determination of common factual issues shall be *binding* upon the court" in the following bench trial. Wachovia Bank, N.A. v. Blackburn, 407 S.C. 321, 330, 755 S.E.2d 437, 442 (2014) (emphasis added). The fact that the equitable claims remain pending does not affect the finality of the at-law claims' verdict, nor does it affect appealability with regard to post-trial motions directed at that verdict. S.C. Code Ann. § 14-3-330(1)&(2)(b); Rule 54(a), SCRCP; Capital U-Drive-It, 369 S.C. at 7; Link, 302 S.C. at 4 fn. 2; Lebovitz, 289 S.C. at 479.

The Plaintiff cannot prevail on its argument that, because the appealed orders are not appealable, there is no appellate stay in effect. While it appears that the Plaintiff would be



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correct if the orders at issue were indeed not appealable, that is not the situation that this case presents.

## EFFECT OF THE APPELLATE STAY

Rule 205, SCACR, states as follows:

> Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.

Rule 241, SCACR (formerly numbered as Rule 225), entitled "Stay and Supersedeas in Civil Actions," provides in pertinent part as follows:

> **(a) General Rule.** As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.
>
> **(b) Exceptions.** The exceptions to the general rule are found in statutes, court rules, and case law. Where specific conditions must be met before the exception applies, those conditions must be strictly complied with. A list of some, but not all, of the exceptions to the general rule is:
>
> (1) Money judgments as provided in S.C. Code Ann. § 18-9-130.
>
> (2) Judgments directing the assignment or delivery of documents or personal property as provided in S.C. Code Ann. § 18-9-150.
>
> (3) Judgments directing the execution of conveyances or other instruments as provided in S.C. Code Ann. § 18-9-160.

(4) Judgments directing the sale or delivery of possession of real property as provided in S.C. Code Ann. § 18-9-170.

(5) Judgments directing the sale of perishable property as provided in S.C. Code Ann. § 18-9-220.

(6) Family court orders regarding a child or requiring payment of support for a spouse or child as provided in S.C. Code Ann. § 63-3-630.

(7) Worker's compensation awards as provided in S.C. Code Ann. § 42-17-60.

(8) An appeal from an order granting an injunction or temporary restraining order.

(9) Family court orders awarding temporary suit costs or attorney's fees as provided in S.C. Code Ann. § 63-3-530(A)(2).

(10) Ejectment orders as provided in S.C. Code Ann. §27-37-130 and S.C. Code Ann. § 27-40-800.

(11) Appeals from administrative tribunals as provided in S.C. Code Ann. § 1-23-380(A)(2) and § 1-23-600(G)(5).

Discussing the appellate stay, S.C. Code Ann. § 18-9-220 provides that:

> In cases not provided for in Sections 18-9-130 and 18-9-150 to 18-9-180, the notice of appeal shall stay proceedings in the court below upon the judgment appealed from, except that when it directs the sale of perishable property, the court below may order the property to be sold and the proceeds of the property to be deposited or invested in bonds of this State or of the United States, to abide the judgment of the appellate court.

The appeal at issue here does not fall within any of the exceptions to the general rule that service of a notice of appeal stays further proceedings at the trial level as to matters that are affected by the appeal (as the parties appear to agree). No perishable property is at issue here. Therefore, the stay is in effect. What the court must determine is whether trial of the equitable claims in this case falls within the scope of what is affected by the appeal. As discussed below, the court determines that it does.

As noted above, in a bifurcated case involving equitable claims and at-law claims to be tried in different trials, with the at-law claims to be tried to a jury, "[i]f there are factual issues common to both claims, absent the most imperative circumstances, the at law claim must be tried first." Blackburn, 407 S.C. at 330. That is because, in a case in which a jury tries the at-law claims and the court tries the equitable claims, "the jury's determination of common factual issues shall be binding upon the court." Id.

Here, there are factual issues common to the Defendants' breach of contract claim and the Plaintiff's foreclosure claim. In a previous order in this case that denied the Plaintiff's motion to strike the Defendants' jury demand, which the Plaintiff did not appeal[1], the Honorable Edgar W. Dickson, in deciding that the Defendants' breach of contract counterclaim is compulsory, ruled that "[i]f what the Defendants allege is true, then they are not in default of the note and mortgage, and the Plaintiff thus cannot enforce the note or be granted foreclosure of the mortgage." (Order filed Oct. 10, 2013.) That ruling is the law of the case. Ulmer v. Ulmer, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006); Cherry v. Myers Timber Co., Inc., 404 S.C. 596, 598 n. 3, 745 S.E.2d 405, 406 n. 3 (Ct. App. 2013).

An examination of the analysis used in Wayne Smith Const. Co., Inc. v. Wolman, Duberstein, and Thompson, 294 S.C. 140, 363 S.E.2d 115 (Ct. App. 1987), is instructive. In that case, there were multiple appeals. Id. The defendant partnership in Smith Construction initially appealed an order denying its motion to quash notices of deposition, and that appeal was dismissed, as the order was not immediately appealable. Id. at 148. The defendant partnership lost at the trial of the case and appealed that order. Id. The trial court then awarded the plaintiff attorney's fees concerning the first, then-dismissed appeal of the order denying the motion to

[1] The *Defendants* appealed a different aspect of this order, but the parties resolved that issue, and that appeal was dismissed.



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quash the deposition notices. Id. The defendant then appealed the order awarding attorney's fees, arguing that the court lacked jurisdiction because of the appeal from the order that rendered judgment for the plaintiff on the substantive case. Id. The Court of Appeals noted the rule that service of a notice of appeal does not prevent the lower court from proceeding with matters that are not affected by the appeal and stated that "Smith Construction's right to be awarded an attorney's fee as costs did not depend upon the success of the partnership's appeal of the trial court's order awarding Smith Construction judgment." Id. at 149. The Court of Appeals held that the lower court had jurisdiction to issue the order awarding attorney's fees. Id.

Here, unlike in Smith Construction, what the Plaintiff seeks to have happen during the pendency of the Defendants' appeal – the trial of the plaintiff's foreclosure claim and the issuance of a judgment on that claim – *does* depend on the success of the Defendants' appeal. If the Defendants succeed on appeal, the jury trial at which the Defendants lost on their at-law counterclaims will be of no effect, there will be no verdict finding against them on those claims, and the parties will be headed to a new jury trial, the result of which will be binding upon the master-in-equity as fact-finder with respect to the foreclosure claim. See Blackburn, 407 S.C. at 330. Whether it has been finally determined in this case that the facts underlying the counterclaims do not provide the Defendants with a defense to the foreclosure claim is very much a "matter[] decided in the order, judgment, decree or decision on appeal[.]" Rule 241(a), SCACR.

Because the trial of the equitable claims in this case would necessarily entail trial of the Plaintiff's foreclosure claim, trial of the equitable claims is a matter affected by the appeal. The appellate stay, accordingly, prevents the occurrence of that trial as long as the stay remains in effect.

## ISSUES REGARDING BOND

At the hearing of the instant motion, the court requested that the parties submit memoranda on the issue of whether the court should require the Defendants to meet bond conditions to prevent the trial of the equitable claims while the appeal is pending and, if so, what those bond conditions should be. For the reasons discussed below, the court declines to impose any bond conditions on the Defendants.

"After service of notice of appeal, any party may move for an order lifting the automatic stay in cases which involve the general rule." Rule 241(c)(1), SCACR. The Appellate Court Rules appear to provide that the court's primary consideration in determining whether to lift the appellate stay is "whether such an order is necessary to preserve jurisdiction of the appeal" – which is more likely to be a consideration in determining whether to impose a supersedeas where one would otherwise not exist – "or to prevent a contested issue from becoming moot." Rule 241(c)(2), SCACR.

Rule 241(c)(3), SCACR, provides as follows:

> The granting of supersedeas or the lifting of the automatic stay under this Rule may be conditioned upon such terms, including but not limited to the filing of a bond or undertaking, as the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court may deem appropriate. Further, where it appears that the granting or lifting of a stay, or the issuance of a writ of supersedeas is insufficient to afford complete relief, the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court may order other affirmative relief upon such terms as are deemed appropriate.

Where a judgment in a mortgage foreclosure action directs the sale of real estate, the sale pursuant to that judgment is not automatically stayed while appellate proceedings are pending, unless the appellant (usually the mortgagor defendant) gives an undertaking as set forth in S.C. Code Ann. § 18-9-170 or a cash deposit as provided in S.C. Code Ann. § 15-1-250.

The Code section that sets out the undertaking conditions prescribes two slightly different undertakings, one given to stay the sale of real property to a specific party or delivery of possession of real property to a specific party while an appeal is pending, and one given to stay "the sale of land to satisfy a mortgage thereon or other lien[.]" S.C. Code Ann. § 18-9-170. The purpose of the former is to provide the party entitled to ownership of the property with compensation for the loss of the land's possession during the time of the appeal, while the purpose of the undertaking in a mortgage foreclosure appeal is to protect the foreclosure plaintiff from impairment of the full payment of the adjudged debt caused by the property lessening in value during the pendency of the appeal. See id.; Gerald v. Gerald, 30 S.C. 348, 9 S.E. 274, 275 (1889).

The requirements of the undertaking to stay a mortgage foreclosure sale of improved land on appeal are as follows:

1) The undertaking must be in writing;

2) The undertaking must be executed by the appellant;

3) Two sureties must agree to be liable on the undertaking by sufficient affidavit (the sureties so doing on the undertaking document itself or in separate instruments);

4) The undertaking must provide that the appellant shall pay to the respondent money per the undertaking if:

    a. The judgment is affirmed; and

    b. The land is finally sold for less than the judgment debt and costs.

5) The undertaking must state that the appellant shall pay the amount payable to the respondent thereunder if the sale is affirmed and there is a deficiency, which amount is measured as follows:

a. The appellant shall pay for any waste he commits or suffers to be committed on the premises from the time of the execution of the undertaking to the time of the sale;

b. The appellant shall pay a reasonable rental value for the use and occupation of the land from the time of the execution of the undertaking to the time of the sale; and

c. The amount payable per the undertaking shall not exceed the amount of the deficiency in the sale proceeds to satisfy the debt and costs.

S.C. Code Ann. § 18-9-170; Gerald, 30 S.C. 348, 9 S.E. at 275-77; see generally S.C. Code Ann. Title 18, Ch. 9. As an alternative to giving the undertaking, the appellant may make a cash deposit in lieu thereof. S.C. Code Ann. § 15-1-250.

The "manifest object of the undertaking required for the purpose of staying a sale pending an appeal is to protect the respondent, as far as practicable, from any damage which may ensue from the delay caused by the appeal, in enforcing his claim[,]" because the respondent, the foreclosure judgment creditor in that situation, has already been determined by a court to be entitled to the sale directed by the judgment. Gerald, 30 S.C. 348, 9 S.E. at 275. As it appears that Plaintiff's counsel agreed at the hearing on this motion, S.C. Code Ann. § 18-9-170 would be applicable in this case only if there had already been a foreclosure judgment rendered. None has been.

Since the justification for imposing such conditions in order to stay the operation of the judgment directing the sale is that the court has already determined that the Plaintiff is *entitled* to the sale, the instant situation is materially different from that subject of S.C. Code Ann. § 18-9-170. The Plaintiff has never been determined by any court to be entitled to the relief it seeks in



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this case, and it is by no means a foregone conclusion that the Plaintiff will be determined to be entitled to that relief, whether the Defendants succeed on appeal or not. This situation is not one which the Defendants have anything to bond off, nor is it analogous to such a situation. Nothing before the court indicates that an order lifting the appellate stay "is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Rule 241(c)(2), SCACR.

The court declines to impose any bond conditions on the Defendants in order for the appellate stay to remain in effect. If Plaintiff has legitimate concerns that waste is occurring on the property, Plaintiff may petition the court under the mortgage loan documents and/or applicable waste case law.

**TO PROCEED WITH THE FORECLOSURE TRIAL POSES POTENTIAL PROBLEMS**

If the appellate stay were lifted, the court would be faced with the specter of this scenario: While the appeal is pending, the court goes forward with the trial of the foreclosure claim. That trial is held with the court being bound to the jury's verdict that decided the Defendants are not entitled to relief on their breach of contract counterclaim. The court finds for the Plaintiff on the foreclosure claim, a judgment of foreclosure is rendered, and the property subject of this case is sold. Afterward, the Defendants prevail on their appeal, and the Court of Appeals directs that a new jury trial be held. At that trial, the Defendants prevail on their breach of contract counterclaim, which necessarily decides, as Judge Dickson ruled, that the Defendants "are not in default of the note and mortgage, and the Plaintiff thus cannot enforce the note or be granted foreclosure of the mortgage." (Order filed Oct. 10, 2013.) This would result in judgments that are irreconcilable with one another. It is safer and more efficient to leave the stay

in effect and have the trial of the foreclosure claim only if and when it is appropriate following the conclusion of the appeal.

## CONCLUSION

For the reasons discussed above, IT IS THEREFORE HEREBY ORDERED that the Plaintiff's motion to proceed with the trial of the equitable claims during the pendency of the appeal is hereby denied, and the court declines to impose any bond conditions on the Defendants in order for the appellate stay to remain in effect.

And IT IS SO ORDERED.

James O. Spence

The Honorable James O. Spence
Master-in-Equity for Lexington County

Lexington, South Carolina

October 31, 2014

FILED
2014 NOV 21 A 9:25
BETH A. CARRIG
CLERK OF COURT
LEXINGTON

State of South Carolina )
)
County of Lexington )

FV-1, Inc. in trust for Morgan Stanley Mortgage Capital Holdings, LLC, ) 12-CP-32-2816

Plaintiff, ) Transcript

v. ) of

Byron J. Dolan; Lisa S. Dolan; First Citizens Bank and Trust Company, Inc.; Wells Fargo Bank, N.A.; Branch Banking and Trust Company, ) Hearing

Defendants. )

Date: Wednesday, September 24, 2014

Time: 1:50 p.m.

Location: Lexington County Judicial Center,

205 East Main Street, Lexington, South Carolina

Reported by
Olivia Michelle Crocker

Exh. C

APPEARANCES

Presiding: The Honorable James O. Spence
Lexington County Judicial Center
205 East Main Street, Courtroom 2-A
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EXHIBITS

No exhibits were marked during this hearing.

PROCEEDINGS

THE COURT: We're here on "FV-1 v. Dolan, et al." It's 2012-CP-32-2816. This is, I believe, Plaintiff's motion to proceed with trial while there is a pending appeal.

MR. GWYNNE: Yes, Your Honor.

THE COURT: Yes, sir?

MR. GWYNNE: Good afternoon, Your Honor.

THE COURT: Yes, sir.

MR. GWYNNE: I'm Charlie Gwynne here --

THE COURT: Yeah.

MR. GWYNNE: -- on behalf of the plaintiff. I filed this motion, and I can go through as much of the procedural history as you'd like, Your Honor, but, essentially, we -- this case was one case. It was pending in the Circuit Court. We had a jury trial scheduled back in April. And the day of -- pretty much the day of the trial, Mr. Radeker and I agreed to bifurcate the case under Rule 42-B. So Judge Keith Kelly, who was the trial judge, signed an order bifurcating the legal claims, which were two counterclaims, from the equitable claims of foreclosure and one counterclaim for accounting. And then that order is, I'm sure, in the file.

So then we have the trial -- a full-day trial,

a jury trial -- on the 17th of April 2014, and the jury returned. Our judge, Kelly, gave a directed verdict on one of the counterclaims. The jury found for my client on the other counterclaim. And Mr. Radeker then appealed the -- the jury's verdict and Judge Kelly's directed verdict ruling.

So I think Mr. Radeker and I -- first of all, just let me say, I think Mr. Radeker and I agree that this is one case. I don't think he'd agree -- argue that there are two -- that the bifurcation made two separate cases because, if that was the case, then this would be easy. We could just proceed.

But, essentially, Mr. Radeker's arguing that, because he filed the -- the appeal of the legal claims, that that should stay the foreclosure claim and the equitable claim for accounting, and my client disagrees with that. We believe that the fact that there's been an appeal of the legal claims under Rule 205 and 241 of the Appellate Court rules, that does not automatically stay the equitable claims from proceeding.

And the other thing I'll say is that Mr. Radeker has no case law, no statutes that support his position. On the other hand, the case law says

that there needs to be a final judgment in order to appeal, and there has not been a final judgment on the foreclosure and the equitable claim for accounting. So we'd like to proceed with those claims, Your Honor.

THE COURT: All right. Thank you. Mr. Radeker?

MR. RADEKER: Thank you, Your Honor. Taking the last first: The jury's verdict and Judge Kelly's ruling on the directed verdict, those are final judgments, as to the claims that they ruled upon. Rule 54-A spells out what a judgment is: It's an order that finally determines the rights of the parties. If those weren't final, we couldn't have made a motion for a new trial. As to them, couldn't have appealed the denial of it. The plaintiff has already tried in the Court of Appeals to have the appeal dismissed, saying that it's interlocutory and no appeal would lie because there's not a final judgment. The Court of Appeals ruled against FV-1 on that.

Here what we've got is a situation where the factual circumstances underlying these claims are all bound up in each other and have a lot of overlap. I point the Court to something that's mentioned in the memorandum that we filed earlier,

as well as an order of Judge Dickson that's in the file, in which Judge Dickson ruled, in deciding that the breach of contract counterclaim was a compulsory claim, that, if what the defendants allege is true, then they're not in default of the note and mortgage, and the plaintiff, thus, cannot enforce the note or be granted foreclosure of the mortgage.

THE COURT: All right. Let's -- let's stop right there, and let me ask a question because this is in a memo. If you went on appeal, which would support that position, and I go forward with the trial and I find for them that they could move forward in the appeal, can we not have, in essence, two inconsistent results?

MR. RADEKER: We could have two inconsistent results.

THE COURT: All right.

MR. RADEKER: And that's why the Appellate Court rules don't permit this to -- they don't permit for the trial to go forward here. What they permit is for the trial court to proceed with the matters that are not affected by the appeal.

THE COURT: Right. I understand.

MR. RADEKER: Here, you know, the facts that would underlie -- the basis of the facts for the trial of

a foreclosure claim are going to be affected, possibly, by the outcome of this appeal and be, varied, potentially. If the Dolans are granted a new trial and prevail at that trial, then what Judge Dickson said is true is true, because that's -- I mean, one, it's the law of the case. But it's also true, based on the nature of the Dolans' claims in this case. Then the plaintiff cannot win at the foreclosure claim. So all the Appellate Court rules permit the Court to do is to proceed with matters that aren't affected by the appeal.

THE COURT: All right. Let -- let me ask --

MR. RADEKER: What this is --

THE COURT: Let me ask another question.

MR. RADEKER: -- by definition --

THE COURT: In the jury portion of it, does that establish the law of the case or the facts of the case? Are they the same set of facts?

MR. RADEKER: Right now it doesn't establish the law in the case because there's an appeal pending.

THE COURT: Right.

MR. RADEKER: But if that's affirmed, then it would establish --

THE COURT: Right.

MR. RADEKER: -- the law of the case.

THE COURT: I -- I mean, the --
MR. RADEKER: So --
THE COURT: -- jury portion of it normally goes when?
MR. RADEKER: First.
THE COURT: First.
MR. RADEKER: Because the jurors' determination --
THE COURT: Right.
MR. RADEKER: -- to the extent that it determines the factual issues that are common to both claims, is going to be binding --
THE COURT: On?
MR. RADEKER: -- upon the Court as a nonjury fact finder.
THE COURT: Okay. So whatever happens with however the appeal ends is binding on the judge, who would then try the equitable portion?
MR. RADEKER: That -- that's right.
THE COURT: Okay.
MR. RADEKER: If -- if the appeal ends in affirmance, then the jury's determination, as to the factual issues that it tried for them, is going to bind this Court. If the appeal ends in reversal and the jury reaches the same verdict and there's no further proceedings and it's final, then, essentially, it's the net same effect, but only

after that happens.

THE COURT: Right. Okay.

MR. RADEKER: But if the -- if the Dolans prevail on a new trial after an appeal, then those determinations bind this Court, essentially making the foreclosure impossible to carry out in this case.

I would say that it's our position that it's pretty clear from looking at the rules -- and this idea that there's no authority for this position is just wrong -- but, it's pretty clear, from looking at the rules, that this Court is prohibited from going forward on the foreclosure claim. But even if it weren't, it would be the wise thing to do for the same reasons that we've already brought up. So even if you disagree with us about whether you're able to go forward with the foreclosure claim, you shouldn't, for those same reasons.

THE COURT: All right.

MR. RADEKER: Thank you.

THE COURT: All right. Let me -- Mr. Gwynne, I want to ask you a question.

MR. GWYNNE: Yes, sir.

THE COURT: Hang on a minute.

MR. GWYNNE: Yes, sir.

THE COURT: All right. Do you have a copy of Mr. Radeker's June 29th memo that we were kind of arguing this before we got to a motion?
MR. GWYNNE: Is that the memorandum filed June 30th?
THE COURT: Yes.
MR. GWYNNE: Yes, sir.
THE COURT: All right. Look at Page 6.
MR. GWYNNE: Okay.
THE COURT: All right. In that middle paragraph where it says, "An illustration demonstrates," could that occur as it's argued in that paragraph? I'll give you a second to look back over it.
MR. GWYNNE: Thank you, Your Honor.

Your Honor, I am certainly -- we're on the same page that we both believe that you are -- Your -- Your Honor -- would be bound by the facts from the -- from the jury -- the common finding -- the facts from the jury. But what Mr. Radeker proposes on Page 6 is not going to happen. What's going to happen is we can have this foreclosure done within the next two months. This appeal's going to take years. The Dolans have already pretty much said -- shown that they're going to take this to the very limit. I'm sure the Supreme Court's next, after they lose in the Appellate Court. But the bottom

line is the -- the reality of the situation is we're -- we can have this foreclosure done in a relatively quick and efficient manner -- this is a judicial economy argument, Your Honor -- within the next two months.

Mr. Radeker can then appeal Your Honor's decision, if he doesn't like it. Then everything will be in -- in the Appeal -- Appeals Court. He can consolidate the two appeals. Everything can be before the justices in Columbia, and the whole case can be decided at that time. Clearly, what's going on here is Mr. Radeker and his clients don't want to have to post the bond. They want to live in this house, this lakefront house, for another three years, rent-free, while my client pays their taxes, pays their hazard insurance. So certainly, yes, you are -- Your Honor is bound by what's the -- the findings of facts were in the -- the trial court, but that's just not going to happen, Your Honor.

THE COURT: All right. Well, let's -- let's go to the bond argument because I had that on my checklist. If this was a straight appeal, if -- if this had just gone straight to a foreclosure and a judge granted a foreclosure for the plaintiff and ordered a sale, then Plaintiff -- then the defendant would

have to file an appeal, but he would also have to post a bond to stop this sale. Are you saying that there's the same requirement, because he has appealed the -- the jury verdict?

MR. GWYNNE: Well, I think the --

THE COURT: Well, because you just mentioned -- you just said he doesn't want to post a bond. Is there a requirement that he post a bond at this point, when we haven't even -- because we haven't even -- we haven't had the foreclosure portion?

MR. GWYNNE: Well, the -- the statute that -- I don't have my -- my rule book in front of me -- I apologize.

THE COURT: It's to --

MR. GWYNNE: But it -- it deals with orders, if I can remember correctly, directing the sale -- ordering the sale of land. So, obviously, Mr. Radeker would say no. The jury verdict and Judge Kelly's directed verdict does not apply. Therefore, he doesn't have to post the bond.

But what they're doing is they're getting around that by delaying the foreclosure even occurring. So they're trying to, obviously, prevent that, and if -- if Your Honor rules against my client at this hearing, I'll certainly move to

post the bond, based on the fact that they are preventing the sale of this property by presenting -- preventing the foreclosure from proceeding.

THE COURT: All right. Mr. Radeker?

MR. RADEKER: Thank you, Your Honor. We think we ought to win on appeal and should, and we think that, if the Court of Appeals gets it right, that we will. And what we're looking forward to is a new trial, so this idea that this is just purely for delay is -- like, I don't know where that's coming from. If -- there's going to be delay incident to it, because of just how long appeals take, but --

THE COURT: Well, I -- I'm not --

MR. RADEKER: -- that's not what the purpose is.

THE COURT: -- I'm not -- and -- and I want -- I want to say this as -- as carefully as I can: Everybody in the room knows all types of delays that have occurred in the foreclosure process. Some of the delays have occurred because we have had numerous settlements with servicers and banks that have required delays. Some of the delays have occurred because there have been state court orders. Some of the delays have occurred because there have been consumer -- new -- new federal regulations. Some of the delays have occurred because defendants have

tried to delay the system, stay in the house as long as they could. Some of the delays, likewise, have occurred because banks, for some strange reason, are not moving forward on large numbers of cases that were filed four or five/six years ago that are in default, but they're underwater. So I think some of the delays are occurring because it is not profitable for a bank to move it through. So I'm not -- there are a lot of reasons and factors that can cause a delay. So a delay -- if a delay -- if there -- if a delay occurs because somebody's exercising a legal right, be it Plaintiff or Defendant, that's just -- that's like saying a basketball team shouldn't be able to stall. I mean, that's why they put the 30-second clock in. There ain't no 30-second clock in foreclosures yet. So I understand your argument.

But what I do want to know is -- what I do want to know is, there isn't -- there is an analogous argument there that if we're going to stop a foreclosure, then we got to post a bond because it is real estate. And what I hear Plaintiff arguing is -- is it ain't the model because we have not had a foreclosure order. We haven't ordered a sale. So -- but we still -- he

still ought to post bond because it's -- the appeal has the same effect. And, I guess, I'm -- I'm -- that was on my list because I was wondering the same thing. You don't normally get that issue until you have a foreclosure order and a sale order -- a -- a sale ordered. We don't have that. We don't know when that would be. Like he said, it could be years. So, theoretically, if I caused a bond to be posted right now, that bond could be in effect for years and years and years and years and years, I guess, just like any other appeal. So, if you'll respond to: Are you required or should you be required to post a bond?

MR. RADEKER: Sure.

THE COURT: Yeah.

MR. RADEKER: We're not required to because there's nothing to bond off, as -- and Mr. Gwynne was just talking about. Yes. There's a statute that would apply to a judgment of foreclosure because it directs a sale of land. That has -- that sale has to be bound off during an appeal, or the -- I mean, the appeal can go forward, but the sale will happen anyway.

THE COURT: Right.

MR. RADEKER: But here, no such order has been rendered.

The plaintiff's never been determined to be entitled to that relief, in any event.

Also I'd speak to this conceptually. The "Plantation Federal Bank v. Gray" case that came down from the Court of Appeals a little while ago talked about the mere fact that a foreclosure plaintiff may end up spending money on property preservation. In that context, it said it doesn't provide that most imperative of circumstances that would allow an equitable claim --

THE COURT: Right.

MR. RADEKER: -- to be tried before an at-law claim. Similarly, as here, I mean, that mere fact alone, you know, doesn't dictate that there be any different results so . . .

THE COURT: I -- and I don't -- and I -- and I understand what everybody's arguing, and I understand judicial economy, and I understand the economics and the time factors on both sides. And -- and it's in play on both sides, so I -- I understand that argument. And it's an argument, but it's not determinative. It's not -- it's not the main thing.

So what your counter back is -- is (a) I got to get a judgment. There -- there isn't a dollar

judgment, right? I don't have a -- the rule says has to be a judgment, and it tells you how to bond it off. Do you bond it off based on the judgment, or do you bond it off based on -- how do you set the bond?

MR. RADEKER: It's in the -- and I don't have that section in front of me. I have looked at this years ago because I did -- paid a bond --

THE COURT: Right.

MR. RADEKER: -- for somebody through this process, but it's been a long time. So I'm going off memory, but it's based on --

THE COURT: Property?

MR. RADEKER: -- what it -- what it is that the plaintiff would likely stand to lose if the judgments ultimately affirm on appeal because of the delay in time.

THE COURT: Wait a minute. Wait a minute. Isn't there a statute?

MR. RADEKER: So --

THE COURT: Isn't there a --

MR. RADEKER: Yes.

THE COURT: -- statute that says --

MR. RADEKER: I believe it's 189170, if I remember correctly.

THE COURT: Isn't there something that says if there's a -- if there's a structure on it, the fair market value -- something times that? Or if there's no structure on it, two times the tax value.

MR. RADEKER: It says --

THE COURT: What's that?

MR. RADEKER: It may be in 189170, which I think is the statute that deals with that. I know one of the things you bond off against is waste, so that may be what's bringing you to think about the value of the structure --

THE COURT: I think --

MR. RADEKER: -- or if there's a structure on it.

THE COURT: -- there's a statute somewhere that says that -- that says two -- there's a formula. It's something times -- if there's a structure on it, there's one calculation --

MR. RADEKER: It is two times something.

THE COURT: Yes. I think it -- and then if there's no structure on it, it's the tax assessed value -- because they provide a mathematical formula. And, I guess, the waste portion, then, is -- I don't -- I'm not sure that the waste -- the waste means loss of profit: I can't get it back and sell it. I mean, waste is normally you're doing --

MR. RADEKER: Or it would be --
THE COURT: -- something to it.
MR. RADEKER: -- like, if, say --
THE COURT: You're -- you're --
MR. RADEKER: -- there was a structure --
THE COURT: -- there's crops --
MR. RADEKER: -- on his property.
THE COURT: -- there's crops or there's inventory or something -- something like that.
MR. RADEKER: Or a house --
THE COURT: Okay.
MR. RADEKER: -- on the property were to be destroyed.
THE COURT: Right. Something like that. Okay.
MR. RADEKER: I think what it is is that the sureties stand bound and doubled for a maximum of twice the judgment amount.
THE COURT: Right.
MR. RADEKER: But their ultimate liability is determined to be if there is loss that's occasioned by the appeal. I think that's what "Gerald v. Gerald" said.
THE COURT: Okay. Well, there's a statute --
MR. RADEKER: Yeah.
THE COURT: -- on it. All right. So your -- your reply is (a) we ain't got a judgment --

MR. RADEKER: There's nothing to bond on.
THE COURT: Nothing to bond off.
MR. RADEKER: No, sir.
THE COURT: Okay. All right.
MR. RADEKER: Thanks.
MR. GWYNNE: Just briefly, Your Honor?
THE COURT: Yes, sir.
MR. GWYNNE: I just want to be very clear that I did file a motion to -- my client filed a motion to dismiss the appeal.
THE COURT: Right.
MR. GWYNNE: And I don't think you have a copy of the order. I know Mr. Radeker e-mailed it --
THE COURT: The Court --
MR. GWYNNE: -- to --
THE COURT: -- of Appeals order?
MR. GWYNNE: Court of Appeals order.
THE COURT: I do.
MR. GWYNNE: If you read that order, the Court of Appeals didn't even rule on my motion. They just denied it. But they made comments to the effect of the -- the -- legal -- the equitable claims are pending before the Master in Equity. Appellates have filed a return, contending that the two orders are -- are immediately appealable, despite the fact

that the Master in Equity has not rendered a final judgment. And then they go on to say that they don't even know if it's appealable. They want us to brief the issue.

I cited in my -- my motion to the Appeals Court -- I cited a North Carolina case which is directly on point, which was in my client's favor. So I don't know if the Appeals Court just wants us to brief the issue, but, I mean, the bottom line is the Appeals Court doesn't even know if -- if Mr. Radeker's -- that his client's appeal is appealable.

THE COURT: So the -- the Appeals Court has not ruled on your motion there?

MR. GWYNNE: He -- they've ruled on my -- they have not made -- they denied it, but if you read the order, they gave no reasoning. And they -- they essentially said if -- you can raise this issue when you -- when you do your briefs -- whether it's even appealable. And that's what the order says. They just --

MR. RADEKER: They --

MR. GWYNNE: -- denied it.

MR. RADEKER: They denied the motion, and they end it with "however the parties may address appealability

in their briefs," basically saying, if you-all want to argue about appealability in your briefs, you are welcome to do so.

THE COURT: Okay. All right. But it says "Denied"?

MR. RADEKER: Correct.

THE COURT: Okay. All right.

MR. GWYNNE: It's denied, Your Honor. I -- I agree with that, but they do not --

THE COURT: Okay.

MR. GWYNNE: They did not comment, and -- and -- you know, another thing that I'm having trouble with in this whole situation is Mr. Radeker and his clients seem to think it's my client's job to somehow -- he's assuming that this case is stayed. There's -- there's no case law. There's no statutes that fit this situation. Yet, I'm the one -- my client's the one -- they -- we -- my client's been doing everything they're supposed to do. We've delay the foreclosure for years. There's nothing that require -- Mr. Radeker has not taken any steps to try and stay this case. There's just -- he just assumes that this case is stayed.

This is, essentially, I -- I would argue, just a novel issue for South Carolina law, and, you know, Your Honor basically has two choices: You

can either let the foreclosure proceed, which would be handled very quickly, and then everything can go upon appeal at a relative -- the cost is not that great, compared to my client having to wait for three years to have the appeal go through the process and maybe appeal to the Supreme Court. Meanwhile, my -- my client is spending a great deal of money, and --

THE COURT: Right.

MR. GWYNNE: -- I understand the case that Mr. Radeker cited, but that's good for the -- for the proposition that the equitable claims can sort of jump in front of the -- the legal claims. That's not what happened.

THE COURT: So what -- what you're saying is -- is that I should do the foreclosure?

MR. GWYNNE: Yes, Your Honor.

THE COURT: If they do the foreclosure, and if I rule for you, sell the property, which is what would happen in a foreclosure.

MR. GWYNNE: If -- yes, Your Honor --

THE COURT: All right.

MR. GWYNNE: -- unless Mr. Radeker wants to appeal it. He can certainly appeal and stop the foreclosure, and there's -- there are -- then after you've --

THE COURT: So then we'd have an appeal after you had -- after we had -- we could theoretically have inconsistent results.

MR. GWYNNE: Well, right now the rule -- the ruling of the Court is what happened at the trial. Or it was on those -- on those factual issues.

THE COURT: What we -- we could have the potential for inconsistent results because I could rule -- the Court of Appeals, as he said, could say you're right. You get a new trial. And -- or it's reversed, and they could rule for him, and then you'd have something saying yes on this side and no on this side.

MR. GWYNNE: If --

THE COURT: Meanwhile, you could have sold the property.

MR. GWYNNE: But in that situation, the -- the rules provide a remedy for the Dolans: They file their bond and delay the -- and stop the sale.

THE COURT: Yeah.

MR. GWYNNE: There's a remedy.

THE COURT: So it -- so it would be fixed if I require them to post a bond.

MR. GWYNNE: Yes, Your Honor.

THE COURT: In your mind, it would be fixed if they post a bond.

MR. GWYNNE: They'd -- they'd be able to, you know, get relief --
THE COURT: No. I mean -- I mean the thing that you're arguing -- the -- the -- the -- I don't want to say "policy" -- but the -- the -- the thing that's giving you the most distress is -- is this being delayed, and your client's losing money.
MR. GWYNNE: Well -- well, just having their day in court, Your Honor.
THE COURT: Right.
MR. GWYNNE: Not necessarily --
THE COURT: Well, I mean --
MR. GWYNNE: -- losing money, but --
THE COURT: -- they -- they --
MR. GWYNNE: -- they're having --
THE COURT: -- I mean, they've had -- they've had a day in court.
MR. GWYNNE: And we won. And we won.
THE COURT: You won, and it's appealed, which is -- which is allowed for because you can't --
MR. GWYNNE: No. I -- I disagree with that. I disagree that they're allowed to appeal what they -- what they've appealed, and the Supreme Court and the --
THE COURT: Okay.
MR. GWYNNE: -- Court of Appeals will -- will deal with

that.

THE COURT: Well, but -- but -- but thus far, what we've had is we haven't had anybody agree with that yet.

MR. GWYNNE: We've got to -- but we haven't had anybody disagree --

THE COURT: Right.

MR. GWYNNE: -- with it either.

THE COURT: I mean -- well, we've -- all we've -- all we've had is the Court of Appeals saying "Denied." You can -- you can argue it at the main thing.

MR. GWYNNE: That's correct, Your Honor.

THE COURT: All right. Okay. All right. But --

MR. GWYNNE: They haven't ruled one way or the other.

THE COURT: Okay.

MR. GWYNNE: You know, another thing I'm having a problem with, Your Honor, is what if you tried this all in one day? Under Mr. Radeker's theory, he -- we could have the legal claims tried first, and then he could stop the trial and say, "Wait a minute, I'm going to appeal this." That would be -- that would be -- that would be -- it would not make sense in that situation. Yet that's what's going on here.

Just because a case was bifurcated, you know, he can't have it both ways. He can't treat the

cases as one to delay my -- my client's foreclosure, and then when they -- it suits them, he says, "Oh, this is a final judgment. This is like a final judgment in a trial." So we have to appeal this, and when you -- "Oh, but you still can't go forward with your -- your claim." I mean, it's not fair to my client that they're having it both ways. When it suits them, "Oh, this is one case, and we have to follow Johnston and the Caughman case, and we say that this is how we're going to go." And then, "Oh, but when my -- when I don't like the verdict at the legal counterclaim stage, I can appeal that right away and delay everything."

He's essentially treating them now like two separate trials, where he has the final verdict in one. If we try this all in one day in front of Judge Keith, then we should -- we would have everything done and there would have been one final ruling.

THE COURT: Well, I -- I understand that, but we've got -- you -- you're complaining about something that's allowed. I mean, you're allowed to bifurcate.

MR. GWYNNE: I -- I agree with that, Your Honor.

THE COURT: Well, I mean, you're allowed to do it. But

because of the way it's come out -- and you're allowed, possibly, to appeal, because we do have an appellate process. So -- so -- all right, I understand your argument.

MR. GWYNNE: But an improper appeal is still an improper appeal, whether the Court decides that --

THE COURT: Well, I -- I --

MR. GWYNNE: -- as a motion to dismiss a case --

THE COURT: I understand, but we don't know that this is an improper appeal. I mean, I haven't had anybody tell me it's an improper appeal.

MR. GWYNNE: That's --

THE COURT: I don't have any order that says that.

MR. GWYNNE: I agree with that, Your Honor --

THE COURT: Right.

MR. GWYNNE: -- but the rules allow Your Honor to proceed with this claim.

THE COURT: Well, what -- what the rule -- what the rules say is that if it is a proper appeal, I don't think I'm supposed to do it. The rules also say that a trial judge does have some discretion in how to move forward when they manage a trial to -- to -- to meet all of these factors. And one thing I am interested in is I am interested in the bond posting argument. Because, in essence, if we had

tried this, if we had tried this case and you had lost in front of -- in -- in front of an equity court judge and you're appealing to stop it, you would have had to have post a bond.

So what -- what I kind of want to get back from y'all is (a) a short memo on if -- if or not bond should be posted, and I want y'all to both, then, say what it ought to be because there is a -- I believe there is a statute. Because I -- I -- I mean, I'm just -- I've -- I've -- I've read everything. I understand everybody's argument. I don't think it is the right thing to move forward with trying the equity side case when we have these issues out there remaining, because it's too much of a potential for -- of a conflicting problem, and it just does not seem to be the right -- right way to case manage it -- best way to case manage it.

It also -- you -- you do raise a point, though -- and I had it down on my checklist to ask. Normal foreclosure, if you're appealing to stop it, you post a bond. I understand, technically, that we haven't got an order to appeal from. All right? But I don't know that that statute says the bond is based on the judgment amount. It seemed like the statute says -- I don't know -- it says that -- I

don't have the book in here with me. Anyway, y'all look that up. Because it's Rule 20-something that talks about posting bond and the -- and the statute about doing the stay for matters involving real estate, and I -- I believe it's a calculation based on if there's an improvement or if there is not -- if it's raw land, some type of multiplier for that.

MR. GWYNNE: Just -- I think it says that, Your Honor, judgments directing the sale or delivery of possession of real property. I think that's --

THE COURT: Okay.

MR. GWYNNE: -- the rule.

THE COURT: What does it say? I mean, what does the -- what's the statute say?

MR. GWYNNE: I don't have that in front of me --

THE COURT: Okay.

MR. GWYNNE: -- Your Honor. I'm sorry.

THE COURT: What -- what is it?

MR. GWYNNE: It's 189170.

MR. RADEKER: That's correct. That's my understanding as well.

THE COURT: Okay. All right. Hang on just a minute. We're going to be recessed.

(Off the record from 2:20 p.m. until 2:22 p.m.)

THE COURT: All right. This says, "189170: Staying Judgment for Sale or Delivery of Land." It says, "You will not commit or suffer waste. And if judgment affirmed, you will pay the value and use of occupation until delivery."

All right. It basically seems to say if you sell it, you have to figure out a reasonable rental value in waste that would be tied back into there being a deficiency judgment if you sold it. And if it's unimproved land, the rental value kind of thing. Anyway, it's got a lot of factors in here, how to do the bond. All right? All right. Let's hear, then -- what I want y'all to do is to tell me why you should or shouldn't post a bond and how much the bond ought to be. All right?

MR. RADEKER: Thank you, Your Honor. Looking at this first, if the judgment appealed from direct sale or delivery of possession of real property, then the execution of that judgment is stayed.

THE COURT: Right.

MR. RADEKER: So the statute is inapplicable, per se.

THE COURT: What -- what -- what I -- I understand your first argument is -- is we don't get to the statute, because while I'm appealing doesn't direct it being sold, because it wasn't a foreclosure

because it was something else. But on -- but you're also arguing -- your argument also, though, is -- is that if I win ultimately on the jury stuff, he can't win in the foreclosure suit.

MR. RADEKER: That's right.

THE COURT: So you're saying there is some bleed over because it would -- it would act, and he's saying, yeah, there is bleed over. And if we're going to have bleed over, let's -- let's do treat it like it is the whole way, so he ought to have to post bond, because before he'd have to post bond before. So what I want to hear as argument is why he ought to have to post bond or not, and -- and I expect there to be a legal and a policy kind of arguments. And then tell me what you think the dollar amount ought to be.

MR. GWYNNE: Okay. And one question, Your Honor.

THE COURT: Yes, sir.

MR. GWYNNE: I assume that my argument isn't limited to 189170, if there's another argument that can be made why a bond should be posted -- that it's not --

THE COURT: Sure.

MR. GWYNNE: -- these unique facts?

THE COURT: Yeah. Absolutely. That's policy -- make

policy and argument on that.
MR. GWYNNE: Okay.
MR. RADEKER: You -- you looking for us to do this in a memo or argue this here today? I'm happy to do it. I didn't know we'd be briefed on that, but --
THE COURT: No. I'd rather -- no. I'd -- I'd rather get it in a memo.
MR. RADEKER: Okay.
THE COURT: Because -- because what I also want you to do is -- is say, "and if bond's posted, pursuant to the statute, this is how we would calculate it."
MR. GWYNNE: Do we have a deadline, so I can . . .
THE COURT: Fri -- no. Just kidding.
MR. RADEKER: I mean, that's just whenever we get to it.
THE COURT: Well, you asked.
MR. GWYNNE: Is 20 days okay?
THE COURT: Y'all tell me.
MR. GWYNNE: My client wants to get this case moving, so 20 days would be --
THE COURT: I -- I understand.
MR. RADEKER: I -- I -- I think that should be fine.
THE COURT: Okay. So, let's say -- today is September --
MR. RADEKER: Today's the 24th --
THE COURT: -- 24th.

MR. GWYNNE: -- so that'd be the 14th --
MR. RADEKER: -- 14th, October.
MR. GWYNNE: You're right.
THE COURT: One, two, three -- do y'all want it on a -- do you want a Tuesday or a Wednesday?
MR. RADEKER: Today --
MR. GWYNNE: Tuesday's fine with me.
THE COURT: All right. The 14th.
MR. RADEKER: We'll take it. I'll take it. So . . .
THE COURT: October 14th. All right, all right. We're off the record now.

(Whereupon the within hearing was concluded at 2:26 p.m.)

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(**Certificate accompanies sealed original only.)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Judge



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Appellate Case No. 2014-001384
Common Pleas Case No. 2012-CP-32-2816

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FV-I, Inc. in trust for Morgan Stanley Mortgage Capital Holdings LLC,...Respondent,

v.

Bryon J. Dolan; Lisa S. Dolan; First Citizens Bank and Trust Company, Inc.; Wells Fargo Bank, N.A.; Branch Banking and Trust Company, Defendants,

Of Bryon J. Dolan and Lisa S. Dolan are the.....Appellants.

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PROOF OF SERVICE

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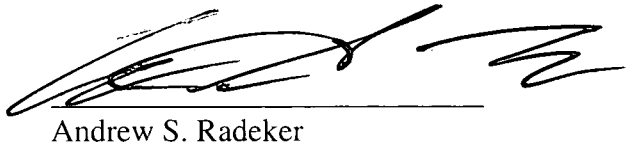
I certify that I served the foregoing return to the Respondent's motion to lift stay by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

Charles S. Gwynne, Jr., Esq.
Jason D. Wyman, Esq.
Rogers Townsend & Thomas, PC
P.O. Box 100200
Columbia, SC 29202

January 30, 2015



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January 30, 2015

**VIA HAND DELIVERY**



The Hon. Jenny Abbott Kitchings
Clerk of Court, Court of Appeals of South Carolina
Edgar Brown Building
1205 Pendleton Street
Columbia, South Carolina 29201

**Re: FV-I, Inc., etc. v. Bryon J. Dolan, et al.**
**Common Pleas Case No.: 2012-CP-32-2816**
**Appellate Case No.: 2014-0001384**

Dear Ms. Kitchings:

Enclosed herewith for filing in the above-referenced case are an original and seven copies of the appellants' return to the respondent's motion to lift stay, with attached proof of service thereof.

Kindly file these documents and return a file-stamped copy to this office in the stamped and addressed envelope enclosed. Of course, if you or your staff have any questions or concerns, please do not hesitate to contact me.

With kind regards, I am,

Very truly yours,
**HARRISON & RADEKER, P.A.**

Andrew S. Radeker

ASR/

Enclosures

cc: Charles S. Gwynne, Jr., Esq.
Jason D. Wyman, Esq.