THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

Kathy Ouzts Rushton, Special Referee

Appellate Case No. 2014-001742

Bernard Loyer, Jr. and Sherry Loyer, Respondents.

v.

S17 Owners Association, Inc.; John L. Avent; Frances Avent; Sylvia S. Berger; Robert J. Berning; Jeanne M. Clavel; Greg Connell; Gerald Crawford; Bruce C. Douglas; Jonathan D. Dunn; Les Galazka; Michael V. Goransky; Frank L. Gougher; David E. Harris; Cathryn A. Knight; John H. Lacher; Kyle R. Larson; Laura Linn; Roger McCoig; Charles Wilmont Miller; Michael O'Brien; Carolyn M. Rischbieter; William Satcher and Belinda Smith-Sullivan, Defendants,

OF WHOM S17 Owners Association, Inc.; John L. Avent; Frances Avent; Sylvia S. Berger; Greg Connell; Jonathan D. Dunn; Michael V. Goransky; Frank L. Gougher; David E. Harris; Cathryn A. Knight; John H. Lacher; Kyle R. Larson; Michael O'Brien; Carolyn M. Rischbieter; and Belinda Smith-Sullivan, are Appellants.

And Charles Wilmont Miller is a Respondent.

FINAL BRIEF OF APPELLANTS

Philip H. Woolhiser, Esquire
112 Trafalgar Street SW
Aiken, South Carolina 29801
(803) 648-9994
Attorney for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES
Re: Appellants' Initial Brief

CASES **PAGE**

RULES

STATUTES

TABLE OF AUTHORITIES

Re: Appellants' Reply Brief

CASES **PAGE**

RULES

ISSUES ON APPEAL

Issues from Appellants' Initial Brief

1. DID THE COURTS HEARING THIS CASE HAVE JURISDICTION OVER THE PARTIES?

2. DID THE SPECIAL REFEREE IMPROPERLY IGNORE THE EQUITY ASPECTS OF THIS CASE?

3. DID THE SPECIAL REFEREE IMPROPERLY BAR 21 CO-LENDERS FROM A SHARE OF THE FORECLOSURE SALE PROCEEDS?

4. DID THE SPECIAL REFEREE ERR IN BARING 21 CO-LENDERS FROM RECOVER UNDER THE MORTGAGE?

Issues from Appellants' Reply to Respondents' Brief

5. WERE THE GROUNDS FOR APPEAL RAISED BY APPELLANTS PROPERLY PRESERVED FOR APPELLATE REVIEW?
   A. THE RESPONDENTS' STATEMENT OF THE CASE ON PAGE 4 DOES NOT COMPLY WITH SCACR RULE 208 (b)(1)(C).
   B. THE LAST SENTENCE ON PAGE 5 OF THE RESPONDENTS' STATEMENT OF THIS CASE IS NOT SUPPORTED BY CASE EVIDENCE AND IGNORES THE MERIT OF OTHER SCRCP ACTIONS.
   C. THE RESPONDENTS IGNORE EQUITY PRINCIPLES AND IMPROPERLY GIVE THE TRIAL COURT THE RESPONSIBILITY TO CONSIDER ONLY MATTERS SPECIFICALLY OBJECTED TO BY THE APPELLANTS IN THE LOWER COURT.

6. DID THE TRIAL COURT ERR IN ITS ORDER AND JUDGMENT OF FORECLOSURE AND SALE BY FINDING IT HAD PERSONALJURISDICTION OVER THE PARTIES?
   A. THE APPELLANT COURT CAN CONSIDER EVIDENCE FROM THE LOWER COURT TO REACH A DECISION.
   B. SUFFICIENCY OF SERVICE HAS NOT BEEN RAISED AS AN ISSUE BY THE APPELLANTS.
   C. VOLUNTARY APPEARANCE CAN NOT BE USED IN THIS CASE TO ESTABLISH JURISDICTION.

7. DID THE TRIAL COURT ERR BY BARRING APPELLANTS FROM RECEIVING A PORTION OF THE SALES PROCEEDS RESULTING FROM THE FORECLOSURE SALE?
   A. THE APPELLANTS DO NOT HAVE AN ADEQUATE REMEDY AT LAW.
   B. THE BALANCE OF EQUITIES ARE IN THE APPELLANTS FAVOR.

STATEMENT OF THE CASE

The "Summons and Complaint" for this action was filed on November 10, 2009. For a considerable time, more than a year, there was an effort by the Plaintiffs to complete service upon the large number of defendants. The service process was complicated by the uncertainty of the defendants' representation, whether by counsel or by self representation. In addition, the Corporate Defendant, S17 Owners Association, Inc., was deeply involved with restructuring and associated actions, in an unsuccessful attempt to improve the corporation's ability to collect funds from the community of lot owners surrounding and benefiting from the 1 mile long aviation runway.

The two plaintiffs hold Promissory Notes totaling $50,000.00. Charles Wilmont Miller, with his wife, holds a Promissory Note of $15,000.00, and is a named defendant in the case. Mr. Miller presented his Note for payment under the foreclosure sale discussed below.

During the five year period that this case has been before the Court, there have been numerous hearings, motions, and transfers of representation. Actions before this Court include the following:

1. Motion to Dismiss by Atty. Marsha Banks, filed 12/11/2009. This Motion was based upon improper venue and non-joining of co-lenders as 3rd party Plaintiffs.

2. Crossclaim by Defendant, Robert Berning, filed 3/03/2010, asking that the Co-Lenders have a judgment of foreclosure.

3. Answer and cross-claim by Defendant, Charles Wilmont Miller, filed 12/16/2009, which states "each individual Lender's lien priority rights and liquidation rights are *par passu* to the other Lenders" and "Plaintiffs lack standing to foreclose on the Mortgage described in the Complaint without the express consent of all Lenders."

4. Alternatively, a crossclaim against Defendant, S17 Owners Association, Inc. was made.

5. Order of continuance filed 10/05/2010 holding all matters in abeyance for 6 months to allow for "Service of Process and Discovery".

6. Order filed 12/09/2013 denying Motion to Dismiss based upon:

   a) Venue in Edgefield County is proper; and,

   b) *Pioneer Savings* (275 S.C. 469)(1980) does not apply in the present case; and,

   c) SRCP Rule 19 does not apply because "all necessary co-lenders are made a party to this action; and,

   d) SCRPC Rule 1.7, does not prevent the Plaintiffs' attorney from representation of the Plaintiffs because "concurrent representation of multiple parties could bring up multiple issues: and a considerable list of other problems.

   e) The 12/09/2013 Order also referred this action to a special referee to hear Rule 60 & 61 Motions and other matters such as omitted lien holders.

7. Special Referee's Order and Judgment dated 6/11/2014 authorizing a foreclosure sale of the Runway, disposition of sale receipts, foreclosure of all Defendants' rights and elimination of any relief to be granted to the Defendants.

8. Notice of Appeal filed 7/07/2014.

9. Motion to Postpone Sale Fund Distribution filed 7/08/2014, which was rejected by the Special Referee.

Based upon the above summary, the information required by SCACR Rule 208(b)(1)(C) is as follows:

1. Nature of Action: The Plaintiffs hold 2 of the 24 notes listed on a single mortgage, which binds the Borrower unto the 24 lenders for the payment of $300,000.00. Under a foreclosure procedure, the 2 Plaintiffs, joined by a single Defendant, have received a portion of the Foreclosure Sale proceeds to the exclusion of the other 21 lenders. The Foreclosure Sale was held on July 8, 2014. The winning bid amount was $88,000.00, with 21 of the 24 co-Lenders excluded from a share of the Sale Proceeds.

2. Response: The Defendants are claiming the distribution of the Foreclosure Sale proceeds is not fair, nor equitable, nor legal. The Foreclosure Judgment is claimed

to be void from the start of the action because of a claimed lack of service upon all Defendants.

3. Action of the Special Referee: Based upon information, claimed to be false by the Appellants, the Special Referee proceeded with the Foreclosure Sale. The Special Referee also extinguished all continued lien-holder rights of 21 co-lenders, a position claimed to be lacking legal support.

4. Date of the Hearing: May 19, 2014

5. Mode of the Hearing: The Hearing was conducted by a Special Referee, without a jury.

6. Amount involved on Appeal: The 21 co-lenders barred from any share of the Foreclosure Sale proceeds, or from any future liens against the successful bidder at the Foreclosure Sale, hold notes in the amount of $235,000.00. Unpaid principal and interest owed to the group of 21 excluded co-lenders exceeds their share of the original mortgage amount, of ($235,000.00). Voiding the Foreclosure Sale involves return of the $88,000.00 winning bid.

7. Date and Nature of the Order of Judgment: The Order is dated June 5, 2014. The Order authorizes the Foreclosure Sale of the S17 Runway and closes any right of 21 of the 24 lenders under the applicable Mortgage to a share of the Foreclosure Sale Proceeds or to the possibility of future lien holder actions against the successful bidder at the Foreclosure Sale.

The dates and descriptions of other orders, judgments and proceedings that may have affected this Appeal, or could explain the issues of this Appeal, are presented above. The Summons and Complaint for this action was filed on November 10, 2009.

ARGUMENT

Initial Brief Issues

1. DID THE COURTS HEARING THIS CASE HAVE JURISDICTION OVER THE PARTIES?

This first paragraph of the Court's 12/09/2013 Order states, "all parties agreed" concerning reference to a Special Referee. The 12/092013 Order refers to "the Defendants" in three other statements. In the third to last line of page 3 of the 12/09/2013 Order, the Court states: "As a practical matter, all necessary co-lenders are made a party to this Action".

Although the "Summons and Complaint" for this action was filed on November 10, 2009, on October 5, 2010 an Order of Continuance was filed allowing more time for "Service of Process". SCRCP 3.(a)(2) requires actual service not more than 120 days after filing. The Court allowed the civil action to continue beyond the 120 day allowance for service. However, the case record, even at this date, almost 5 years after the case filing, does not contain the necessary proof of service upon all defendants. In particular, the registered agent of the Corporate Defendant, John L. Avent, has not been served.

During the initial stages of the 5/19/2014 Foreclosure Hearing, the Court performed an evaluation of the representation of the defendants. The Court asked the Plaintiffs' Counsel if Defense Counsel, Marsha Banks, represented all but four defendants, (R.p. 43 Line 24 – R.p. 44 Line 13). The Court asked the individuals in the Court Room if any were not represented by Ms. Banks, and hearing no response proceeded to hear the case, (R.p. 44 Lines 22-25) . The Court had no way to know if every named defendant was within the sound of the voice of the Special Referee, had not swore in the entire audience, and had not requested any evidence of any attorneys present as to their possession of retainer agreements from the large number of defendants.

Later, Ms. Banks testified that she represented "quite a few Defendants in this case", (R.p. 58 Lines 11-14). There is no testimony from Ms. Banks claiming that she represents all of the defendants, except those represented by Attorneys Medlock and Simmons. Attorney Medlock, representing the Plaintiffs, was responsible for service upon the defendants. However, rather that referring to Court records as evidence of service, he chose to pass the service responsibility to Atty. Banks, a responsibility she denied.

Paragraph #5 of the Plaintiffs' Complaint uses S.C. Code §15-35-840 to prove the 25 named defendants have designated an attorney as their agent for service.

S.C. Code §15-35-840: Every judgment creditor who enters a judgment in any court of record in this State and does not at the same time enter as part thereof the appointment of an agent upon whom process may be served in any action or proceeding affecting any real estate upon which the judgment may at any time constitute a lien shall be deemed thereby to have constituted the attorney of record making the entry of such judgment as the agent of such judgment creditor and of his successor in interest for the purpose of accepting service of or being served with process in any such action.

In the unlikely event that the Plaintiffs' attorney maintained that position as a validation of jurisdiction, it must be pointed out that there has been no filing of a judgment in this action, and the cited code has no application to the Plaintiffs' search for an agent for service upon the 25 named defendants.

Because of the lack of service on the Corporate Defendant and other defendants, in the category of "lenders/note holders", the Order filed 12/09/2014 was void due to the Court's lack of jurisdiction. The counsels of the parties should have been aware of the jurisdictional issue, but instead chose to proceed to foreclosure.

Because of the lack of jurisdiction over all the parties of this action, the Foreclosure Sale held on July 08, 2014 must be held to be void and the $88,000.00 winning bid proceeds must be returned to the winning bidder.

Finding #4 of the Special Referee's Order states that all defendants and/or attorneys of record making either an appearance or filing a responsive pleading were notified of the Hearing before the Special Referee. The Hearing Notice did not reach the defendants that were not served and that were not represented by Attorneys Banks, Simmons or Medlock.

2. DID THE SPECIAL REFEREE IMPROPERLY IGNORE THE EQUITY ASPECTS OF THIS CASE?

In the 1988 Case, *Pee Dee State Bank v. Prosser*, 295 S.C.229 (Ct. App. 1989), the Court stated: "An action to foreclose a mortgage is an action in equity." The 2011 Case, *Matrix Financial Services Corp. v. Frazer*, 394 S.C. 134 (S.C. 2011), in a holding involving equitable subrogation, explained the need to accomplish substantial justice and discussed the maxim that no one should be enriched by another's loss.

In the current case, all the 24 individual co-lenders have the same position in a foreclosure suit against the Corporate Defendant, S17 Owners. The two plaintiffs, Bernard and Sherry Loyer, each hold a note that possesses the same position as all the other 22 notes, that is, all notes are first position liens. The two Loyer Plaintiffs added the other 22 note holders as defendants only for the purpose of increasing the Loyer share at the pain of eliminating the share of the non-Corporate defendants. Clearly, the Loyer Plaintiffs seek to be enriched by the loss of the other lender's/note holders. The fairness principle of this equity case requires all lenders to be treated equally at the time of distribution of the Foreclosure Sale bid amount.

In Finding #14 of the Special Referee's Order, the Court gives high evidentiary significance to the absence of "testimony from any other Defendants who were named in this action to compel them to come forward to prove their Notes and/or debt." There is no equitable principle that required the Plaintiffs to name all of their co-lenders to be "defendants". The single mortgage issued to identify the security for all the notes, lists 24 notes having an aggregate borrowed amount of $300,000.00. Semi-annual payments made under the notes to each note holder were exactly proportional to the note value, for

example, the payment to the holder of a $10,000.00 Note was exactly twice the amount paid to a holder of a $5,000.00 Note. There was no uncertainty over the amount owed to each co-lender.

Fairness to all note holders requires the proceeds from the Foreclosure Sale to be paid to all co-lenders in an amount proportional to the amount of the applicable note. The Plaintiffs' addition of all co-lenders to the foreclosure action as "defendants" serves no equitable purpose of fairness. The purpose of the addition of "defendants", was to increase the share of the Plaintiffs in the Foreclosure Sale Proceeds by decreasing the share of other co-lenders.

Another equitable doctrine that applies to the current action is "Unjust Enrichment". Similar to the situation in *Barrett v. Miller*, 283 S.C. 262 (CT. App. 1984), in the current case the taking of a larger share of the foreclosure sale proceeds, by decreasing the share of all other co-lenders, is an unjust enrichment wherein the Plaintiffs have been unjustly enriched at the expense of the co-lenders.

It is entirely proper that the Special Referee's decision on sale proceeds distribution be analyzed by the Appellant Court by an complete review of the case as presented to the lower court. The Court of Appeals in 1988 held that an independent review is mandatory - not optional: "In an appeal of an equitable action tried before a Master authorized to enter final judgment, this court must review the entire record and make its own findings of fact in accordance with the preponderance of the evidence." *Ellis v. Smith Grading & Paving, Inc.*, 294 S.C. 470 (Ct. App. 1988).

The Mortgage that is the subject of this action, (Plaintiffs' Exhibit #4 from the June, 2014 Hearing), contains the following provisions relevant to this case:

a) Uniform Covenant #4 allows any lender to initiate an action against the Corporate Defendant to preserve the runway, e.g. repair the runway.

b) Non-Uniform Covenant #9, in the event of Corporate Defendants' failure to make a semi-annual payment, allows any of the 26 co-lenders (individuals) to

initiate and complete a Foreclosure Sale. The third provision of this Covenant #9 sale proceeds distribution applies after satisfaction of sale expenses and a number of other expenses incurred since the Mortgage Date of 5/02/2006. This 3rd provision is the "payment in full of the principal indebtedness and interest thereon". "Payment in full of the principal" means the entire original $300,000.00 principal, not the partial $50,000.00 principal of the two plaintiffs. The terms of the mortgage make the plaintiffs' addition of 24 defendants useless and a hindrance to the efficient operation of the Court.

The second major error of the Special Referees' Finding #17 is the complete oversight of the second Provision of the above described Covenant #9, Sale Proceeds Distribution. This second provision requires the payment of "insurance, taxes and other encumbrances". This calculation was completely ignored by the Special Referee.

The trial court in an equity action may determine the reasonableness of attorney fees. *Book of Enoree v. Yarborough*, 120 S.C. 385 (1922) In light of the short comings of the service procedure of this case, as set forth under Issue 1 above, it is questionable if a $5,000.00 attorney fee is justified for the Plaintiffs' attorney. The deficiencies in so basic a requirement as proper service, suggest review of the fee award is justified. Second, the $400.00 in Bankruptcy fee is not directly related to this case and should not be allowed.

Last, is the $2,000.00 attorney fee of Defendant Charles Wilmot Miller's attorney. The Non-Uniform Covenant #9 of the mortgage of this case requires that the proceeds of the Foreclosure Sale are applied first, "to the expense of advertising, selling and conveying said property, including a reasonable attorney's fee;" the attorney of Defendant Miller was not involved in advertising/selling/conveying process. Instead he advised and assisted his client in a scheme to obtain a portion of the Sale Proceeds. His efforts did not aid the sale process, instead his efforts were directed toward the distribution of proceeds to a single individual. The result of his efforts were realized after the Sale took place, and hence, his fees should be paid solely by his client.

In view of the attempt to avoid the fairness principles of this equity case, it is difficult to identify any value added by Defendant Miller's counsel; additional support for this billing is needed.

Applying equitable principles of fairness, prevention of unjust distribution of funds, and the need to revisit the attorney fee award, this case should be remanded to the lower court for a recalculation of the proper distribution of the Foreclosure Sale Proceeds.

3. DID THE SPECIAL REFEREE IMPROPERLY BAR 21 CO-LENDERS FROM THEIR SHARE OF THE SALE PROCEEDS?

Finding #20 of the Special Referee's Order bars 22 named individuals, (comprising 21 Co-Lenders) from receiving any recovery under the mortgage of this Action. The bases for this bar are the lack of a crossclaim for foreclosure and not proving the existence of any debt. As explained above, the specific foreclosure provision of the mortgage only requires a single lender to file, however Sale Proceeds are applying against the entire principle amount. Also, as shown, the amount of debt owed to each lender is a straight forward calculation; there is no need for each defendant to individually prove the existence of debt.

Also, a crossclaim by each of the 21 Co-Lenders has no meaning for the following reasons:

a) Complaint Paragraph #9 states all of the sums secured by the Mortgage are accelerated; and,
b) Complaint Paragraph #11 states the conditions of the Mortgage have been broken and the entire balance is due and payable; and,
c) Complaint Paragraph #12 does not apply; there are no known subordinate liens or claims. The lien of each of the 21 defendants is equal in position to that of the Plaintiffs; and,
d) Complaint Paragraph #17 admits the 21 lenders, (22 individuals), are "under the Mortgage". There is no equitable reason for the 21 lenders to assert their

claim, because their claim is clearly stated on the face of the Mortgage. The quantification of the amount owed to each lender was established by the Plaintiffs' claim.

e) Charles Miller was accepted by the Special Referee to be eligible for satisfaction of his Note; yet, he did not enter a crossclaim.

f) During the direct examination of Mr. Miller, his $15,000.00 Note was entered into evidence with total principal and interest owed of $23,346.01, (R.p. 54 Line 12 – R.p. 57 Line 12). Plaintiff Sherry Loyer presented her $10,000.00 Note with total principal and interest owed of $14,846.88, (R.p. 51 Line 3 – R.p. 52 Line 10)

g) $22,346.01 ÷ 3 = $7,448.67

$14,846.88 ÷ 2 = $7,423.44

For an average of $7,436.00 debt for each $5,000.00 increment of Note value. No practical need for each individual Co-Lender to complete the same debt calculation.

h) In his closing statement, the Counsel for Mr. Miller stated he only had to prove two things, i.e. a debt owed and the existence of a Mortgage securing that debt, (R.p. 67 Line 20 – R.p. 68 Line 6).

i) Mr. Miller did not counterclaim, he only offered evidence of a debt and a Mortgage. Yet, the Special Referee held that Mr. Miller "placed the Note and Mortgage in the hands of "Plaintiffs' Attorney for collection. (Finding #14 of the Order)

j) The transcript does not contain evidence of Mr. Miller's debt being placed into a relationship with other claims.

As described above, the Special Referee did not require a crossclaim from Mr. Miller. The only requirement for payment to Mr. Miller was proof of a debt and an associated Mortgage. This is the same evidence before the Court and which, under equity, should have been applied to all other 21 Co-Lenders.

4. DID THE SPECIAL REFEREE ERR IN REQUIRING 21 CO-LENDERS TO PARTICIPATE IN THE MORTGAGE FORECLOSURE?

In its 12/04/2013 Order, the Court referred this action to the Special Referee with authority to enter a final judgment and to sell the subject property at public sale. The Special Referee was also ordered to hear on the merits matters such as "marketability of title and/or matters relating to omitted lienholders or claimants".

In her Finding #19, the Special Referee considers the mortgage default provision that any Lender may declare all sums secured by the mortgage to be due and payable. However, the Plaintiffs did not declare all sums secured by the mortgage to be due. The first prayer of the Plaintiffs' Complaint is for the Court to determine the amount due upon the Notes held by the Plaintiffs. In particular, the Plaintiffs did not include the notes totaling $250,000.00 held by the other 22 Lenders whose notes were secured by the single mortgage of this action.

The testimony of Plaintiff, Bernard Loyer, Jr. only addresses his note and claim of $59,714.70 and he asks the Court to foreclose on the mortgage, (R.p. 45 Line 23 – R.p. 50 Line 5). Similarly the testimony of Plaintiff, Sherry Loyer only addresses her note and a claim of $15,078.66, (R.p. 51 Line 3 – R.p. 52 Line 22). Lastly, the testimony of Defendant, Charles Wilmot Miller addressed his note and a claim for $22,346.01 secured by the mortgage, (R.p. 54 Line 13 – R.p. 57 Line 7).

The only testimony given at the hearing leading to the 12/04/2013 Order was directed to the claims of 3 mortgagees. No claims were presented to the Court by the remaining 21 mortgagees.

In its discussion of *Pioneer Savings & Loan Association of Whiteville v. Horry Coastal Enterprises, Inc.*, 275 S.C. 469 (1980), the Court's 12/04/2013 Order held that this action could not be dismissed because all co-lenders/co-mortgagees have been named. The Court does not rule on the status of the mortgage if the co-lenders/co-mortgagees decline to come forward to assist their interest in the property.

In the case, *Bartles v. Livingston*, 282 S.C. 448 (S.C. App. 1984), the Court stated; "we hold that a mortgagee whose debt remains unsatisfied after sale of the property is entitled to a deficiency judgment, unless the right to a deficiency has been waived." In the current action, the Plaintiffs waived the right to a deficiency. However, the Plaintiffs could only waive for themselves. The remaining 21 co-mortgagees did not waive and their standing as first position lien holders is equal to that of the Plaintiffs.

As discussed in Issue #1 above, the Judgment and resulting Foreclosure Sale are void because of a lack of service upon all parties. However, the following Issue #4 Argument applies notwithstanding any holding on the lack of service issue.

S.C. Code §29-3-630 requires that sale under a mortgage, with a mortgagee's power to sell, must have the debt, for which the security given, be established by a judgment of some court of competent jurisdiction. Setting aside the lack of jurisdiction issue, the criteria of S.C. Code §29-3-630 is satisfied in the current action. The Foreclosure Sale is valid and title may pass.

However, in the current case, the entire debt of the mortgagor was not claimed. Only the Plaintiffs' $50,000.00 notes and Mr. Miller's $15,000.00 note were claimed. The 21 remaining note holders under the mortgage were offered the opportunity to claim their debt to be due, but there was no requirement that they do so.

SCRCP Rule 19(a) provides the Court with the authority to join an action if required for complete relief among parties and in particular Rule 19(a)(2)(i) requires joiner of a person needing to protect an interest relating to the subject of the action. To satisfy the Rule 19 requirements, the 22 Defendants had to be made a plaintiff, not a defendant. A plaintiff could present his/her note and the amount of the associated claim. A defendant would disclaim any responsibility for payment of the Plaintiffs' claims. Obviously, if the Plaintiffs had properly joined the 22 defendants as plaintiffs, they would have had to include the joined plaintiffs in the distribution of Foreclosure Sale Proceeds. The Special Referee did not require the joiner of 22 Plaintiffs.

Lacking the joiner of all required co-lenders/co-mortgagees, the 21 notes associated with $250,000.00 of the $300,000.00 mortgage amount remain and the mortgage is not satisfied by the Foreclosure Sale. Instead the successful bidder at the sale receives title to the S17 Runway collateral, but encumbered by the mortgage securing payment of the 21 outstanding notes.

Issues from Appellants' Reply to Respondent's Brief

5. WERE THE GROUNDS FOR APPEAL RAISED BY APPELLANTS PROPERLY PRESERVED FOR APPELLATE REVIEW?

A. THE RESPONDENTS' STATEMENT OF THE CASE ON PAGE 4 DOES NOT COMPLY WITH SCACR RULE 208 (b)(1)(C).

In the penultimate sentence of Page 4 of the Respondents' Initial Brief, the Respondents state that Appellants have "failed to raise any affirmative defenses except the defense of improper venue". The Respondents' "affirmative defenses" statement referred to a pre-foreclosure hearing answer, which was not relevant due to evidence presented at the Foreclosure Hearing.

In the last sentence of the second paragraph of Page 5 of the Respondents' Initial Brief, the Respondents again state that the Lower Court did not receive evidence that the Appellants were owners of their respective notes. Paragraph 7 of the Special Referee's Order and Judgment dated 6/5/2014, states that notes were made, executed and delivered to various lenders – not only to the Respondents. The Court acknowledged that terms and conditions are stated in the Notes. In Paragraph 8 of the Special Referee's Order and Judgment dated 6/5/2014, the Court acknowledged that all of the Respondents and Appellants received a mortgage, which evidences the repayment of money advanced by the mortgagees to the mortgagor.

Plaintiffs' Exhibits #2, #3, and #7 clearly show that all the notes signed by the mortgagor, S17 Owners Association, Inc., only contain 2 variables, i.e., the note amount and the installment amount. The amortization table accompanying each note is only dependent upon the note amount. The claim for unpaid principal and interest by each Respondent and Charles Wilmot Miller is exactly proportional to the applicable note amount. The mortgage

placed into evidence by the Respondents, (Plaintiffs' Exhibit #4), can be used to identify the exact note amount for each Appellant.

Therefore, the absence of evidence of the note amount and unpaid note principal/interest that is proclaimed by the Respondents as "uncontested", is certainly contested. The note amounts, unpaid principal and unpaid interest do not require additional evidence; the Court could have easily determined the status of the note held by each Respondent without additional evidence being entered.

B. THE LAST SENTENCE ON PAGE 5 OF THE RESPONDENTS' STATEMENT OF THIS CASE IS NOT SUPPORTED BY CASE EVIDENCE AND IGNORES THE MERIT OF OTHER SCRCP ACTIONS.

In the last sentence of Page 5 of the Respondents' Initial Brief, the Respondents state that the Appellants did not make a SCRCP Rule 59 (e) Motion to alter or amend. This is not correct.

Attorney Marsha Banks, who perhaps represented some of the Appellants, explained that the Court experience at that point would have demonstrated the ease of proving their note, (R.p. 65 Lines 1-22). The Court accepted that a motion was being made, (R.p. 65 Lines 23-24). The Respondents' Attorney objected to the use of affidavits, which use was never mentioned by Attorney Banks, (R.p. 66 Lines 16-23). The Court denied the motion for a 5-day delay; a delay designed to allow time for all Appellants to appear with their individual note. The Court assumed all the defendants understood what the Court wanted to see. Faced with the prospect of a 5-day continuance that would have guaranteed all Appellants and others an equitable share in the foreclosure, the Court ruled: "This has been going on long enough", (R.p. 67 Lines 5-17). This is not a sufficient reason for denial of a motion.

The 6/5/2014 Judgment for a Foreclosure Sale, was appealed to the Court of Appeals with a Notice of Appeal filed with the Edgefield Clerk of Court on July 7, 2014. The Appeal included the validity of excluding a group of Defendants from the distribution of Sale Proceeds. On July 8, 2014 the Appellants filed a "Motion to Postpone Sale Fund Distribution" with the Edgefield County Clerk of Court. This motion would have held the

Sale Proceeds in escrow to efficiently and equitably respond to the results of the "Notice of Appeal". While similar in effect to a SCRCP Rule 59(e) Motion, the SCRCP Rule 59(a) "Postpone Motion" could not be filed within the 10-day service requirement of Rule 59(e).

SCRCP Rule 46. Exceptions, unnecessarily, also applies as a substitute for a Rule 59(e) Motion. The Notice of Appeal, served by the Appellants, makes known to the Court, the Appellants' objection to the action of the Court. The absence of an opportunity to object at the time of the Lower Court's Order, results in the absence of an objection being non-prejudicial to the Appellants.

Concerning the remaining seven potential issues, listed by the Respondents on pages 6 and 7 of their Initial Brief, the statement of the Appellant Court in *Kneale v. Bonds*, 452 S.E. 2d 840, 317 S.C. 262 (S.C. Ap. 1994) is correctly on-point: "On appeal of an equitable action tried by a master, this court has authority to find facts in accordance with our own view of the preponderance of the evidence."

The Respondents provide extensive discussion of the case law surrounding issues raised for the first time on appeal; even going so far as to label the "first time on appeal" issue as "axiomatic". The Appellants in this case, are not raising issues for the first time by this appeal. Instead, the Appellants are asking the Appellant Court to consider the evidence and testimony and using equity principles, to decide if the proper action was taken by the Lower Court.

The Respondents' Footnote (1) on page 7 of their Initial Brief applies to the Record on Appeal and an administrative tribunal proceeding. The application to the Lower Court proceedings is not apparent.

C. THE RESPONDENTS IGNORE EQUITY PRINCIPLES AND IMPROPERLY GIVE THE TRIAL COURT THE RESPONSIBILITY TO CONSIDER ONLY MATTERS SPECIFICALLY OBJECTED TO BY THE APPELLANTS IN THE LOWER COURT.

U.S. Bank Trust Nat. Ass'n v. Bell, 684 S.E.2d 199, 385 S.C. 364 (S.C.App. 2009) included the following statement in its Standard of Review: "A mortgage foreclosure is an

action in equity." This was confirming a 1997 case. The Respondents agreed the current Foreclosure Case is an action in equity and the Court of Appeals has a broad scope of review. (Respondents' Initial Brief, page 6) The Respondents then continue to list eight possible errors that could have been made by the Lower Court, but then the Respondents state that since the eight errors were not considered by the Trial Court, then the issues were not preserved for Appellate review.

The issue of personal jurisdiction is of primary concern, since the lack of jurisdiction nullifies all subsequent issue consideration. A typical example of the Lower Court's investigation of the jurisdiction issue is the Lower Court's question presented to the courtroom audience: "So is everyone else represented by Ms. Banks, is there anyone else that's not represented by her?" No response from the courtroom, (R.p. 44 Lines 22-25). This action by the Lower Court raises several questions. First, how did the Court even know the courtroom heard the question? Second, how did the Court know that every named Defendant was present in the courtroom? The answer to both questions is that there was no way for the Court to know all involved parties were under the Court's jurisdiction based upon a general question addressed to a random assemblage of hearing onlookers.

6. DID THE TRIAL COURT ERR IN ITS ORDER AND JUDGMENT OF FORECLOSURE AND SALE BY FINDING IT HAD PERSONAL JURISDICTION OVER THE PARTIES?

A. THE APPELLANT COURT CAN CONSIDER EVIDENCE FROM THE LOWER COURT TO REACH A DECISION.

In the first sentence of the 2nd Issue of the Respondents' Initial Brief, on page 8, the Respondents again state that the lack of personal jurisdiction was not presented to the lower court. As described above, (the last 4 lines of page 4), this is an equity case and the Appellant Court certainly should review the existing evidence to confirm a lack of personal jurisdiction does, in fact, exist. In the second sentence of the above referenced 2nd Issue, the Respondents claim some Appellants have waived the right to appeal. As set out above, the waiver is not relevant.

B. SUFFICIENCY OF SERVICE HAS NOT BEEN RAISED AS AN ISSUE BY THE APPELLANTS.

The Respondents' discussion of sufficiency of service on page 8 of its Initial Brief is not relevant. The Appellants are only claiming that there are a certain number of individuals in this case who have not been served at all. These are individuals who have not been served by any mechanism set forth in SCRCP Rule 4(d) as effective. The Respondents possess a small, but easily ascertainable, number of affidavits of service. The Lower Court improperly relied upon the Respondents' attorney to identify the Defendants represented by Attorney Marsha Banks, (R.p. 44 Lines 11-14). Earlier, the Lower Court recognized that Attorney Marsha Banks did not represent all Defendants, (R.p. 43 Line 24 – R.p. 44 Line 3). Later in the Foreclosure Hearing, Attorney Marsha Banks again informed the Lower Court that she represents "quite a few Defendants in this case", (R.p. 58 Lines 11-12). The Lower Court did not ask Attorney Marsha Banks, which Defendants were or were not represented. Although the evidence indicates there is a question of Defendant representation, there are no issues raised and no evidence in the record that pertains to "sufficiency of service". There are Defendants claiming no service, not the insufficiency of some service.

C. VOLUNTARY APPEARANCE CAN NOT BE USED IN THIS CASE TO ESTABLISH JURISDICTION.

In the second sentence of the Respondents' 2nd Issue of their Initial Brief, "voluntary appearance" is correctly stated to be present in SCRCP Rule 4(d). What is incorrect is the discussion of "voluntary appearance" in page 9 of the Respondents' Initial Brief. The Respondents state that all Appellants filed an answer to the Complaint through Attorney Marsha Banks. The Respondents' attorney admitted that was incorrect by acknowledging Defendant Mr. Berning was not represented by Attorney Marsha Banks, (R.p. 44 Lines 11-15). In addition, as described above, the Lower Court knew that some Defendants were not represented, as did Attorney Marsha Banks. To be the attorney of record for all Defendants, as stated in the Respondents' Initial Brief, page 9, Marsha Banks would have to have some written evidence of "acceptance of representation" by all Defendants, which she apparently

does not. Otherwise, the attorney would not have stated she represents only "quite a few defendants", as stated above.

The Respondents' reliance on *Sterns Bank Nat. Ass'n v. Glenwood Falls*, LP, 373 S.C. 331 (S.C. App. 2007) is misplaced. The Court in *Sterns Bank* did give examples of voluntary appearances; however, the examples do not match the current case. In the current case, there are Defendants who never accepted representation by Attorney Marsha Banks and never announced that they did. The operative phase from *Sterns Bank* is: "Accordingly, Courts decide on a case by case basis whether a Defendant's act demonstrates intent to submit to the Courts' jurisdiction." For some defendants in the current case, there are no acts that can be used as a basis for the said decision.

The Appellants have filed a Motion with the Appellant Court to require the Respondents' Attorney to certify the specific valid affidavits of service he possesses; and to require Attorney Marsha Banks to provide copies of specific Defendant's Retention Agreements. This Motion has not been answered by the Appellant Court at this time.

In the last full sentence of page 8 of the Respondents' Initial Brief, there is the statement: "The failure of Appellants to dispute Ms. Banks' representation is compelling." The compelling aspect of disputing representation would seem to be claimed by the Respondents to be some form of a "voluntary appearance". The Respondents fail to recognize that some of the Defendants could have believed the runway operation was a benefit to the community, the S17 Owners Association, Inc. should be given the opportunity to survive, and the Loyer Lawsuit was primarily of benefit to the Respondents – not the Community. Attorney Marsha Banks described this position of some community residents, unsuccessfully, to the Lower Court, (R.p. 58 Line 11 – R.p. 60 Line 5).

The Respondents argue the insufficiency of service issue in pages 10-12 of their Initial Brief. As discussed by the Appellants before, the use of an "Insufficiency of Service" defense would only be of use to a Defendant, if there had been some attempt to actually serve the Defendant. On page 10 of their Initial Brief, the Respondents refer to *Garner v. Houck*, 312 S.C. 481 (S.C. 1993) as an example of an attempted use of "insufficient service of

process under Rule 12". In *Garner*, a Defendant claimed the Plaintiff had served an unauthorized agent. There was an actual physical transfer of a document to some person; the transfer just involved the wrong person. The *Garner* attempted service and other examples of the use of SCRCP Rule 12, all involved at least an attempted transfer of a document to an actual person. In the present case, the Respondents did not even come close to transferring a Summons and Complaint document to certain Defendants. Not a single Appellant is claiming delivery of a document was insufficient, instead, the claim is that delivery of the Summons and Complaint did not occur at all. SCRCP Rule 4(d)(8) addresses refused delivery by certified mail; that event would not allow the Plaintiff to claim sufficiency of service. Therefore, the level of an attempt of service must exceed simply mailing a certified letter. There is no evidence that the Respondents' attempt at service even rose to the level of a certified letter to all Appellants.

In the penultimate sentence of page 11 of the Respondents' Initial Brief, the Respondents again state: "the Trial Court was never asked to rule upon any such jurisdictional challenge by Appellants." The reason for this lack of challenge is clear, i.e. a named defendant, who was never physically served (or made a voluntary appearance) would legally never know he had any case involvement.

7. DID THE TRIAL COURT ERR BY BARRING APPELLANTS FROM RECEIVING A PORTION OF THE SALES PROCEEDS RESULTING FROM THE FORECLOSURE SALE?

A. THE APPELLANTS DO NOT HAVE AN ADEQUATE REMEDY AT LAW.

In the last paragraph of page 12 of the Respondents' Initial Brief, the Respondents are arguing that the current case is not based in equity. This is disregard of *U.S. Bank Trust Nat. Ass'n.* listed in Page 4 above, which holds that a foreclosure action is in equity. The 3 cases cited by the Respondents do not apply in the present case. The following argument will prove that an adequate remedy at law is not available in the current case.

The Respondents' addition that equity does not aid those who slumber seems to revert to the Respondents' argument that all the Defendants had to do was to appear before

the Lower Court, prove their principal/interest balances, and just like that they share in the sale proceeds. This concept of slumbering Defendants ignores the point that Attorney Banks made several times. Her last attempt being her description of defendants not understanding the type of justice being handed out by the legal system, (i.e. how can a lender of funds end up being a defendant?) and a group of individuals trying to do what is best for their community, (R.p. 64 Line 9 – R.p. 65 Line 22).

In the second sentence of page 13 of the Respondents' Initial Brief, the Respondent claims the Appellants had an adequate remedy at law; that remedy being to sell the most valuable asset of their community and receive a small share of the runway's actual worth. Also, the Respondents claim the Appellants have a continuing adequate remedy at law; that remedy most likely being to pursue a judgment via their individual notes. The judgment, perhaps being against an entity with minimal assets, (S17 Owners Association, Inc.), or perhaps against the new runway owner with uncertain results.

In the first full paragraph of page 13 of their Initial Brief, the Respondents attempt to utilize *Lever v. Lighting Galleries, Inc.*, 374 S.C. 30 (S.C. 2007) to prove the Appellants, having both a note and a mortgage, originally had the option of an action on the note or a foreclosure action. The Respondents overlook the third available action, which is doing nothing, except giving their mortgagee time to solve its financial issues. The Respondents ignore the possibility that the multiple note/single mortgage combination selected by the runway community was a design that would make it difficult for a minority of mortgagors/note holders to foreclose against the community's central, valuable assets. Equity principals giving all note holders a share of risk/reward based only on the amount of their investment in the community was perhaps the primary goal of the community's note/mortgage/contribution campaign.

B. THE BALANCE OF EQUITIES ARE IN THE APPELLANTS FAVOR.

The last paragraph of page 13 of the Respondents' Initial Brief asserts the concept that equity principles would require the foreclosure. If the principle of fairness and unjust

enrichment would have been properly applied, the total principle and accrued interest of all notes would be $446,920.20 (see below Note 1). It is unlikely a foreclosure sale would have been pursued, since all noteholders would have been in the same position as before the sale. The foreclosed sale brought in less than 20% of the outstanding amount owed. There is a very real possibility the noteholders would have decided to pursue other options and avoid all the expenses, such as advertising and legal fees, suffered by the foreclosure sale.

The Respondents' final paragraph on page 12 states the Appellants were being advised by attorney(s) to cross-claim. If the Appellants had taken the advice, the proceeding result of a $446,920.20 claim would have resulted, the foreclosure sale would have produced a small return of the initial investment to all note holders, including the Respondents, and the only winner would have been the high bidder at the foreclosure sale. Certainly not an outcome favored by most note holders and the principles of equity.

Note 1: Total original note total was $300,000.00. Using Mr. Miller's $15,000.00 note as an example, at the time of the Foreclosure Hearing, the note principal was reduced to $14,015.76 and accrued interest was $8,300.25 or a total amount owed of $22,346.01. (TP 19, L1-14) The same payments were made for all notes. Therefore the total owed is $300,000.00 x $22,346.01 ÷$15,000.00 = $446,920.20.

CONCLUSION

The Plaintiff's were unable to complete service upon all the defendants. Attorney Marsha Banks obtained a signed retainer agreement from some defendants, but not all. Therefore, the Court lacked jurisdiction over all parties. The involved Courts relied upon the statements of Counsel for parties; however, said statements do not overrule the requirements for written evidence of service. Therefore, the final judgment and Foreclosure Sale should be held to be void, the sale funds should be returned to the successful bidder, and leave to initiate a new action should be granted.

This Foreclosure action is a proceeding in equity. If this action is not void for a lack of jurisdiction, then the exclusion of 21 co-lenders from the proceeds of the Foreclosure Sale is not fair. This action should be remanded to the lower court to re-allocate the sale

proceeds, evaluate the proper payments for fees and expenses, and determine the effect of the Plaintiffs' waiver of a right to a deficiency from the Foreclosure Sale.

If it is determined that the courts in this case did have jurisdiction, and that the lower Courts properly ruled upon the equity aspects of this case, then, the case should be remanded to re-evaluate the distribution of the Foreclosure Sale Proceeds.

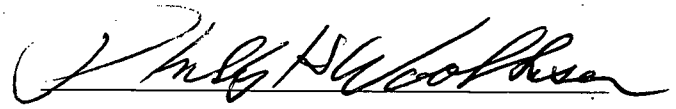
The Respondents were required by the terms of the Mortgage to pay the full amount of the Mortgage's principal indebtedness, not solely a part of the principal. The Appellants were improperly denied the right to a deficiency judgment. There was no legal requirement for Defendents to crossclaim.

It was not accurate for opposing counsel to claim that the amount owed to the Defendents that did not crossclaim was unknown. All co-lenders had a share in the total Mortgage indebtedness proportionate to the Note values clearly set forth in the Mortgage, and all notes were treated equally.

In the event the Court is determined to have jurisdiction, and equity principles are properly followed, and the 21 co-lenders were properly barred from a share of the Foreclosure sale Proceeds, then, it is proper that the portion of the $300,000.00 mortgage held by the 21 individual co-lenders should remain on record. The mortgage in this action secures the debt of 24 co-lenders. The security of 21 co-lenders under a single mortgage can not be removed by a debt collection of a minority of co-lenders.

The Order of the Special Referee should be remanded for a determination of the allocation of foreclosure sale proceeds to all Mortgages, the judgment amount each Defendant owns against the winning bidder at the foreclosure sale, and reconsideration of the allowed attorney fees.

Respectfully submitted,



Philip H. Woolhiser

I, Philip H. Woolhiser, hereby certify that the Appellants' Final Brief complies with Rule 211 (b), of the South Carolina Appellate Court Rules.

Philip H. Woolhiser
S. C. Bar No.: 12466
112 Trafalgar Street, SW
Aiken, South Carolina 29801
Phone: 803-648-6308
woolhiser@bellsouth.net
Attorney for Appellants

December 23, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

Kathy Ouzts Rushton, Special Referee

Case No. 2014-001742

CERTIFICATE OF SERVICE

I, Mary B. Woolhiser, Secretary for Attorney Philip H. Woolhiser, certify that I have caused Appellants' Final Brief, Record On Appeal, Certificate of Compliance, and this Certificate of Service, in the above-referenced matter to be served, via either hand delivery or U.S. Mail, on December 23, 2014, to applicable parties as addressed below:

Aiken, South Carolina
December 23, 2014

Mary B. Woolhiser

Original to: The Honorable Jenny Abbott Kitchings (Hand Delivered)
Clerk of the South Carolina Court of Appeals
1205 Pendleton Street
Columbia, South Carolina 29201

Copies to: Bernard Loyer, Jr., *pro se*
Sherry Loyer, *pro se*
61 Rachel Avenue
Trenton, SC 29847

Paul Knapp Simons, Esquire (Hand Delivered)
111 Park Ave SW
Aiken, SC 29801
Attorney for Respondent, C. W. Miller

Marsha M. Banks, Esquire, Attorney for certain Defendants (Hand Delivered)
319 Park Ave SE
Aiken, SC 29801
Attorney for certain Defendants

Robert J. Berning, *pro se*
120 Pine Needle Rd.
Aiken, SC 29803

S-17 Owners Association, Inc.
81 Rachel Ave
Trenton, SC 29847