

2010-178066

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Berkeley County
Court of Common Pleas

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Thomas L. Hughston, Jr., Circuit Court Judge **S C Supreme Court**

Opinion No 2010-UP-382 (S C Ct App filed August 4, 2010)

Sheep Island Plantation, LLC

Respondent

v

Bar-Pen Investments, LLC,

Petitioner

APPENDIX – VOLUME I

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Thomas L. Hughston, Circuit Court Judge

Case No 06-CP-08-1650

Sheep Island Plantation, LLC,

Appellant,

v

Bar-Pen Investments, LLC,

Respondent

RECORD ON APPEAL
VOLUME I

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MAY-14-2008 11 34 BERKELEY COUNTY
COUNTY OF BERKELEY
IN THE COURT OF COMMON PLEAS

843 719 4509 P 03
JU TEN N A CIVIL CASE

SHEEP ISLAND PLANTATION LLC
BAR-PEN INVESTMENTS LLC

CASE NO 2006CP0801650
BAR-PEN INVESTMENTS LLC
SHEEP ISLAND PLANTATION LLC

2008 MAR 13 11 03

PLAINTIFF(S)

CLERK OF COURT

DEFENDANT(S)

CHECK ONE

- ☐ JURY VERDICT This action came before the court for a trial by jury
The issues have been tried and a verdict rendered
- ☐ DECISION BY THE COURT This action came to trial or hearing before
the court The issues have been tried or heard and a decision
rendered
- ☐ ACTION DISMISSED (CHECK REASON) ☐ Rule 12(b), 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

IT IS ORDERED AND ADJUDGED

☐ See attached order, ☒ Statement of Judgment by the Court

Defendant's (Bar Pen) motion for directed verdict is granted.

Dated at Moncks Corner, SC, this BH day of March, 2008.

T. L. Heston
PRESIDING JUDGE / CLERK OF COURT

This judgment/order was entered on the BH day of Mar, 2008
and a copy mailed first class this 13th day of Mar, 2008, to
attorneys of record or to parties (when appearing pro se) as follows

FUTERAL, STEPHAN V

ALTMAN, CHARLES S

ATTORNEY(S) FOR THE PLAINTIFF(S)
CERTIFIED TRUE COPIES OF RECORD
IN THIS COUNTY

Court Reporter May P Brown
DATE 5-9-08 CLERK OF COURT C.P. & C.S.
BERKELEY COUNTY SC

(FORM 4)

ATTORNEY(S) FOR THE DEFENDANT(S)

May P Brown
CLERK OF COURT / DEPUTY CLERK

MAY-14-2008 11 27

CLERK OF COURT

98/

TOTAL P 000001
P 03

APP 11

IN THE STATE OF SOUTH CAROLINA)
)
BERKELEY COUNTY)
)
SHEEP ISLAND PLANTATION, LLC,)
)
Plaintiff,)
vs)
)
BAR-PEN INVESTMENTS, LLC,)
)
Defendant)
_____)

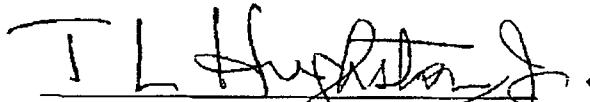
IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NUMBER 06-CP-08-1650

ORDER

This case came before me on Post-trial Motions by the Plaintiff following my directing a Verdict in favor of the Defendant prior to submitting anything to the Jury I deny the Plaintiff's Post-trial Motions and specifically state as a matter of law that the Defendant did not repudiate the contract prior to the Plaintiff failing to close on the contract to purchase land. Also, I again state that as a matter of law the Plaintiff failed to give any notice to the Defendant that it desired to exercise its rights under the fifteen day provision for extension of the contract until many months had passed

IT IS SO ORDERED

May 8, 2008
Charleston, South Carolina


Thomas L. Hughston, Jr., Presiding Judge

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Sheep Island Plantation, LLC,

Plaintiff,

vs

Bar-Pen Investments, LLC,

Defendant

IN THE COURT OF COMMON PLEAS
9TH JUDICIAL CIRCUIT

CASE NO 06-CP-10-1656
08

NOTICE OF LIS PENDENS

FILED
2006 AUG -4 PM 4 49
JERRY P. BROOKH
CLERK OF COURT
BERKELEY COUNTY, SC

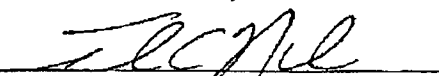
NOTICE IS HEREBY GIVEN that an action has been commenced or will be commenced in this Court upon complaint of the above named Plaintiff against the above named Defendant affecting the title to the real property described as follows

ALL that certain piece, parcel or tract of land, together with all improvements thereon, situate, lying and being in Berkeley County, South Carolina and known and designated as Tract 3A, containing 101 165 acres, more or less, as shown on that certain plat entitled PLAT OF A BOUNDARY SURVEY SHOING THE SUBDIVISION OF TRACT 3 TO FORM TRACT 3A SURVEYED AT THE REQUEST OF BYRON S TONEY LOCATED IN BERKELEY COUNTY, SC," prepared by Joseph O Eelman, R L S , dated April 18, 2005, and recorded April 19, 2005 in Plat Cabinet Q at Page 367E in the Office of the Register of Deeds for Berkeley County, South Carolina, said tract of land having such actual size, shape, dimensions, buttings and boundings as shown on said plat, reference to which is hereby made for a more complete description

BEING the same property conveyed to Bar-Pen Investments LLC, a South Carolina limited liability company, by deed of Sheep Island Property, LLC, a South Carolina limited liability company, dated July 7, 2005 and recorded July 8, 2005 in Book 4827 at Page 260 in the Office of the Register of Deeds for Berkeley County South Carolina.

Tax Map No 194-00-02-162

FUTERAL LAW FIRM, LLC



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Attorneys for Plaintiff

Dated August 4, 2006

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY
SHEEP ISLAND PLANTATION, LLC,

Plaintiff,

vs

BAR-PEN INVESTMENTS, LLC,

Defendant.

IN THE COURT OF COMMON PLEAS
9TH JUDICIAL CIRCUIT
CASE NO 06-CP-08-1650

AMENDED NOTICE OF LIS
PENDENS

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CLERK OF COURT
BERKELEY COUNTY SC

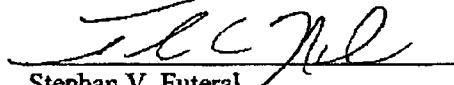
NOTICE IS HEREBY GIVEN that an action has been or will be commenced with the filing of this Amended Notice of Lis Pendens in this Court upon complaint of the above named Plaintiff against the above named Defendant affecting the title to the real property described as follows:

ALL that certain piece, parcel or tract of land, together with all improvements thereon, situate, lying and being in Berkeley County, South Carolina and known and designated as Tract 3A, containing 101 165 acres, more or less, as shown on that certain plat entitled " PLAT OF A BOUNDARY SURVEY SHOING THE SUBDIVISION OF TRACT 3 TO FORM TRACT 3A SURVEYED AT THE REQUEST OF BYRON S TONEY LOCATED IN BERKELEY COUNTY SC," prepared by Joseph O Eelman, R L S , dated April 18, 2005, and recorded April 19, 2005 in Plat Cabinet Q at Page 367E in the Office of the Register of Deeds for Berkeley County, South Carolina, said tract of land having such actual size, shape, dimensions, buttings and boundings as shown on said plat, reference to which is hereby made for a more complete description.

BEING the same property conveyed to Bar-Pen Investments, LLC, a South Carolina limited liability company, by deed of Sheep Island Property, LLC, a South Carolina limited liability company dated July 7, 2005, and recorded July 8, 2005 in Book 4827 at Page 260 in the Office of the Register of Deeds for Berkeley County, South Carolina

Tax Map No 194-00-02-162

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Attorneys for Plaintiff

Dated August 22, 2006

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY
SHEEP ISLAND PLANTATION, LLC,

Plaintiff,

vs

BAR-PEN INVESTMENTS, LLC,
Defendant.

IN THE COURT OF COMMON PLEAS
9TH JUDICIAL CIRCUIT
CASE NO 06-CP-08-1650

COMPLAINT

(Jury Trial Demanded)

FILED
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MAR 14 P 11
CLERK OF COURT
BERKELEY COUNTY

Plaintiff would respectfully show unto the court

1 Plaintiff is a limited liability company formed and organized under the laws of South Carolina and doing business in the County of Charleston, State of South Carolina

2 Plaintiff is informed and believes Defendant is a limited liability company formed and organized under the laws of South Carolina and doing business in the County of Berkeley, State of South Carolina and maintaining a registered agent in the County of Charleston, State of South Carolina.

3 This action is for the recovery of real property (hereinafter "the Property") or for an estate or an interest therein or for the determination in any form of such right or interest and for injuries to real property, such property being located in the County of Berkeley, State of South Carolina, commonly known as Tract 3A on Sheep Island Road, Summerville, South Carolina and more accurately described as follows

ALL that certain piece, parcel or tract of land, together with all improvements thereon, situate, lying and being in Berkeley County, South Carolina and known and designated as Tract 3A, containing 101 165 acres more or less, as shown on that certain plat entitled " PLAT OF A BOUNDARY SURVEY SHOING THE SUBDIVISION OF TRACT 3 TO FORM TRACT 3A SURVEYED AT THE REQUEST OF BYRON S TONEY LOCATED IN BERKELEY COUNTY, SC,"

prepared by Joseph O Eelman, R L S , dated April 18, 2005, and recorded April 19, 2005 in Plat Cabinet Q at Page 367E in the Office of the Register of Deeds for Berkeley County, South Carolina, said tract of land having such actual size, shape, dimensions, buttings and boundings as shown on said plat, reference to which is hereby made for a more complete description

BEING the same property conveyed to Bar-Pen Investments, LLC, a South Carolina limited liability company, by deed of Sheep Island Property, LLC, a South Carolina limited liability company, dated July 7, 2005, and recorded July 8, 2005 in Book 4827 at Page 260 in the Office of the Register of Deeds for Berkeley County, South Carolina.

Tax Map No 194 00-02-162

4 On or about December 14, 2005, E Bruce Marshall and/or Jeremy S Marshall (hereinafter "the Marshalls") entered into written contract with Defendant, a copy of which is attached hereto as Exhibit A and incorporated by reference, where the Marshalls agreed to buy and Defendant agreed to sell the Property for the purchase price of \$2 530 000 00

5 This contract constitutes a valid legal, and binding agreement between the parties

6 The contract further provided for closing to take place no later than July 31, 2006

7 The contract provides that in the event of Seller's default, the Buyer may recover attorney's fees and actual costs incurred

8 Subsequently, the Marshalls assigned their rights under the contract to Plaintiff

9 On or about July 13, 2006, Plaintiff and Defendant amended the contract to extend the closing date thirty (30) days in exchange for payment by Plaintiff to Defendant in the amount of \$50 000 00 and this amendment was confirmed in writing by Defendant.

10 Plaintiff tendered payment to Defendant in the amount of \$50,000 00

11 On or about August 1, 2006 Defendant informed Plaintiff that it terminated the contract

FOR A FIRST CAUSE OF ACTION

(Specific Performance)

12 All prior allegations not inconsistent with this cause of action are realleged and incorporated by reference herein

13 The above-referenced contract with its subsequent amendment provides that Defendant will convey the property to Plaintiff by August 30, 2006

14 The contract with its subsequent amendment is legally valid

15 The contract with its subsequent amendment is fair, just, and equitable

16 Up until the time Defendant terminated the contract, as alleged above, Plaintiff and the Marshalls had fully performed their obligations under the contract

17 Plaintiff remains ready, willing, and able to perform on the contract.

18 The Property is unique in nature

19 No adequate remedy at law exists for Plaintiff

20 Plaintiff is informed and believes it is entitled to Order requiring Defendant to convey the Property to Plaintiff under the terms of the contract, attached hereto as Exhibit A and incorporated by reference.

FOR A SECOND CAUSE OF ACTION

(Breach of Contract)

21 All prior allegations not inconsistent with this cause of action are realleged and incorporated by reference herein

22 The above-referenced contract with subsequent amendment constitutes a valid, binding contract between Plaintiff and Defendant.

23 Defendant's actions as described above constitute a breach or unjustifiable failure to perform the contract

24 As a direct and proximate result of Defendant's breach, Plaintiff has sustained actual damages, consequential damages, and incidental damages, plus attorney's fees and the costs of this action

25 Plaintiff is informed and believes it is entitled to actual damages, consequential damages, incidental damages attorney's fees, prejudgment interest, and the costs of this action

WHEREFORE, Plaintiff prays for an Order requiring Defendant to convey the Property to Plaintiff under the terms of the contract, attached hereto as Exhibit A and incorporated by reference, or in the alternative, for judgment against Defendant for actual damages, consequential damages, incidental damages, attorney's fees, prejudgment interest, and the costs of this action, and for such other and further relief as the Court may deem just and proper

FUTERAL LAW FIRM, LLC



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Facsimile (843) 284-5501

email to sfuteral@charlestonlaw.net

Attorneys for Plaintiff

Dated: August 22, 2006

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

SHEEP ISLAND PLANTATION, LLC,

Plaintiff,

vs.

BAR-PEN INVESTMENTS, LLC,

Defendant

IN THE COURT OF COMMON PLEAS

9TH JUDICIAL CIRCUIT

CASE NO 06-CP-08-1650

SUMMONS

FILED
2006 AUG 23 PM 5 02
CLERK OF COURT
BERKELEY COUNTY

TO THE DEFENDANT ABOVE NAMED

YOU ARE HEREBY SUMMONED AND REQUIRED TO ANSWER the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to the Complaint on the Clerk of Court for Berkeley County and upon the subscriber at his office, 1004 Anna Knapp Blvd , 2nd Floor, Mt Pleasant, South Carolina 29464, within thirty (30) days after the service hereof, exclusive of the day of such service

YOU ARE HEREBY GIVEN NOTICE FURTHER that if you fail to appear and defend and fail to answer the Complaint as required by this Summons within thirty (30) days after the service hereof, judgment by default will be rendered against you for the relief demanded in the Complaint

FUTERAL LAW FIRM, LLC



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Attorneys for Plaintiff

Dated August 22, 2006

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	CIVIL ACTION NUMBER 06-CP-08-1650
	)	
SHEEP ISLAND PLANTATION, LLC	)	
	)	
Plaintiff,	)	
	)	
vs	)	
	)	
BAR-PEN INVESTMENTS, LLC	)	
	)	
Defendant	)	

ANSWER AND COUNTERCLAIM

AS AND FOR A FIRST DEFENSE
(General Denial)

1 It denies each and every allegations of the Complaint not hereinafter specifically admitted
As to the allegations of paragraphs 12 and 21, no responses are required as the said paragraphs are
a restatement of allegations which are otherwise responded to herein.

2 As to the allegations of paragraph 1 of the Complaint, upon information and belief, it
admits that portion of the allegations stating the Plaintiff is a limited liability company formed and
organized under the laws of South Carolina, however, as to the remaining allegations, it does not
have information with which to admit or deny the same and therefore demands strict proof thereof

3 As to the allegations of paragraph 2 of the Complaint, it admits the same

4 As to the allegations of paragraph 3 of the Complaint, the said allegations contain
conclusions which do not require response by the Defendant, however if a response is required, it
denies the same

5 As to the allegations of paragraph 4 of the Complaint, it admits it entered into a written Agreement to Buy and Sell Real Estate (the ' Contract) with E Bruce Marshall and/or Jeremy S Marshall on December 14, 2005 As to the remaining allegations of the said paragraph 4, the said allegations refer to a written document which speaks for itself and referenced is craved to said document for to determine the contents thereof

6 As to the allegations of paragraph 5 of the Complaint it denies the same, as the Contract has expired by it terms

7 As to the allegations of paragraphs 6 and 7 of the Complaint, the allegations refer to provisions of a written agreement which speaks for itself and reference is craved to the document to determine its contents

8 As to the allegations of paragraph 8 of the Complaint, it does not have sufficient information to form a believe as to the said allegations and demands strict proof thereof

9 As to the allegations of paragraph 9 of the Complaint, it denies the same

10 As to the allegations of paragraph 10 fo the Complaint, it admits a check in the amount of \$50 000 00 was delivered to it, however, the check was returned to Plaintiff's counsel on the date it was received, which was after the Contract has expired by it own terms

11 As to the allegations of paragraph 11 of the Complaint, it denies the same, as the Contract expired by its own terms prior to August 1, 2006, a fact which Plaintiff was aware

12 As to the allegations of paragraph 13 of the Complaint, it denies the same

13 As to the allegations of paragraph 14 of the Complaint, it admits the contract was valid. It denies the existence of an amendment to the contract. Further answering the allegations of

paragraph 14 of the Complaint, the rights of Plaintiff, if any, to purchase the property terminated pursuant to the terms of the contract

14 As to the allegations of paragraph 15 of the Complaint, it admits the contract was fair, just and equitable, however it denies there was any amendment to the contract

15 As to the allegations of paragraph 16 of the Complaint, it denies that it terminated the contract as the contract terminated by its terms as a result of the Buyer under the contract closing the transaction within the time period allowed under the time is of the essence contract. Further it denies that Plaintiff or any other person fully performed Buyer's obligation under the contract, as the Buyer failed to close the transaction as stated above

16 As to the allegations of paragraph 17 of the Complaint the said allegations are a conclusion by the Plaintiff which require no response Further, Plaintiff has no right with regard the contract as any rights it had have terminated by the terms of the contract

17 As to the allegations of paragraphs 18 19 and 20 of the Complaint, it denies the same

18 As to the allegations of paragraph 22 of the Complaint, it admits the contract was valid It denies the existence of an amendment to the contract. Further answering the allegations of paragraph 14 of the Complaint, the rights of Plaintiff, if any, to purchase the property terminated pursuant to the terms of the contract.

19 As to the allegations of paragraphs 23 and 24 of the Complaint, it denies the same

20 As to the allegations of paragraph 25 of the Complaint, the allegations contained therein are a conclusion of Plaintiff which require no response from Defendant, however if a response is required, it denies the same

AS AND FOR A SECOND DEFENSE
(Waiver, Estoppel and Laches)

The allegations of previous allegations of this Answer and Counterclaim are realleged and reasserted herein as if set forth herein verbatim

21 The contract provides in paragraph 34, "closing shall take place no sooner than July 15, 2006 and no later than July 31, 2006 with "Time being of the essence "

22 On or about July 13, 2006, Defendant offered the Plaintiff the opportunity to extend the closing date for a period of thirty (30) days

23 On or about July 20, 2006 having not received a response from Plaintiff with regard to the offer of an extension of the closing time, Defendant withdrew its offer to extend the closing date

24 Plaintiff did not request or indicate a desire to extend the closing date until after July 31, 2006

25 Plaintiff is barred by the doctrines of waiver, estoppel and laches from any entitlement for relief

AS AND FOR A THIRD DEFENSE AND
BY WAY OF A FIRST COUNTERCLAIM
(BREACH OF CONTRACT)

The allegations of previous allegations of this Answer and Counterclaim are realleged and reasserted herein as if set forth herein verbatim

26 On or about December 14, 2005, Defendant and E Bruce Marshall and/or Jeremy S Marshall ("Buyer") entered into an Agreement to Purchase and Sell (the "Agreement"), whereby, Defendant agreed to sell to Buyer the property described in the Agreement

27 Paragraph 34 of the Agreement provides the closing of the transaction contemplated in the Agreement was to take place between July 15, 2006 and July 31, 2006, time is of the essence

28 At some time prior to July 31, 2006 Plaintiff notified Defendant a closing would take place in the late afternoon of July 31, 2006

29 At some time during July 31, 2006, Defendant became aware the closing scheduled for that day was cancelled.

30 At the time of the cancellation, Plaintiff did not request an extension of the closing date under the Agreement

31 Plaintiff failed to close the transaction contemplated under the Agreement as called for in the Agreement

32 Plaintiff's failure to close the transaction contemplated under the Agreement constitutes a breach of Plaintiff's obligation under the Agreement.

33 Pursuant to the terms of the Agreement, Defendant is entitled to recovery of any attorneys fees and cost incurred because of Plaintiff's default

34 Defendant is entitled to retain the Earnest Money Deposit for its own uses

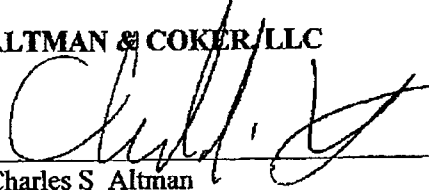
WHEREFORE, having fully answered the Complaint here, Defendant prays

1 This Court dismiss the Complaint with prejudice,

2 This Court award Defendant a judgment against Plaintiff for the attorneys fees and costs incurred by Defendant in defending this action, and

3 for such other and further relief as this Court may deem just and proper

ALTMAN & COKER/LLC



Charles S. Altman
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Charleston, South Carolina 29402
843 853 9907
843 853 9838 facsimile
caltman@altmancoker.com
Attorneys for the Defendant

September 26, 2006

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	CIVIL ACTION NUMBER 06-CP-08-1650
	)	
SHEEP ISLAND PLANTATION, LLC	)	
	)	
Plaintiff,	)	
	)	
vs	)	
	)	
BAR-PEN INVESTMENTS, LLC	)	
	)	
Defendant	)	

CERTIFICATE OF SERVICE

I hereby certify that, on this 26th day of September, 2006 a copy of Defendant s Answer and Counterclaim was served upon the below stated parties via United States Mail with sufficient first class postage affixed thereto and addressed as follows

Stephan V Futeral, Esquire
Futeral Law Firm, LLC
Post Office Box 1543
Mt Pleasant, South Carolina 26464

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STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY
SHEEP ISLAND PLANTATION, LLC,
Plaintiff
vs
BAR-PEN INVESTMENTS, LLC,
Defendant

IN THE COURT OF COMMON PLEAS
9TH JUDICIAL CIRCUIT
CASE NO 06-CP-08-1650

REPLY

(Jury Trial Demanded)

FILED
2006 DEC -5 PM 3 26
CLERK OF COURT
BERKELEY COUNTY SC

TO CHARLES S. ALTMAN ESQ., ATTORNEY FOR DEFENDANT

Plaintiff, by and through undersigned counsel, and in reply to Defendant's Answer and Counterclaim alleges as follows

1 Each and every allegation of each and every paragraph of the Answer and Counterclaim not hereinafter admitted explained, or qualified is denied and strict proof is demanded thereof

2 Plaintiff admits the allegations in paragraph twenty-six (26)

3 As to the allegations contained in paragraph twenty-seven (27) the said allegations refer to a written document which speaks for itself and reference is craved to said document for determination of the contents thereof

4 Plaintiff denies the allegations contained in paragraph twenty-eight (28) and demands strict proof thereof

5 Plaintiff is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph twenty-nine (29) and demands strict proof thereof

6 Plaintiff denies the allegations contained in paragraphs thirty (30), thirty-one (31),
thirty-two (32), and thirty-three (33) and demands strict proof thereof

FOR A FIRST DEFENSE

(Waiver, Estoppel, and Laches)

7 Defendant's claims should be dismissed pursuant to waiver, estoppel, and laches

FOR A SECOND DEFENSE

(Unclean Hands)

8 Defendant's claims and causes of action are barred by the doctrine of Unclean Hands

FOR A THIRD DEFENSE

(Rule 12(b)(6), SCRCP)

9 Defendant fails to state a cause of action against Plaintiff upon which relief may be
granted, and, therefore, should be dismissed pursuant to Rule 12(b)(6), SCRCP

FOR A FOURTH DEFENSE

(Statute of Frauds)

10 Defendant's claims are barred by the Statute of Frauds

FOR A FIFTH DEFENSE

(Set-off)

11 Any amounts Plaintiff may owe to Defendant should be set off by the amounts
Defendant owes to Plaintiff

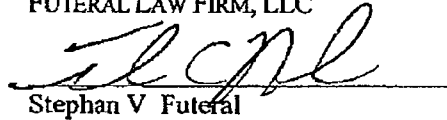
FOR A SIXTH DEFENSE

(Failure to Mitigate)

12 Defendant has failed to mitigate its damages and any recovery should be barred or
reduced accordingly

WHEREFORE, Plaintiff prays that Defendant take nothing by way of its Answer and Counterclaim, the claims against Plaintiff be dismissed with its cost of suit and attorney's fees incurred herein, and for such other and further relief as the Court may deem just and proper

FUTERAL LAW FIRM, LLC



Stephan V Futeral

S C Bar ID 66427

Thomas C Nelson

S C Bar ID 71178

Post Office Box 1543

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email to sfuteral@charlestonlaw.net

Dated 12/4/06

Attorneys for Plaintiff

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY
SHEEP ISLAND PLANTATION LLC

Plaintiff

vs

BAR-PEN INVESTMENTS, LLC

Defendant

IN THE COURT OF COMMON PLEAS
9TH JUDICIAL CIRCUIT
CASE NO 06 CP 08-1650

FIRST AMENDED COMPLAINT

(Jury Trial Demanded)

FILED
07 JUL -3 PM 12 11
HARRY P. LITTON
CLERK OF COURT
BERKELEY COUNTY SC

Plaintiff would respectfully show unto the court

1 Plaintiff is a limited liability company formed and organized under the laws of South Carolina and doing business in the County of Charleston State of South Carolina

2 Plaintiff is informed and believes Defendant is a limited liability company formed and organized under the laws of South Carolina and doing business in the County of Berkeley State of South Carolina

3 This action is for the recovery of real property (hereinafter "the Property ") or for an estate or an interest therein or for the determination in any form of such right or interest and for injuries to real property, such property being located in the County of Berkeley State of South Carolina, commonly known as Tract 3A on Sheep Island Road Summerville South Carolina and more accurately described as follows

ALL that certain piece, parcel or tract of land, together with all improvements thereon situate, lying and being in Berkeley County South Carolina and known and designated as Tract 3A, containing 101 165 acres, more or less as shown on that certain plat entitled PLAT OF A BOUNDARY SURVEY SHOWING THE SUBDIVISION OF TRACT 3 TO FORM TRACT 3A SURVEYED AT THE REQUEST OF BYRON S TONEY LOCATED IN BERKELEY COUNTY, SC prepared by Joseph O Eelman, R L S dated April 18 2005 and recorded April 19, 2005 in Plat Cabinet Q at Page 367E in the Office of the Register of Deeds for

Berkeley County, South Carolina, said tract of land having its actual size shape dimensions buttress and boundings as shown on said plat reference to which is hereby made for a more complete description

BEING the same property conveyed to Bar-Pen Investments LLC a South Carolina limited liability company, by deed of Sheep Island Property LLC, a South Carolina limited liability company dated July 7, 2005, and recorded July 8 2005 in Book 4827 at Page 260 in the Office of the Register of Deeds for Berkeley County South Carolina

Tax Map No 194 00-02-162

4 On or about December 14 2005 E Bruce Marshall and/or Jeremy S Marshall (hereinafter the Marshalls) entered into written contract with Defendant a copy of which is attached hereto as Exhibit A and incorporated by reference where the Marshalls agreed to buy and Defendant agreed to sell the Property for the purchase price of \$2,530,000 00

5 Subsequently the Marshalls assigned their rights under the contract to Plaintiff

6 This contract constitutes a valid legal and binding agreement between the parties

7 The contract further provided for closing to take place no later than July 31, 2006

8 The contract contains an extension clause which provides that [1]f the transaction has not closed within the stipulated time limit because a contingency has not been satisfied through no fault of either party then both parties agree to extend this agreement for a period not to exceed 15 consecutive days from the original closing date "

9 The contract is contingent upon Plaintiff obtaining financing

10 The closing was scheduled for Monday July 31 2006

11 Through no fault of either party on Friday July 28 2006 at approximately 2 00 p m., Plaintiff's lender changed the closing conditions and required Plaintiff to deposit an additional \$211 625 00 with the lender prior to closing in addition to what was already required to Plaintiff's knowledge, which Plaintiff could not do in time for closing despite exercising diligence to do so

12 The closing did not occur on July 31 2006 as scheduled because the lender would not issue a loan to Plaintiff without Plaintiff depositing the additional \$211 625 00 to the lender

13 Defendant immediately terminated the contract

14 Defendant's termination of the contract did not allow any extension for Plaintiff to complete its financing and close

15 Plaintiff was ready, willing and able to purchase the property before August 15 2006

16 The contract provides that in the event of Seller's default, the Buyer may recover attorney's fees and actual costs incurred

17 Defendant waived any claim for justification of their nonperformance with regard to any alleged breach by Plaintiff with regard to Paragraph 6 of the contract because Defendant accepted a \$40 000 non refundable deposit from Plaintiff

FOR A FIRST CAUSE OF ACTION

(Specific Performance)

18 All prior allegations not inconsistent with this cause of action are realleged and incorporated by reference herein

19 The contract is legally valid

20 The contract with its subsequent amendment is fair just and equitable

21 Up until the time Defendant terminated the contract as alleged above, Plaintiff and the Marshalls had fully performed their obligations under the contract

22 Plaintiff remains ready willing, and able to perform on the contract

23 The Property is unique in nature

24 No adequate remedy at law exists for Plaintiff

25 Plaintiff is informed and believes it is entitled to Order requiring Defendant to convey the Property to Plaintiff under the terms of the contract attached hereto as Exhibit A and incorporated by reference and allowing Plaintiff a reasonable amount of time to prepare for closing

FOR A SECOND CAUSE OF ACTION

(Breach of Contract)

26 All prior allegations not inconsistent with this cause of action are realleged and incorporated by reference herein

27 The above referenced contract with subsequent amendment and/or extension constitutes a valid binding contract between Plaintiff and Defendant

28 Defendant's actions as described above, constitute a breach or unjustifiable failure to perform the contract

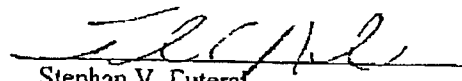
29 As a direct and proximate result of Defendant's breach Plaintiff has sustained actual damages consequential damages, and incidental damages plus attorney's fees and the costs of this action

30 Plaintiff is informed and believes it is entitled to actual damages consequential damages incidental damages attorney's fees prejudgment interest and the costs of this action

WHEREFORE Plaintiff prays for an Order requiring Defendant to convey the Property to Plaintiff under the terms of the contract, attached hereto as Exhibit A and incorporated by reference or in the alternative, for judgment against Defendant for actual damages, consequential damages, incidental damages attorney's fees prejudgment interest and the costs of this action and for such other and further relief as the Court may deem just and proper

Attorney Signatures on Following Page.

FUTERAL LAW FIRM I C



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S C Bar ID 66427

Thomas C Nelson

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Attorneys for Plaintiff

Dated June 18 2007

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY
SHEEP ISLAND PLANTATION LLC

Plaintiff,

vs

BAR-PEN INVESTMENTS LLC

Defendant

IN THE COURT OF - COMMON PLEAS
9TH JUDICIAL CIRCUIT
CASE NO 06 CP-08-1650

AMENDED SUMMONS

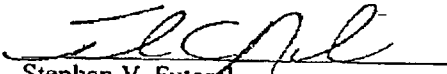
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CLERK OF COURT
BERKELEY COUNTY SC

TO THE DEFENDANT ABOVE NAMED

YOU ARE HEREBY SUMMONED AND REQUIRED TO ANSWER the Amended Complaint in this action a copy of which is herewith served upon you and to serve a copy of your answer to the Amended Complaint on the Clerk of Court for Berkeley County and upon the subscriber at his office 1004 Anna Knapp Blvd 2nd Floor Mt Pleasant South Carolina 29464 within thirty (30) days after the service hereof exclusive of the day of such service

YOU ARE HEREBY GIVEN NOTICE FURTHER that if you fail to appear and defend and fail to answer the Amended Complaint as required by this Summons within thirty (30) days after the service hereof judgment by default will be rendered against you for the relief demanded in the Amended Complaint

FUTERAL LAW FIRM LLC


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Attorneys for Plaintiff

Dated

6/18/07

7/30

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	CIVIL ACTION NUMBER. 06-CP-08-1650
	)	
SHEEP ISLAND PLANTATION, LLC	)	
	)	
Plaintiff,	)	
	)	
vs	)	
	)	
BAR-PEN INVESTMENTS LLC	)	
	)	
Defendant.	)	

AMENDED ANSWER AND COUNTERCLAIM

AS AND FOR A FIRST DEFENSE
(General Denial)

1 It denies each and every allegation of the Amended Complaint not hereinafter specifically admitted. As to the allegations of paragraphs 18 and 26, no responses are required as the said paragraphs are a restatement of allegations which are otherwise responded to herein

2 As to the allegations of paragraph 1 of the Amended Complaint, upon information and belief, it admits that portion of the allegations stating the Plaintiff is a limited liability company formed and organized under the laws of South Carolina, however as to the remaining allegations, it does not have information with which to admit or deny the same and therefore demands strict proof thereof.

3 As to the allegations of paragraph 2 of the Amended Complaint, it admits the same

4 As to the allegations of paragraph 3 of the Amended Complaint, it admits the action was commenced by Plaintiff claiming an interest in the real property described therein and the property

described is an accurate description of the property, however, it denies the suit was commenced claiming any injury to the property

5 As to the allegations of paragraph 4 of the Amended Complaint, it admits it entered into a written Agreement to Buy and Sell Real Estate (the 'Contract') with E Bruce Marshall and/or Jeremy S Marshall on December 14, 2005 As to the remaining allegations of the said paragraph 4, the said allegations refer to a written document which speaks for itself and reference is craved to said document to determine the contents thereof

6 As to the allegations of paragraph 5 of the Amended Complaint, it does not have sufficient information with which to form a belief as to the said allegations and demands strict proof thereof

7 As to the allegations of paragraph 6 of the Amended Complaint it admits the contract was a valid legal and binding agreement between the parties Further answering the said allegations, the rights of Plaintiff to purchase the property described in the contract terminated pursuant to the terms of the contract.

8 As to the allegations of paragraphs 7 and 8 of the Amended Complaint, the allegations refer to provisions of a written agreement which speaks for itself and reference is craved to the said document to determine its contents

9 As to the allegations of paragraph 9 of the Amended Complaint, it admits the same, provided that the application for the financing and the financing are within the parameters defined in the Contract

10 As to the allegations of paragraph 10 of the Amended Complaint, it is without sufficient information to form a belief as to the said allegations and demands strict proof thereof

11 As to the allegations of paragraph 11 of the Amended Complaint, it admits it had no fault or responsibility regarding the events described in said paragraph 11. Upon information and belief, Plaintiff failed to assure its financing was in place within a reasonable time prior to the last Time is of the Essence closing date allowed in the contract, July 31, 2006 and for this reason is solely at fault with regard to its failure to be able to timely close the purchase of the property as contemplated in the contract.

12 As to the allegations of paragraph 12 of the Amended Complaint, it does not have sufficient information with which to form a belief as to the allegations contained therein and therefore denies the same. Further responding to said allegations, it is informed and believes the reason the closing did not take place is because of the failure of the Plaintiff to obtain a commitment for the necessary financing within a reasonable period of time prior to the final closing date allowed under the contract.

13 As to the allegations of paragraph 13 of the Amended Complaint, the contract terminated according to its terms upon the failure of the Plaintiff to close the transaction in a timely manner.

14 As to the allegations of paragraph 14 of the Amended Complaint, by the terms of the contract the Plaintiff was not allowed any time after July 31, 2006 to close on the purchase of the property as the final date for closing of the purchase pursuant to the contract was Time is of the Essence on July 31, 2007.

15 As to the allegations of paragraph 15 of the Amended Complaint, it does not have information with which to form a belief as to the allegations contained therein. Further answering said allegations, it states the ability of the Plaintiff to close the purchase before August 15, 2006 is irrelevant as Plaintiff was not prepared to close the purchase within the time period allowed by the

contract nor was Defendant made aware that Plaintiff believed it was entitled to a fifteen (15) day extension through August 15, 2006 until April, 2007

16 As to the allegations of paragraph 16 of the Amended Complaint, the allegations refer to the provisions of a written document which speaks for itself

17 As to the allegations of paragraph 17 of the Complaint, it denies the same

18 As to the allegations of paragraph 19 of the Amended Complaint, it admits the contract was legally valid and binding at the time the contract was entered into. However, under the terms of the contract, the right of the Plaintiff to purchase the property terminated pursuant to the terms of the contract on July 31, 2006, Time is of the Essence when the Plaintiff failed to close the purchase of the transaction contemplated under the contract.

19 As to the allegations of paragraph 20 of the Amended Complaint, it admits the contract was fair, just and equitable

20 As to the allegations of paragraph 21 of the Amended Complaint, the rights of the Plaintiff and the Marshalls to purchase the property under the contract terminated pursuant to the terms of the contract on July 31, 2006 because the Plaintiff failed to close the transaction contemplated under the contract. Further answering said allegations, it denies Plaintiff and the Marshalls fully performed their obligations under the contract as they had not obtained the financing necessary to purchase the property pursuant to the terms of the contract.

21 As to the allegations of paragraph 22 of the Amended Complaint, it does not have sufficient information with which to form a belief as to the allegations contained therein. Further answering said allegations, Plaintiff's assertions in paragraph 22 are irrelevant as the right of Plaintiff to purchase the property terminated pursuant to the terms of the contract on July 31, 2006

22 Answering the allegations of paragraphs 23 24 and 25 of the Amended Complaint, it denies the same

23 Answering the allegations of paragraph 27, it admits the contract with the amendment was a valid and binding contact Further responding to the said allegations it states the right of Plaintiff to close the purchase pursuant to the terms of the contract expired on July 31, 2006 In addition, it denies there were any extensions to the contract.

24 Answering the allegations of paragraphs 28, 29 and 30 of the Amended Complaint, it denies the same

AS AND FOR A SECOND DEFENSE
(Warver, Estoppel and Laches)

The allegations of previous allegations of this Amended Answer and Counterclaim are realleged and reasserted herein as if set forth herein verbatim

25 The contract provides in paragraph 34, "closing shall take place no sooner than July 15 2006 and no later than July 31 2006 with 'Time being of the essence '"

26 On or about July 13, 2006, Defendant offered the Plaintiff the opportunity to extend the closing date for a period of thirty (30) days

27 On or about July 20, 2006, having not received a response from Plaintiff with regard to the offer of an extension of the closing time, Defendant withdrew its offer to extend the closing date

28 Plaintiff did not request or indicate a desire to extend the closing date until after July 31, 2006 when it proposed to pay the sum of \$50,000 00 for a thirty (30) day extension to close

29 At no time prior to the close of business on July 31, 2006 or prior to April, 2007, did Plaintiff advise Defendant there was a problem with financing, the problem was not caused by any

action or inaction of Plaintiff or that Plaintiff had any right to close the purchase after July 31, 2006 and would have been prepared to close the purchase under the contract on or before August 15, 2006

30 Plaintiff is barred by the doctrines of waiver estoppel and laches from any entitlement for relief

**AS AND FOR A THIRD DEFENSE AND
BY WAY OF A FIRST COUNTERCLAIM
(BREACH OF CONTRACT)**

The allegations of previous allegations of this Amended Answer and Counterclaim are realleged and reasserted herein as if set forth herein verbatim

31 On or about December 14, 2005, Defendant and E Bruce Marshall and/or Jeremy S Marshall (Buyer') entered into an Agreement to Purchase and Sell (the "Agreement"), whereby, Defendant agreed to sell to Buyer the property described in the Agreement.

32 Paragraph 34 of the Agreement provides the closing of the transaction contemplated in the Agreement was to take place between July 15 2006 and July 31, 2006 time is of the essence

33 At some time prior to July 31, 2006, Plaintiff notified Defendant a closing would take place in the late afternoon of July 31, 2006

34 At some time during July 31, 2006, Defendant became aware the closing scheduled for that day was cancelled

35 At the time of the cancellation, Plaintiff did not request an extension of the closing date under the Agreement.

36 Plaintiff failed to close the transaction contemplated under the Agreement as called for in the Agreement.

37 Plaintiff's failure to close the transaction contemplated under the Agreement constitutes a breach of Plaintiff's obligation under the Agreement

38 Pursuant to the terms of the Agreement, Defendant is entitled to recovery of any attorneys' fees and cost incurred because of Plaintiff's default.

39 Defendant is entitled to retain the Earnest Money Deposit for its own uses

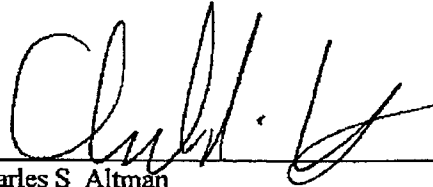
WHEREFORE, having fully answered the Amended Complaint here, Defendant prays

1 This Court dismiss the Amended Complaint with prejudice

2 This Court award Defendant a judgment against Plaintiff for the attorneys' fees and costs incurred by Defendant in defending this action, and

3 For such other and further relief as this Court may deem just and proper

ALTMAN & COKER, LLC



Charles S. Altman
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caltman@altmancoker.com
Attorneys for the Defendant

July 30, 2007

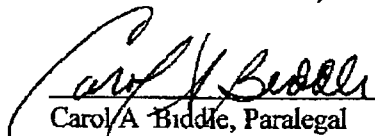
STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY) CIVIL ACTION NUMBER 06-CP-08-1650
SHEEP ISLAND PLANTATION, LLC)
Plaintiff,)
vs)
BAR-PEN INVESTMENTS, LLC)
Defendant.)

CERTIFICATE OF SERVICE

I hereby certify that, on this 30th day of July 2007 a copy of *Defendant's Amended Answer and Counterclaim* was served upon the below stated parties via regular United States Mail with sufficient first class postage affixed thereto and addressed as follows

Thomas C Nelson, Esquire
Futeral Law Firm, LLC
Post Office Box 1543
Mt Pleasant, South Carolina 29464

ALTMAN & COKER, LLC


Carol A Biddle, Paralegal
Post Office Box 265
Charleston, South Carolina 29402
(843) 853-9907
(843) 853-9838 Facsimile

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY
SHEEP ISLAND PLANTATION, LLC,

Plaintiff,

vs

BAR-PEN INVESTMENTS, LLC,

Defendant.

IN THE COURT OF COMMON PLEAS
9TH JUDICIAL CIRCUIT
CASE NO 06-CP-08-1650

**REPLY TO AMENDED ANSWER
AND COUNTERCLAIM**

TO CHARLES S. ALTMAN, ESQUIRE, ATTORNEY FOR DEFENDANT

Plaintiff by and through undersigned counsel and in reply to Defendant's Answer and Counterclaim, alleges as follows

1 Each and every allegation of each and every paragraph of the Amended Answer and Counterclaim not hereinafter admitted, explained, or qualified is denied and strict proof is demanded thereof

2 Plaintiff admits the allegations in paragraph 31 of the Amended Answer and Counterclaim

3 As to the allegations contained in paragraph 32, the said allegations refer to a written document which speaks for itself and reference is craved to said document for determination of the contents thereof.

4 Plaintiff admits the allegations contained in paragraph 33 to the extent they allege that Plaintiff intended to close on July 31, 2006, and but for a change in closing conditions by Plaintiff's lender, the closing would have occurred. As to the remainder of said paragraph, Plaintiff denies these allegations and demands strict proof thereof.

5 Plaintiff is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 34 and demands strict proof thereof

6 Plaintiff denies the allegations contained in paragraphs 35, 36, 37, 38, and 39 and demands strict proof thereof

FOR A FIRST DEFENSE

(Waiver, Estoppel, and Laches)

7 Defendant's claims should be dismissed pursuant to waiver, estoppel, and laches

FOR A SECOND DEFENSE

(Unclean Hands)

8 Defendant's claims and causes of action are barred by the doctrine of Unclean Hands

FOR A THIRD DEFENSE

(Rule 12(b)(6), SCRCF)

9 Defendant fails to state a cause of action against Plaintiff upon which relief may be granted, and, therefore, should be dismissed pursuant to Rule 12(b)(6), SCRCF

FOR A FOURTH DEFENSE

(Statute of Frauds)

10 Defendant's claims are barred by the Statute of Frauds

FOR A FIFTH DEFENSE

(Set-off)

11 Any amounts Plaintiff may owe to Defendant should be set off by the amounts Defendant owes to Plaintiff

FOR A SIXTH DEFENSE

(Failure to Mitigate)

12 Defendant has failed to mitigate its damages and any recovery should be barred or reduced accordingly

WHEREFORE, Plaintiff prays that Defendant take nothing by way of its Amended Answer and Counterclaim, the claims against Plaintiff be dismissed with its cost of suit and attorney's fees incurred herein, and for such other and further relief as the Court may deem just and proper

FUTERAL LAW FIRM, LLC



Stephan V. Futeral

S C Bar ID 66427

Thomas C. Nelson

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email to sfuteral@charlestonlaw.net

Dated

3/8/08

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The foregoing document was served on March 8, 2007 by facsimile as listed below and will be hand-delivered to opposing counsel at trial

Charles S. Altman, Esquire
Altman & Coker, LLC
171 Church Street, Suite 318
Charleston South Carolina 29401
Fax (843) 853-9838



Thomas Nelson

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY
SHEEP ISLAND PLANTATION, LLC,
Plaintiff,
vs
BAR-PEN INVESTMENTS, LLC,
Defendant

IN THE COURT OF COMMON PLEAS
9TH JUDICIAL CIRCUIT
CASE NO 06-CP-08-1650

PLAINTIFF'S MOTION TO ALTER
OR AMEND THE JUDGMENT AND
FOR A NEW TRIAL

2008 MAR 24 PM 3 51
CLERK OF
BERKELEY COUNTY

TO CHARLES ALTMAN, ESQUIRE, ATTORNEY FOR PLAINTIFFS

YOU WILL PLEASE TAKE NOTICE that the undersigned will move before the Court within ten (10) days or as soon thereafter as counsel may be heard, for an Order, pursuant to Rule 59 (a) – (e), South Carolina Rules of Civil Procedure to alter or amend the judgment and for a new trial

BACKGROUND

This is a breach of contract action for damages. On or about December 14, 2005, Plaintiff entered into a contract with Defendant to purchase real estate for approximately 2.5 million dollars. Among other things, the contract contained the following provisions:

33. EXTENSION AGREEMENT. If the transaction has not closed within the stipulated time limit because a contingency has not been satisfied through no fault of either party, then both parties agree to extend this agreement for a period not to exceed 15 consecutive days from the original closing date. Closing shall occur within this time extension, but in no event shall closing occur later than the above extension date.

At trial, the testimony showed that toward the end of June 2006, Berkeley County determined that proposed water and sewer lines would not be directed to the subject property as had been earlier anticipated. Thus, according to the testimony from Plaintiff's witnesses and the lender's underwriter, the terms discussed between Plaintiff and the lender changed to suit a loan for "raw land." Plaintiff's

realtor testified at trial that she thereafter explained the situation to Defendant's realtor and asked for an extension to the closing date. According to Bruce Marshall, one of Plaintiff's members, Plaintiff did not specify how much additional time it needed to close. On July 13, 2006, Defendant offered to sell Plaintiff a 30-day extension to the contract for \$50,000. Seven days later, on July 20, 2006, Defendant withdrew this offer. The evidence at trial showed that in addition to withdrawing its offer, Defendant also informed Plaintiff that there would be no extensions.

At trial, Plaintiff produced evidence that on July 21, 2006, Defendant and its realtor discussed the contract's 15-day extension, and Defendant informed its realtor that there would be no extension to the contract and that if Plaintiff attempted to use the 15-day extension, Defendant would litigate it. The evidence at trial also showed that on July 21, 2007, Mr. Marshall informed Defendant's realtor that Plaintiff may need a 'day or two' extension, and Defendant's realtor informed Plaintiff that there would be no extensions.

The original closing was scheduled for Monday, July 31, 2006. On Friday afternoon, July 28, 2006, Plaintiff's lender informed Plaintiff that it needed to bring an additional \$211,625.00 to closing. At trial, Plaintiff produced testimony that on the day of closing, Plaintiff's attorney informed Defendant of Plaintiff's problem in closing and requested a "day or two" extension. However, Defendant informed Plaintiff's attorney that there would be no extensions to the contract. Late afternoon July 31, 2006, Defendant terminated the contract in writing. The evidence at trial shows that on August 1, 2006, Defendant reaffirmed the termination on the basis that Plaintiff allegedly was in default of the contract. Plaintiff's realtor testified that after the closing date, she again asked for a 'day or two' extension but Defendant refused. Finally, after the closing date, Plaintiff's attorney also requested a 'day or two' extension to close but again Defendant refused.

It should be noted that at trial, Aubrey Woody, a member of Defendant, testified “[i]f the contingency had not been met, they would be entitled to 15 days I don’t think there’s any questions about that’ [Cross Examination of Aubrey Woody, p 39, lines 8 – 10] Aubrey also gave conflicting testimony by, at first, testifying that he did not have any communication with the Buyer’s closing attorney on July 31, 2006, but then later reading from his deposition that it was possible that he had spoken with the Buyer’s closing attorney [Cross Examination of Aubrey Woody, p 41, lines 3 – 6] Mr Woody admitted at trial that there is no notice provision in the 15-day Extension Agreement of the contract. [Re-Cross Examination of Aubrey Wooddey, p 45, lines 5 – 9]

At the close of the three-day trial, Defendant moved for a directed verdict, and the trial court granted this motion largely on the basis that it found there was “no evidence” in the record to show that Plaintiff gave Defendant notice of Plaintiff’s intent to exercise a 15-day extension under Paragraph 33

LAW/ANALYSIS

STANDARD OF REVIEW

In ruling on motions for directed verdict or judgment notwithstanding the verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing motions. The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt

Parrish v Allison, 656 S E 2d 382, 388 (Ct. App 2007)

When considering directed verdict motions, the trial court does not have the authority to decide credibility issues or to resolve conflicts in the testimony or evidence. The issue must be submitted to the jury whenever there is material evidence tending to establish the issue in the mind of a reasonable juror

Id

ARGUMENT

- I The court should alter or amend the judgment and grant Plaintiff a new trial where Defendant repeatedly repudiated any extension to the contract which thereby gave Plaintiff the option to initiate this lawsuit for damages regardless of whether Plaintiff requested a 15-day extension under Paragraph 33

It is black letter law that

Repudiation of a contract before the time for performance, which amounts to a refusal to perform it at any time, gives the adverse party the option to treat the entire contract as broken and to sue immediately for damages as for a total breach.

There is no necessity in such case for a tender of performance, or compliance with conditions precedent, or waiting for the time of performance to arrive. No notice need be given that the repudiation is treated as a breach.

Ralph King Anderson, Jr., *South Carolina Requests to Charge – Civil*, 2002 § 19-19

The evidence at trial when viewed in the light most favorable to Plaintiff, clearly shows that starting on July 20, 2006 and even after the closing date, Defendant repeatedly repudiated, orally and in writing, an extension under the parties' agreement. 'Repudiation includes a refusal or declination to perform in accordance with the contract' *Id.* at § 19-18. The evidence shows that although Defendant was clearly aware of Plaintiff's right to a 15-day extension, Defendant told its realtor that Defendant would "litigate that right. According to the evidence at trial, Mr. Woody proclaimed that "he was a lawyer, he had plenty of money and that he would go to court instead."

Because Defendant unequivocally repudiated the extension clause of the parties' contract, Plaintiff was allowed by law to "to treat the entire contract as broken and sue immediately for damages as for a total breach. Indeed, Plaintiff was under no obligation "for a tender of performance or compliance with conditions precedent, or waiting for the time of performance to arrive. Moreover, Plaintiff was not required to give Defendant 'notice that the repudiation

is treated as a breach" by Plaintiff. Thus, the evidence shows that Plaintiff was legally justified to begin this suite by filing a lis pendens on August 4, 2006.

When granting Defendant's motion for a directed verdict, the trial court neither addressed nor applied the law regarding repudiation to determine whether there was evidence that Defendant repudiated the contract. Consequently, the trial court never addressed whether Plaintiff was at all required to ask for an extension to close formally or otherwise, when Defendant had repeatedly stated there would not be any extensions. Because Plaintiff presented overwhelming evidence of Defendant's repudiation, under which circumstances Plaintiff was not required to give Defendant any notice that Plaintiff sought an extension under Paragraph 33 of the parties' agreement. Accordingly, this court erred in directing a verdict and should grant Plaintiff's request for a new trial.

II The court should alter or amend the judgment and grant Plaintiff a new trial because the trial court lacked any authority to impose upon Plaintiff an obligation to give formal notice of a request for a 15-day extension to be entitled any extension.

"The primary purpose of all rules of contract construction is to determine the intent of the parties." Goldston v. State Farm Mut. Auto. Ins. Co., 358 S.C. 157, 170, 594 S.E.2d 511, 518 (Ct. App. 2004). In determining the parties' intentions, the court must read the contract as a whole. S. Atl. Fin. Servs., Inc. v. Middleton, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003). When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect, and the court must construe it according to its plain, ordinary, and popular meaning. Moser v. Gosnell, 334 S.C. 425, 430, 513 S.E.2d 123, 125 (Ct. App. 1999).

Here, the agreement is utterly silent on whether Plaintiff was required to notify Defendant under Paragraph 33 of a 15-day extension, or the manner in which to do so. Yet, the trial court found that Plaintiff failed to produce evidence that it requested a 15-day extension under Paragraph 33. In

other words, the court's ruling suggests that it judicially added a notice requirement of some sort to the parties' agreement

Parties have the right to make their own contracts Torrington Co v Aetna Cas & Sur Co, 264 S C 636, 643, 216 S E 2d 547, 550 (1975), MailSource, LLC v M A Bailey & Assocs, 356 S C 363, 369, 588 S E 2d 635, 638-39 (Ct.App.2003) " Succinctly stated, a court has no authority to rewrite a contract and impose unwanted obligations and terms under the guise of specific performance or judicial construction " Lowcountry Open Land Trust v Charleston Southern University, --- S E 2d --- 6, 2007 WL 4754032 (Ct. App 2007) (emphasis added)

To the extent the trial court s ruling suggests that notice was a condition precedent to the 15-day extension, such ruling is in error In South Carolina, "a condition precedent may not be implied when it might have been provided for by the express agreement Worley v Yarborough Ford, Inc, 317 S C 206, 452 S E 2d 622 (Ct. App 1994) (citing 17A C J S Contracts § 338 (1963), 17A Am Jur 2d Contracts § 471 (1991))

Here, although the contract does expressly provide for written/prior notice as to other matters, the contract does not expressly state that any notice is required with regard to the 15-day extension To the contrary, the contract clearly, explicitly, and unambiguously provides that the 15-day extension is not invoked until *after* the closing has not taken place

If the transaction has not closed within the stipulated time limit because a contingency has not been satisfied through no fault of either party, then both parties agree to extend this agreement for a period not to exceed 15 consecutive days from the original closing date

At trial Defendant referenced Corbin on Contracts for the notion that "[n]otice ought to be given when information material to the performance of a contract is within the peculiar knowledge of only one of the contracting parties Essentially Defendant argued that it never knew *why* Plaintiff

needed an extension. However, the evidence showed that the performance of the contract was within Defendant's knowledge. Plaintiff's realtor and closing attorney both testified that they had explained the situation to Defendant and its realtor. Specifically, Plaintiff's realtor told Defendant's realtor that issues with water and sewer created issues with Plaintiff's loan. Moreover, Plaintiff's attorney testified that he directly informed Defendant that Plaintiff was notified just before closing that the lender required that Plaintiff prepay interest by depositing \$211,625 into a money market account with the lender. Importantly, the evidence also showed that Defendant purposefully chose not to inquire regarding Plaintiff's "credit-worthiness or any other information needed for the loan processing" even though this information was available to Defendant pursuant to Paragraph 6 of the Agreement and even though Defendant's realtor spoke with the lender regarding the closing itself.

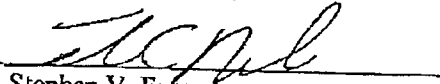
Because the Agreement is clear and unambiguous and there was no notice requirement provided for in the Agreement to invoke an extension to the closing date, this court should not rewrite the parties' agreement to require some form of notice, formal or otherwise. Nonetheless, to the extent that the agreement requires some sort of notice for an extension, there is ample evidence in the record that Plaintiff requested an extension both before and after the closing date. Considering that the agreement is silent as to notice, this court should not impose any requirements such as notice in writing, notice which specifically references Paragraph 33, or notice which specifically asks for 15 days. Accordingly, this court should grant Plaintiff's motion for a new trial.

CONCLUSION

Viewing the evidence in the light most favorable to Plaintiff and for all the reasons stated on the record and in this motion, this Court should grant Plaintiff's Motion to Alter and Amend the Judgment and for a New Trial.

Respectfully Submitted,

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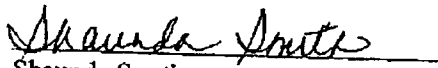
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The foregoing document was served on March 24, 2008, via hand delivery to the following addresses

The Honorable Thomas L. Hughston, Jr.
9th Judicial Circuit
100 Broad Street Suite 368
Charleston South Carolina 29401-2285

Charles S. Altman, Esq.
Altman & Coker, LLC
171 Church Street, Suite 318
Charleston South Carolina 29401


Shaunda Smith
Legal Assistant to Stephan V. Futeral

2008 MAR 24 PM 3 51
CLERK OF COURT
BERKELEY COUNTY SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY	)	Case No 06-CP-08-1650
SHEEP ISLAND PLANTATION, LLC	)	
Plaintiff,	)	
VS	)	
BAR-PEN INVESTMENTS, LLC	)	
Defendant	)	

**DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S
MOTION TO ALTER OR AMEND THE JUDGMENT AND FOR A NEW TRIAL**

Defendant Bar-Pen Investments, LLC (hereinafter "Defendant"), by and through its undersigned counsel, respectfully submits this memorandum of law in opposition to Plaintiff Sheep Island Plantation, LLC's (hereinafter "Plaintiff") "Motion to Alter or Amend the Judgment and for a New Trial "

BACKGROUND

Plaintiff commenced this breach of contract action for damages against Defendant on August 23 2006 The case was tried before a jury from March 11, 2008 through March 13 2008 At the close of evidence, Defendant renewed the motion for directed verdict it previously made at the conclusion of Plaintiff's case in chief Taking all evidence in the light most favorable to Plaintiff, this Court granted the motion, ruling Plaintiff failed to present evidence from which a reasonable jury could conclude Defendant breached the contract at issue The Court properly based its ruling on the following facts as determined from the testimony of the witnesses and the exhibits introduced at trial

On or about December 14, 2005 Plaintiff entered into a written contract (hereinafter the "Contract") to purchase commercial real estate from Defendant for a purchase price of Two Million Five Hundred Thirty Thousand and 00/100 (\$2,530,000 00) Dollars. The Contract provided that time was of the essence, and stated that closing must occur no earlier than July 15, 2006 and no later than July 31, 2006. The Contract contained a clause, however, providing that, if the transaction did not close within the required time, "because a contingency has not been satisfied through no fault of either party," both parties agreed to an extension "not to exceed 15 consecutive days from the original closing date" (hereinafter the "no fault clause").

The uncontested testimony established Plaintiff was unable to close by the July 31, 2006 deadline, while Defendant was ready, willing and able to close within the deadline. Plaintiff presented contested testimony that it indirectly requested a "one or two" day extension because of its inability to close. Notably, however, no evidence was presented to establish that Plaintiff ever sought an extension pursuant to the terms of the no fault clause. In other words, Plaintiff never asserted its right to an extension based upon a claim that its failure to close was because a contingency had not been satisfied through no fault of its own.¹ Undisputed evidence revealed Plaintiff tendered Fifty Thousand and 00/100 (\$50,000 00) Dollars to Defendant on August 1, 2006 (i.e. the day after the contracted-for deadline) in an unsuccessful attempt to purchase an extension, the offer for which had been previously withdrawn and revoked by Defendant. Indeed, Plaintiff's testimony established it, through its attorney, had overlooked the no fault clause and was unaware of its existence during the relevant time period.²

¹ As Plaintiff's attorney conceded during argument on Defendant's renewed directed verdict motion, Plaintiff "never got around to explaining why" an extension of the closing date was needed. (Transcript of Renewed Directed Verdict Motion, p. 38, lines 7-8)

² In his deposition, Plaintiff's real estate attorney Benjamin A. Lafond, Esquire (hereinafter "Mr. Lafond") testified he was, in fact, unaware of the no fault clause.

The evidence further established that Plaintiff did not attempt to invoke the no fault provision until filing an amended complaint in April of 2007, more than seven months after this lawsuit was commenced and more than eight (8) months past the July 31, 2006 deadline

At trial, Plaintiff claimed it was entitled to an extension of up to fifteen (15) days pursuant to the no fault clause. Plaintiff argued the wording of the no fault clause supported the conclusion that no notice was required to Defendant of the right to the extension under this provision, and no obligation was imposed upon it to provide a reason establishing (or, at least, asserting) that the failure to close by the July 31, 2006 deadline was because a contractual contingency had not been satisfied through no fault on its part.

Having heard all evidence presented by both parties, this Court found Plaintiff had not presented evidence from which a reasonable jury could find that Defendant breached the Contract by refusing the unexplained request for an extension or by repudiating the Contract prior to the time for performance. More specifically, the Court ruled, "as a matter of law under th[e] contract the Plaintiff had an obligation to bring it to the Defendant's attention if they wanted to exercise their rights under the 15-day clause and there's absolutely no testimony in

[Question] Okay. At any time between August 1st and August 15th, 2006, did you convey to Skipper Woody to any broker to anyone that under the terms of the contract that the purchaser was entitled to a fifteen-day extension?

[Lafond] No. I missed that.

[Question] You missed that?

[Lafond] Flat missed it.

(Deposition of Benjamin A. Lafond, p. 57 line 23 – p. 58, line 5) Throughout its memorandum in support of the present motion, Plaintiff asserts that Mr. Lafond contacted Defendant's member Aubrey J. Skipper, Woody Jr. Esquire (hereinafter Mr. Woody), on July 31, 2006. Defendant denies having a conversation with Mr. Lafond that day; however, assuming *arguendo* a conversation between Mr. Lafond and Mr. Woody did occur, the conversation could not have concerned an extension pursuant to the no fault clause as Mr. Lafond openly admits he was unaware of its existence. The only communication of record between Mr. Lafond and Mr. Woody concerned the tender of the \$50,000 check (for the previously revoked extension offer) that was promptly returned to Mr. Lafond.

the record which would support the idea they notified them that they were proceeding under that 15-day clause” (Transcript of Renewed Directed Verdict Motion, p 41, lines 3-9)

(emphasis added) Plaintiff now moves the Court for a new trial pursuant to Rule 59, SCRCP. Plaintiff’s motion is without merit and should be denied.

ARGUMENT AND CITATION OF AUTHORITY

I Directed verdict standard

In ruling on a motion for directed verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion and to deny the motion where either the evidence yields more than one reasonable inference or its inference is in doubt. Strange v. S.C. Dep’t of Highways & Pub. Transp., 314 S.C. 427, 429-430, 445 S.E.2d 439, 440 (1994), Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 514 S.E.2d 126 (1999). If the evidence does not yield more than one reasonable inference, however, a directed verdict in favor of the moving party is proper. American Fire and Casualty Co. v. Johnson, 332 S.C. 307, 504 S.E.2d 356 (Ct. App. 1998). “In essence, the court must determine whether a verdict for the opposing party ‘would be reasonably possible under the facts as liberally construed in his favor.’” Love v. Gamble, 316 S.C. 203, 448 S.E.2d 876, 878-879 (Ct. App. 1994). “[T]his does not mean”, however, “that the court should ignore facts unfavorable to the opposing party.” Id. The trial court’s decision in this regard can only be reversed when there is no evidence to support its ruling. Strange, 314 S.C. at 430, 445 S.E.2d at 440.

II Plaintiff's "Motion to Alter or Amend the Judgment and for a New Trial" must be ~~denied because Plaintiff did not make the motion promptly after the jury was discharged or request ten (10) days within which to make the motion as required by Rule 59(b), SCRCP~~

Plaintiff filed the present motion pursuant to Rule 59. Rule 59 pertains to new trials as well as to amendment of judgments, distinct requests as evidenced by the plain language of the rule. Although styled as 'Plaintiff's Motion to Alter or Amend the Judgment and for a New Trial', the present motion is more properly viewed as only a motion for a new trial. This conclusion is dictated by logic, as there is simply no other relief this Court could grant to Plaintiff under the circumstances. The Court could not alter or amend judgment to favor Plaintiff, because such would be tantamount to directing a verdict for Plaintiff. In addition to the fact that such a ruling would be unsupported by the evidence presented at trial, it would also be procedurally improper because Plaintiff did not previously move for a directed verdict and has, therefore, forgone any claim to such. This conclusion is further corroborated by Plaintiff's own memorandum in support of the present motion, a close reading of which reveals that its object is but the grant of a new trial, tacitly conceding no other amendment or alteration of the judgment is possible.³

In pertinent part, Rule 59(b) provides '[t]he motion for a new trial shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter.' In Boone v. Goodwin, 314 S.C. 374, 376, 444 S.E.2d 524, 525 (1994) the South Carolina Supreme Court held that "a party must make a motion for a new trial promptly after the jury is discharged or request ten days within which to make the motion." (emphasis added)

³ Plaintiff's memorandum includes two arguments in support of its position. The first concludes with the following language "[a]ccordingly this court erred in directing a verdict and should grant Plaintiff's request for a new trial." Similarly Plaintiff's second argument concludes with, "[a]ccordingly this court should grant Plaintiff's motion for a new trial."

Plaintiff did not move for a new trial following the discharge of the jury, nor did it request or obtain additional time in which to make the motion from the Court.⁴ The present motion is, therefore, untimely and must be denied.

III Plaintiff's "Motion to Alter or Amend the Judgment and for a New Trial" should be denied because Plaintiff did not timely serve the motion on Defendant pursuant to Rule 59(e), SCRCP

Assuming, arguendo, it would be possible for the Court to alter or amend the judgment in some way other than granting a new trial, Plaintiff's motion to alter or amend is nonetheless procedurally improper and must be denied. Rule 59(e) requires that a motion to alter or amend judgment be served not later than ten (10) days after the receipt of written notice of the entry of the order Norris v. Heyward, 312 S C 67, 69, 439 S E 2d 264, 265 (1993) In this case, the directed verdict was announced in court on March 13, 2008 and written notice thereof was emailed to all counsel on the same date. Despite the fact that the certificate of service attached to Plaintiff's motion states that it was hand-delivered to Defendant's counsel on March 24, 2008, no copy of the motion was, in fact, delivered to Defendant's counsel until the letter providing a copy of the file-stamped motion (dated March 31, 2008) was received on April 1, 2008. This fact is

⁴ The trial transcript clearly shows the Plaintiff failed to move for a new trial or request additional time in which to make the motion.

[The Court] I rule as a matter of law under this contract the Plaintiff had an obligation to bring it to the Seller's attention, to the Defendant's attention if they wanted to exercise their rights under the 15-day clause and there is absolutely no testimony in the record which would support the idea they notified them that they were proceeding under that 15-day clause. I grant the motion for a directed verdict.

[Mr. Altman] Thank you, Your Honor.

[The Court] Bring the jury back in.

(Jurors discharged.)

(Transcript of Record. Testimony of Michael Rakes p. 41 lines 5 - 15)

supported by the affidavits of Defendant's counsel Charles S. Altman as well as Carol S. Biddle, Mr. Altman's paralegal, Marcus W. Meetze, Mr. Altman's law clerk, and Erica Bondy, Mr. Altman's receptionist, copies of which are attached hereto as Exhibit A.

Rule 5(b)(1), SCRCP, provides that service upon a party represented by an attorney shall be made by delivering or mailing a copy to that party's attorney. As noted above, service of the present motion was purportedly made by hand delivery. Rule 5(b)(1) explains, "[d]elivery of a copy means handing it to the attorney or to the party, or leaving it at his office with his clerk or other person in charge thereof; or, if there be no one in charge, leaving it in a conspicuous place therein." As the attached affidavits attest, delivery and, therefore, proper service of the present motion, was not timely affected. The Plaintiff's motion should be denied because Plaintiff failed to serve the motion within ten (10) days as required by Rule 59(e).

IV Plaintiff's "Motion to Alter or Amend the Judgment and for a New Trial" should be denied because Plaintiff did not present evidence that Defendant breached the Contract.

Although it is undisputed that Plaintiff never informed Defendant at any time prior to its amended complaint that it claimed an extension under the no fault clause, Plaintiff contends its failure to provide such notice to Defendant is of no consequence because Defendant "repudiated" the Contract and/or no notice was required under the terms of the Contract. Both arguments are without merit.

A. Plaintiff did not present sufficient evidence from which a reasonable jury could conclude Defendant repudiated the Contract.

Plaintiff asserts Defendant repudiated the Contract and, therefore, was not entitled to a directed verdict. With respect to its repudiation argument, Plaintiff cites only the following legal authority:

It is black letter law that.

Repudiation of a contract before the time for performance, which amounts to a refusal to perform it at any time, gives the adverse party the option to treat the entire contract as broken and to sue immediately for damages as for a total breach. There is no necessity in such case for a tender of performance, or compliance with conditions precedent, or waiting for the time of performance to arrive. No notice need to be given that the repudiation is treated as a breach.

Ralph King Anderson, Jr., South Carolina Requests to Charge – Civil, 2002, § 19-19

“Repudiation includes a refusal or declination to perform in accordance with the contract.” Id. at § 19-18

Plaintiff's analysis of this issue is incomplete and incorrect.

“A repudiation is (a) a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach or (b) a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach.” Restatement (Second) of Contracts § 250 (1981) (emphasis added). Under the doctrine known as “breach by anticipatory repudiation” if one party to a contract declares in advance that he will not perform at the time set for his performance, the other party may bring an immediate action for total breach of the contract.” Fairfax v. Washington Metro Area Transit Auth., 582 F.2d 1321, 1325 (4th Cir. 1978) (emphasis added). To constitute an anticipatory repudiation, “it must appear that the party bound under a contract has unequivocally refused to perform.” Id. at 1326 (emphasis added), Suburban Improvement Co. v. Scott Lumber Co., 67 F.2d 335, 337 (4th Cir. 1993) (same). In other words, “there must be a ‘positive, unconditional, and unequivocal declaration of fixed purpose not to perform the contract in any event or any time’” Fairfax, 582 F.2d at 1326 *citing* Dingley v. Oler, 117

Plaintiffs presented no evidence of any unequivocal declaration by Defendant of its refusal to perform its obligations under the Contract in general or to abide by the no fault clause in particular.⁵ Plaintiff merely presented evidence that Defendant communicated its lack of willingness to agree to (i.e., "grant") any extensions of time outside (i.e. separate and apart from) the no fault clause (e.g., Defendant's withdrawal of its offer to purchase an extension for \$50,000, Defendant's return of Plaintiff's \$50,000 tender on August 1, 2006, and Defendant's rejection of Plaintiff's unexplained requests for a "day or two" extension).⁶ As Plaintiff's memorandum in support of the present motion implicitly concedes, the only evidence unequivocally pertaining to the no fault clause was that "Defendant told its [own] realtor" – i.e.,

⁵ The evidence presented at trial clearly demonstrates that the Defendant was at all times set for performance, "ready willing and able to perform" In a July 31 2006 letter to the Plaintiff's real estate attorney Benjamin A. Lafond, Esquire Skipper Woody wrote "I have spoken to my client and they are ready, willing and able to close on the above-captioned property" (Testimony of Aubrey J Woody, Jr p 12 lines 14-16)

⁶ In its memorandum in support of the present motion, Plaintiff makes much of Mr Woody's testimony that "[i]f the contingency had not been met, they would be entitled to 15 days. I don't think there's any questions about that" (Testimony of Aubrey J Woody Jr p 39, lines 7-9) Contrary to Plaintiff's apparent belief, this testimony is not helpful to its position and is entirely consistent with Defendant's position that its refusal to "grant" an extension did not pertain to the no fault clause The following exchange between Mr Woody and Plaintiff's counsel clearly reveals this distinction.

[Question] Is there anything in the agreement that says the time for giving the 15-day notice and place is at the closing on the 31st? Anything in that agreement that says that whatsoever?

[Mr Woody] No, but you've got to close.

[Question] In fact, there's nothing in that agreement whatsoever that even talks about how this notice is supposed to be given when and if it's given, correct?

[Mr Woody] You'd have to close, Steve If you're going to use your 15 days use your 15 days but you've got to close

[Question] I'm sorry The 15 days you have to close you have to -- you keep saying you have to close, you have to close You had already said there are no extensions correct?

[Mr Woody] There were no additional extensions to the 30-day extension. We weren't talking about the 15-day extension. You keep you keep referring to it as if we had cut off all extensions or the term of the contract. I don't have the right to cut off [paragraph] 33 [of the Contract, i.e., the no fault clause] off"

(Testimony of Aubrey J Woody, Jr pp 45 line 13 – p 46 line 5) (emphasis added)

not Plaintiff or Plaintiff's real estate agent – that, based upon the facts as it understood them at that time, it did not believe Plaintiff was entitled to an extension under the no fault clause and would litigate any attempt by Plaintiff to assert its right to an extension under this provision of the Contract – of course, this was ultimately a moot point because this communication was never relayed to Plaintiff (or its representatives) and Plaintiff never actually made any attempt to assert its right to an extension under the no fault clause until its April 2007 amended complaint.^{7 8} The

⁷ The only evidence specifically relating to the no fault clause pertained to a private conversation between Mr Wooddy and his own real estate agent Michael Rakes (hereinafter "Rakes"). This conversation occurred on July 21, 2006 the day after Rakes communicated the withdrawal of the \$50,000 extension offer to Plaintiff's real estate agent Georgia Richard (hereinafter "Richard"). As Rakes explained, after the for-consideration 30-day extension offer had been withdrawn by Defendant, Bruce Marshall (hereinafter "Marshall") one of Plaintiff's members left Rakes a voice mail, again inquiring about a 30-day extension. Rakes notes and testimony reveal that Marshall claimed the extension was needed because of an issue pertaining to the "water and sewer" at the subject property. According to Rakes this was an issue that Plaintiff should have resolved during the 90-day due diligence period provided for in the Contract. Based on this understanding Rakes inquired to Mr Wooddy "would this have any bearing on this 15-day clause. In response Mr Wooddy "said something to the effect to [Rakes] that if they did that they would have to litigate it or they may have to litigate it", according to Rakes testimony (Testimony of Michael Rakes, p. 12, line 17 – p. 13, line 24 p. 15 lines 5-21). Notably there is no evidence in the record that any communication specifically regarding the no fault clause was exchanged between Plaintiff and Defendant, or any of their representatives. Rakes communication to Richmond withdrawing the 30-day for-consideration extension offer simply informed her the extension offer had been withdrawn and that "[Defendant] is ready, willing and able to close per the contract and will grant no extension of time" (Email from Rakes to Richmond dated July 20, 2006) (emphasis added). This was not an unequivocal communication of Defendant's intent not to honor the no fault clause only an expression of its unwillingness to agree to any further extensions the no fault extension having already been agreed upon at the time of the execution of the Contract.

⁸ It is also worth noting that no evidence was presented from which the jury could have reasonably concluded Plaintiff was without fault in failing to timely close. By its express terms, the no fault clause only applied if the transaction did not close within the stipulated time which was of the essence because a contingency could not be satisfied through no fault of either party. Under that circumstance the closing date would be extended by no more than fifteen (15) days. The Contract provided that the sale was contingent upon Plaintiff obtaining an 80% loan. The contingency stated as follows:

6 LOAN PROCESSING AND APPLICATION Buyer's obligation under this agreement is contingent on Buyer obtaining said loan. Buyer shall apply for a maximum 80.00% loan (loan to value ratio) within 30 consecutive days from the execution of this agreement and shall provide Seller with written satisfactory loan approval within 45 consecutive days that contains no credit, income, or asset conditions, unless otherwise set forth in this contract. Time is of the essence. Should the Buyer fail to make loan application or receive approval within said period, and to diligently pursue the application, the Seller shall have the option to terminate this Agreement, with the written notice. Buyer also agrees to provide all documents or information requested by the lending company in a prompt and timely manner. Buyer will take any action that is needed or requested by Lender to process the loan application. Buyer further hereby gives permission to Lender to disclose pertinent information concerning the Buyer's credit-worthiness or any other information needed for

fact that Plaintiff never expressly sought an extension under the no fault clause is consistent with the following undisputed items of evidence, all of which are, likewise, irreconcilably inconsistent with Plaintiff's claim that it should now prevail pursuant to the no fault clause (1) Plaintiff's own attorney admitted his lack of awareness of the existence of the no fault clause at all relevant times, (2) Plaintiff tendered \$50,000 to Defendant on August 1, 2006 in an attempt to purchase an extension, and (3) Plaintiff did not expressly rely upon the no fault clause in any way until it amended its complaint some eight (8) months after the July 31, 2006 deadline

Plaintiff asserted Defendant breached the Contract by refusing to acquiesce in the extension of the closing date pursuant to the terms of the no fault clause. However, as this Court correctly recognized, the no fault extension is only applicable when the failure to satisfy a contingency in the Contract is, in fact, through no fault of either party. Taking the evidence in a light most favorable to Plaintiff, there was no evidence presented to establish Plaintiff ever sought an extension based upon the no fault clause. Taking the evidence in the light most favorable to Plaintiff, Plaintiff presented no evidence that Defendant ever made any communication to Plaintiff that could constitute a "repudiation" of the Contract or the no fault clause, as that term has been construed by appellate decisions. In fact, as stated in the termination letter dated July 31, 2006, Defendant "was [during the period set for closing under the Contract] ready, willing and able to perform." (Testimony of Aubrey J. Woody, Jr. p. 12,

the loan processing to listing or cooperating broker(s) or agent(s). If Buyer fails to comply with these conditions Buyer shall be in default of this agreement subject to the terms of paragraph 22.

The uncontroverted evidence established that the reason Plaintiff was unable to close on July 31, 2006 was that Plaintiff had failed to timely read the lender's commitment letter and was not prepared to meet the financial obligations imposed upon Plaintiff by the lender as a condition of the loan. Moreover, the evidence revealed that Plaintiff (1) failed to provide information to the lending institution concerning Plaintiff's members (2) failed to secure the funds necessary to secure the loan, and (3) failed to communicate pertinent information to Defendant. Therefore, under any view of the evidence, Plaintiff was at least partially at fault in failing to close on time and there

lines 14-16) Taking the evidence in the light most favorable to Plaintiff, there was no evidence that Defendant denied any extension based upon the no fault provision. This Court properly directed a verdict in favor of Defendant. Plaintiff's motion should be denied.⁹

B The Court properly interpreted the Contract in accordance with its plain language and applicable principles of South Carolina law

The construction of an agreement is a matter of contract law. McDuffie v. McDuffie, 313 S.C. 397, 399, 438 S.E.2d 239, 241 (1993). The primary objective in construing a contract is to ascertain and give effect to the intention of the parties. Williams v. Teran, Inc., 266 S.C. 55, 59, 221 S.E.2d 526, 528 (1976). The Court must first look at the language of the contract in order to determine the intention of the parties. Superior Auto. Ins. Co. v. Maners, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973). In determining the parties' intentions, the court must read the contract as a whole. S. Atl. Fin. Servs., Inc. v. Middleton, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003). If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect. Blakeley v. Rabon, 266 S.C. 68, 72, 221 S.E.2d 767, 769 (1976). "All contracts should receive a sensible and reasonable construction, and not such a one as will lead to absurd consequences or unjust results." Proffitt v. Sitton, 244 S.C. 206, 212, 136 S.E.2d 257, 260 (1965).

The no fault clause reads as follows

33 EXTENSION AGREEMENT If the transaction has not closed within the stipulated time limit because a contingency has not been satisfied through no fault of either party, then both parties agree to extend this agreement for a period not to exceed 15 consecutive days from the original closing date. Closing shall

was no basis for a reasonable jury to conclude Plaintiff was, in fact, entitled to an extension under the no fault clause.

⁹ To the extent that it may be suggested that Defendant had any duty to Plaintiff to advise it of any rights under the no fault clause, Defendant would note that such a suggestion is unavailing. Plaintiff is composed of sophisticated business people including one real estate developer. Plaintiff was also represented by an experienced real estate agent as well as an experienced real estate attorney. Clearly Plaintiff was in a position to read the Contract and seek the advice of counsel concerning its terms if it was unclear of any right or duties it may have under the Contract.

occur within this time extension, but in no event shall closing

~~occur later than the above extension date~~

Plaintiff contends its failure to notify Defendant of any claim to an extension pursuant to the no fault clause is of no consequence and that the Court erred in interpreting the Contract in such a way as to require notice of such a claim. Plaintiff's argument relies upon an unreasonable and, therefore, unacceptable interpretation of the plain language of the Contract.

The no fault clause plainly provides that it is applicable only in the event "a contingency has not been satisfied through no fault of either party." Putting aside the fact that, as has been explained, there is overwhelming evidence of Plaintiff's fault in failing to timely close, even if Plaintiff was, in fact, faultless, some notice of its position with regard to this provision must have been conveyed to Defendant for Plaintiff to claim rights thereunder. Reading the Contract as a whole, it is without dispute that time was of the essence of the Contract and that a closing deadline of July 31, 2006 had been mutually agreed upon. The no fault clause was an exception to this otherwise firm and material deadline, to be resorted to only in the event that the party invoking its provisions was doing so in the absence of fault in failing to timely close – otherwise that party would have simply defaulted on its contractual obligations. The interpretation of this clause suggested by Plaintiff would allow a party to expand the contracted-for and expressly material July 31, 2006 deadline, without notice, with absolutely no explanation of the need therefore, whether or not such need was brought about because a contingency has not been satisfied through that party's fault. In effect, Plaintiff's interpretation would convert the no fault extension into an automatic extension of up to fifteen (15) days, allowing an at-fault party to mask its failure to make timely preparations for closing (i.e., default) so long as it could be ready to close within fifteen (15) days after July 31, 2006. Such an interpretation is unreasonable and absurd when reading the Contract as a whole and giving effect

to its clear intention to make time of the essence Plaintiff's interpretation of the no fault clause
was properly rejected by this Court. Plaintiff's motion should be denied

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that this Court deny Plaintiff's
"Motion to Alter and Amend the Judgment and for a New Trial "

Respectfully submitted,



ALTMAN & COKER, LLC

Charles S. Altman, Esquire

Meredith L. Coker, Esquire

P O Box 265

Charleston, South Carolina 29402

Telephone (843) 853-9907

Facsimile (843) 853-9893

-AND-



YOUNG CLEMENT RIVERS, LLP

William L. Howard, Esquire

Russell G. Hines, Esquire

28 Broad Street

Charleston, South Carolina 29401

Telephone (843) 577-4000

Facsimile (843) 579-1392

May 7, 2008

EXHIBIT A

00061

APP 71

STATE OF SOUTH CAROLINA)

COUNTY OF BERKELEY)

SHEEP ISLAND PLANTATION, LLC)

Plaintiff,)

vs)

BAR-PEN INVESTMENTS, LLC)

Defendant.)

IN THE COURT OF COMMON PLEAS

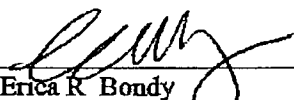
Case No 06-CP-08-1650

AFFIDAVIT OF ERICA R. BONDY

BEFORE ME, personally appeared Erica Bondy, who being first duly sworn, deposes and attests to the following

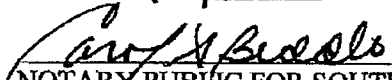
- (1) I, Erica R. Bondy, am over eighteen (18) years of age and am competent to testify on the matters herein
- (2) I, Erica R. Bondy, am a receptionist with Altman and Coker, LLC with personal knowledge of the matters herein.
- (3) On March 24, 2008 I was working at Altman and Coker, LLC, 171 Church Street, Suite 318, Charleston, SC 29401 from the hours of 8 30 am - 5 30 pm
- (4) At no time on March 24, 2008 did I witness delivery or accept service of Plaintiff's Motion to Alter or Amend the Judgment and for a New Trial from the Futeral Law Firm, LLC

Date May 5, 2008


Erica R. Bondy

SWORN TO BEFORE ME

this May 5, 2008


NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission expires 8/15/2012

Page 1 of 1

00062

APP 72

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF BERKELEY

Case No. 06-CP-08-1650

SHEEP ISLAND PLANTATION, LLC

Plaintiff,

vs

BAR-PEN INVESTMENTS, LLC

Defendant.

AFFIDAVIT OF CHARLES S ALTMAN

BEFORE ME, personally appeared Charles S Altman who being first duly sworn,
deposes and attests to the following

- (1) I, Charles S Altman, am over eighteen (18) years of age and am competent to testify on the matters herein
- (2) I, Charles S Altman, am a member of Altman and Coker, LLC with personal knowledge of the matters herein.
- (3) I, Charles S Altman, am the primary attorney assigned in the above-captioned matter
- (4) On March 24, 2008 I was present in the office of Altman and Coker, LLC, 171 Church Street, Suite 318, Charleston, SC 29401 from the hours of 8 00 am to 6 00 pm.
- (5) The only employees and members present in the office of Altman and Coker, LLC on March 24, 2008 were the following Charles S Altman, Meredith L. Coker, Carol A. Biddle Marcus W Meetze, and Erica R Bondy

Page 1 of 7

00063

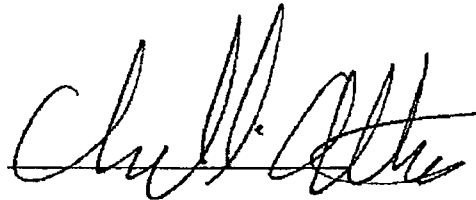
APP 73

(6) At no time on March 24, 2008 did I witness delivery or accept service of
Plaintiff's Motion to Alter or Amend the Judgment and for a New Trial from the

Futeral Law Firm, LLC

(7) On April 1, 2008 I received a letter from the Futeral Law Firm, LLC containing
said motion To my knowledge, this is the first and only time Altman and Coker,
LLC was served with said motion

Date 5/17/08



Charles S. Altman

SWORN TO BEFORE ME

this May 7, 2008


NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission expires 8/15/2012

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF BERKELEY

Case No. ~~06-CP-08-1650~~

SHEEP ISLAND PLANTATION, LLC

Plaintiff

vs

BAR-PEN INVESTMENTS LLC

Defendant.

AFFIDAVIT OF CAROL A BIDDLE

BEFORE ME, personally appeared Carol A Biddle, who being first duly sworn, deposes and attests to the following

- (1) I, Carol A Biddle, am over eighteen (18) years of age and am competent to testify on the matters herein
- (2) I, Carol A Biddle, am a paralegal with Altman and Coker, LLC with personal knowledge of the matters herein
- (3) On March 24, 2008 I was working at Altman and Coker, LLC, 171 Church Street, Suite 318, Charleston, SC 29401 from the hours of 8 30 am - 5 30 pm
- (4) At no time on March 24, 2008 did I witness delivery or accept service of Plaintiff's Motion to Alter or Amend the Judgment and for a New Trial from the Futeral Law Firm, LLC
- (5) On April 1, 2008 I witnessed Charles S Altman, Esq. open a letter from the Futeral Law Firm, LLC containing said motion. To my knowledge, this is the first and only time Altman and Coker, LLC was served with said motion

Date 5/7/08

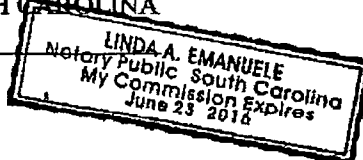
Carol A Biddle
Carol A Biddle

SWORN TO BEFORE ME

this May 7, 2008

Linda Emanuele
NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission expires _____



Page 4 of 7

00065

APP 75

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

)
COUNTY OF BERKELEY

)
~~Case No 06-CP-08-1650~~

)
SHEEP ISLAND PLANTATION, LLC

)
Plaintiff,

)
vs

)
BAR-PEN INVESTMENTS, LLC

)
Defendant.
)

AFFIDAVIT OF MARCUS W MEETZE

BEFORE ME, personally appeared Marcus W Meetze, who being first duly sworn, deposes and attests to the following

- (1) I, Marcus W Meetze, am over eighteen (18) years of age and am competent to testify on the matters herein.
- (2) I, Marcus W Meetze, am a law clerk with Altman and Coker, LLC with personal knowledge of the matters herein.
- (3) On March 24, 2008 I was working at Altman and Coker, LLC, 171 Church Street, Suite 318, Charleston, SC 29401 from the hours of 9 00 am - 5 30 pm.
- (4) At no time on March 24, 2008 did I witness delivery or accept service of Plaintiff's Motion to Alter or Amend the Judgment and for a New Trial from the Futeral Law Firm, LLC

(5) On April 1, 2008 I witnessed Charles S Altman, Esq open a letter from the
Futeral Law Firm, LLC containing said motion To my knowledge, this is the first
and only time Altman and Coker, LLC was served with said motion

Date 5/5/08

M. W. Meetze
Marcus W Meetze

SWORN TO BEFORE ME

this 5th, May, 2008

Carol A. Beards
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission expires 8/15/2012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	Case No ~~06-CP-08-1650~~
COUNTY OF BERKELEY	)	
	)	
SHEEP ISLAND PLANTATION, LLC	)	
	)	
Plaintiff,	)	
	)	
vs	)	
	)	
BAR-PEN INVESTMENTS, LLC	)	
	)	
Defendant.	)	

AFFIDAVIT OF MEREDITH L. COKER

BEFORE ME, personally appeared Meredith L. Coker, who being first duly sworn, deposes and attests to the following:

- (1) I, Meredith L. Coker, am over eighteen (18) years of age and am competent to testify on the matters herein.
- (2) I, Meredith L. Coker, am a member of Altman and Coker, LLC with personal knowledge of the matters herein.
- (3) On March 24, 2008 I was present in my office at 171 Church Street, Suite 318 Charleston, SC 29402 from the hours of 8 00 am to 6 00 pm.
- (4) At no time on March 24, 2008 did I witness delivery or accept service of Plaintiff's Motion to Alter or Amend the Judgment and for a New Trial from the Futeral Law Firm, LLC.

Date 5/7/08


Meredith L. Coker

SWORN TO BEFORE ME
this May 7, 2008

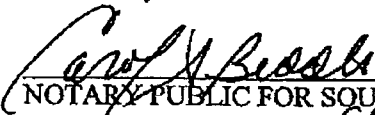

NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission expires 8/15/2012

EXHIBIT B

00069

APP 79

1 STATE OF SOUTH CAROLINA)
 2 COUNTY OF BERKELEY) IN THE COURT OF COMMON PLEAS
 3 SHEEP ISLAND PLANTATION, LLC,) Case No 2006-CP-08-1650
 4 Plaintiff,)
 5 -vs-) DEPOSITION OF
 6 BAR-PEN INVESTMENTS, LLC,) BENJAMIN A. LAFOND,
 7 Defendant.) ESQUIRE

COPY

11 Given before Ted J Brown, Court Reporter and Notary
 12 Public, at the Law Offices of The Woody Law Firm, 622
 13 Johnnie Dodds Boulevard, Mt. Pleasant, South Carolina,
 14 on Tuesday, May the 29th, 2007, commencing at 9 13
 15 o'clock, a m.

21 **RAY SWARTZ & ASSOCIATES OF SOUTH CAROLINA**
 22 **-Professional Court Reporters-**
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1 the contract that the purchaser was entitled to
2 a fifteen-day extension?

3 A No I missed that

4 Q You missed that?

5 A Flat missed it

6 Q When did you realize it?

7 A Fairly recently when it was brought to my
8 attention by Bruce Marshall

9 Q Did anyone, to your knowledge, between August
10 1st and August 15th, 2006, convey to the seller
11 that the purchaser was entitled to a fifteen-day
12 extension?

13 A Not to my knowledge

14 Q Between August 1st and August 15th, 2006, did
15 anyone tender the purchase price to the seller?

16 A No And based on Skipper's letter to me from
17 August 1st, I mean he said the contract was
18 terminated and he wasn't going to close I mean
19 going through the mechanics, we were there We
20 could have closed, you know If had given any
21 indication that the sellers would be willing to
22 close And he told me flat out, on the phone,
23 that they were not going to close, that the
24 contract was dead on the 31st, if they didn't
25 close on the 31st I mean it would have been a,

RAY SWARTZ & ASSOCIATES OF SOUTH CAROLINA 1-800-822-8711

couple of days to close and were willing, obviously, by my email to him that evening, showed him, hey, here's another \$50,000 00 I mean they were willing to go that extra step So, that --

Q You didn't say on what terms the \$50,000 00 was going to be paid, did you?

A No But, I think it's reasonable to assume that the \$50,000 00 was on the terms of the extension that had been conveyed The extension offer that had been conveyed to them earlier

Q Do you have any personal knowledge that anyone conveyed to the seller that the purchaser wanted to extend for thirty days, prior to your letter of the 31st of July, 2006?

A No, because that would have all been done through brokers

Q Okay So, you have no personal knowledge that that message was ever conveyed?

A Just what I've heard

Q Just what you heard?

A Just what I've heard

Q Okay At any time between August 1st and August 15th, 2006, did you convey to Skipper Woody, to any broker, to anyone that under the terms of

RAY SWARTZ & ASSOCIATES OF SOUTH CAROLINA 1-800-822-8711

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY) 06-CP-08-1650

Sheep Island Plantation LLC)
Plaintiff,) Transcript of Record
vs) Testimony of
Bar-Pen Investments LLC) Aubrey J Wooddy, Jr
Defendant)

B E F O R E

Honorable Thomas L Hughston, Jr
Berkeley County Courthouse
Moncks Corner, South Carolina

A P P E A R A N C E S

Stephan V Futeral, Esquire
Thomas Nelson, Esquire
Attorneys for Plaintiff

Charles S Altman, Esquire
Attorney for Defendant

Grace L Hurley, CVR-CM
Circuit Court Reporter

1 think it was going to close

2 Q What did you do?

3 A I put them on notice that we were ready, willing and able
4 to close and that we considered this to be a default in the
5 contract

6 Q Let me show you a document that's been marked previously
7 as Plaintiff's Exhibit Fourteen Is that the letter you
8 wrote?

9 A This is correct

10 Q Would you please read the letter for us, the entire
11 letter?

12 A Sure It says, "Dear Ben, it is my understanding that
13 the closing was canceled today at your office on the above-
14 captioned," referring to the transaction, "I have spoken to
15 my client and they are ready, willing and able to close on the
16 above-captioned property We believe the closing date was to
17 be on or before July 31st, 2006 Time being of the essence it
18 is our opinion that your client has defaulted under the terms
19 of the agreement between the parties and we are hereby
20 terminating the agreement With best regards, I am "

21 Q Did you have a response to that letter?

22 A A response came into my office a little after five

23 Q Did you have a response that said, "No, we're ready to
24 close?"

25 A No

1 A Again, Steve, I don't remember but the financing
2 a concern of ours in terms of whether we thought they had it
3 or not because we thought they had it

4 Q Would I be correct that if you came up to July 31st and
5 the buyers were not in fault in being unable to close on that
6 day then they would have been entitled to a 15-day extension
7 to close, correct?

8 A If the contingency had not been met they would be
9 entitled to 15 days I don't think there's any question about
10 that

11 Q Okay, and you would agree with me that one of the very
12 contingencies you're talking about that they had to meet was
13 just simply closing on the 31st ---

14 A Correct

15 Q --- not financing, just closing

16 A Correct

17 Q Okay and you were at some point notified they're having
18 problems closing on the 31st

19 A I was notified that they were not going to close

20 Q Okay, and if they weren't at fault and they couldn't
21 close on the 31st, financing notwithstanding, then under the
22 contract I'd be correct they'd get 15 more days right?

23 A They had the 15 days if that was the situation

24 Q Okay, and I'm also correct that you had no knowledge of
25 fault according to your own testimony as of that day

1 extension of the contract due to a contingency If you don't
2 tell the other side that you're, in effect, your contingency
3 hasn't been met then I don't know, you know, I don't know how
4 you can affect your remedy under 33

5 Q Uh-huh, so, then just so I understand you, even though
6 there's -- is there anything in that document anywhere that
7 says they must provide you notice in writing of a 15-day
8 extension, anywhere in that agreement at all?

9 A No, no ---

10 Q Okay

11 A But by ---

12 Q Is there ---

13 A Okay, go ahead

14 Q Is there anything in that agreement that says the time
15 for giving the 15-day notice and place is at the closing on
16 the 31st? Anything in that agreement that says that
17 whatsoever?

18 A No, but you've got to close

19 Q In fact, there's nothing in that agreement whatsoever
20 that even talks about how this notice is supposed to be given
21 when and if it's given, correct?

22 A You'd have to close, Steve If you're going to use your
23 15 days use your 15 days, but you've got to close

24 Q I'm sorry ~~The 15 days~~ you have to close you have to --
25 you keep saying you have to close, you have to close You had

~~STATE OF SOUTH CAROLINA~~) IN THE COURT ~~OF COMMON PLEAS~~
06-CP-08-1650

COUNTY OF BERKELEY)

Sheep Island Plantation LLC)

Plaintiff,)

vs)

Bar-Pen Investments LLC)

Defendant)

Transcript of Record

March 13, 2008

B E F O R E

Honorable Thomas L Hughston, Jr
Berkeley County Courthouse
Moncks Corner South Carolina

A P P E A R A N C E S

Stephan V Futeral, Esquire
Thomas Nelson, Esquire
Attorneys for Plaintiff

Charles S Altman Esquire
Attorney for Defendant

Grace L Hurley, CVR-CM
Circuit Court Reporter

1 THE COURT Why?

2 MR FUTERAL And here's the response, the answer -- we
3 know why and that's a question of whether we're at fault

4 THE COURT If that had been communicated to the
5 sellers you've got a point but that wasn't

6 MR FUTERAL Your Honor, good faith and fair dealing on
7 both ends of this transaction they responded to the
8 discussion as Mr Lafond said, he just said, "Look, there
9 are no extensions " Mr Woody didn't ask why and we never
10 got around to explaining why, but Your Honor, there is
11 circumstantial evidence to show that they knew exactly why and
12 here's why Georgia Richard testified that she communicated
13 to Mickey Rakes that the water and sewer problem somehow
14 affected their ability to get a loan Benji Lafond
15 specifically told him that they dropped the bomb with regard
16 to the interest He knew why, that he dropped the bomb on the
17 211 and, Your Honor says they didn't know why They knew
18 exactly why We didn't have \$211,000 that day and that's
19 Benji Lafond's testimony He had all the information we had
20 to give

21 THE COURT Well, he told them that they had a fact --
22 that they -- that he told him that after the fact, that's when
23 he's still asking for one or two days more to close

24 MR FUTERAL That's the -- wait, Your Honor, that's the
25 perfect time, looking at the contract, 15 days is not invoked

1 THE COURT All right, I've heard, I've heard enough
2 now as far as that's concerned and everything My ruling is
3 it's amply summed up by the last witness actually when he
4 said, "I cannot help it if their attorney and their agent did
5 not tell them about the 15-day clause " I rule as a matter
6 of law under this contract the Plaintiff had an obligation to
7 bring it to the Seller's attention, to the Defendant's
8 attention if they wanted to exercise their rights under the
9 15-day clause and there's absolutely no testimony in the
10 record which would support the idea they notified them that
11 they were proceeding under that 15-day clause I grant the
12 motion for a directed verdict

13 MR ALTMAN Thank you, Your Honor

14 THE COURT Bring the jury back in
15 (Jurors discharged)
16
17
18
19
20
21
22
23
24
25

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY	)	CIVIL ACTION NUMBER 06-CP-08-1650
SHEEP ISLAND PLANTATION, LLC	)	
	)	
Plaintiff,	)	
	)	
vs	)	
	)	
BAR-PEN INVESTMENTS, LLC	)	
	)	
Defendant.	)	

CERTIFICATE OF SERVICE

I hereby certify that, on this 7th day of May, 2008 a copy of *Defendant's Memorandum of Law in Opposition of Plaintiff's Motion to Alter or Amend the Judgment and for a New Trial* was served upon the below stated parties via hand delivery

Stephan V Futeral, Esquire
Thomas C Nelson, Esquire
Futeral Law Firm, LLC
Post Office Box 1543
Mt. Pleasant, South Carolina 26464

ALTMAN & COKER, LLC



Wes Meetze, Law Clerk
Post Office Box 265
Charleston, South Carolina 29402
(843) 853-9907
(843) 853-9838 Facsimile

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

SEP 05 2008

SC Court of Appeals

Thomas L. Hughston, Circuit Court Judge

Case No 06-CP-08-1650

Sheep Island Plantation, LLC,

Appellant,

v

Bar-Pen Investments, LLC,

Respondent.

APPELLANT'S RETURN TO RESPONDENT'S MOTION TO DISMISS

FUTERAL LAW FIRM, LLC

Stephan V. Futeral
S C Bar ID 66427
Thomas C. Nelson
S C Bar ID 71178
Post Office Box 1543
Mt Pleasant, South Carolina 29465-1543
Telephone (843) 284-5500
Facsimile (843) 284-5501
Email to sfuteral@charlestonlaw.net
Email to tnelson@charlestonlaw.net

Attorneys for Appellant

Appellants, by and through undersigned counsel, respectfully submit the following Return to Respondent's Motion to Dismiss the captioned appeal pursuant to Rule 224, SCACR

BACKGROUND

On August 23, 2006, Appellant filed a Summons and Complaint against Respondent with causes of action for Specific Performance and Breach of Contract. A copy of the Complaint is attached hereto as Exhibit A. This case was tried before the Honorable Thomas L. Hughston, Jr. from March 10 to March 13, 2008. At the conclusion of Appellant's case, Respondent moved for a directed verdict, and the trial court denied Respondent's motion. At the conclusion of Respondent's case, Respondent renewed its directed verdict motion and the trial court granted the motion.

On Monday, March 24, 2008, before it received written notice of the entry of judgment, Appellant filed a motion to alter or amend the judgment and for a new trial and served such motion on the trial judge and on Respondent's counsel via United States Mail on March 31, 2008. Copies of the motion and a letter from Appellant's counsel's office are attached hereto as Exhibits B and C. Thereafter, on or about April 3, 2008, because Appellant had yet to receive from the clerk of court any written notice of entry of judgment, Appellant's counsel directly contacted the Clerk of Court's office for Berkeley County and requested a copy of the court's order. See the affidavit of Thomas Nelson attached hereto as Exhibit D.

Appellant's motion to alter or amend the judgment was heard before Judge Hughston on May 8, 2008, and the court denied Appellant's motion. Appellant received written notice of entry of this judgment on May 15, 2008, a copy of which is attached hereto as Exhibit E. Thereafter, on May 15, 2008, Appellant served its notice of appeal from the order granting Respondent's directed verdict and from the order denying Appellant's motion to alter or amend and

for a new trial. A copy of the Notice of Appeal and Proof of Service, both filed on May 16, 2008, are attached hereto as Exhibits F and G.

ARGUMENT

I This Court has jurisdiction to hear this matter because Appellant made its Rule 59(e) Motion before receiving written notice of the entry of judgment and thereby stayed the time for perfecting Appellant's appeal.

Rule 59(e), SCRPC, provides that "[a] motion to alter or amend the judgment shall be served not later than 10 days after receipt of the written notice of entry of the order." Pursuant to Rule 77, SCRPC, "[i]mmediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by first class mail upon every party affected thereby." (emphasis added) In Diamond Jewelers of Spartanburg, Inc. v. Naegle Outdoor Advertising Co., 290 S.C. 260, 349 S.E.2d 888 (1985), the clerk of court did not send the appellant a notice of judgment until more than 10 days after entry of judgment. The appellant argued that it was inequitable to preclude his post-trial motions under Rules 52(b), 59(b), and 59(e), SCRPC when the clerk failed to give him immediate notice upon entry of the judgment. The supreme court agreed and stated, "under the Rules of Civil Procedure a party has ten days from receipt of the clerk of court's notice of judgment to serve these post-trial motions." Id. (emphasis added)

Here, Appellant filed and served its Rule 59(e) motion *before* it received written notice of the entry of judgment. Thus, pursuant to Rule 203(b)(1), SCACR, the time for filing this appeal was stayed until Appellant received written notice of the entry of the order denying Appellant's Rule 59(e) motion. See also Rule 59(f), SCRPC ("The time for appeal of all parties shall be stayed by a timely motion under [Rule 59] and shall run from the receipt of written notice of entry of the order granting or denying such motions.") Accordingly, this appeal was timely made, this Court has jurisdiction to hear this appeal, and this Court should deny Respondent's motion to dismiss.

To the extent Respondent claims that Appellant received written notice of the entry of judgment on March 13, 2008 by "email or regular mail the same day," Respondent overlooks the following (1) pursuant to Rule 77, SCRCP, neither regular mail or email is a proper manner of delivering written notice of entry of judgment and (2) assuming *arguendo* that regular mail or email was a proper method of delivering written notice of entry of judgment, Appellant's counsel received neither from the clerk of court's office. See Affidavits of Counsel attached hereto as Exhibits D and H. Accordingly, because Appellant's counsel never received the written notice of entry of judgment, Appellant timely made its Rule 59(e) motion, and the time for perfecting the appeal was stayed.

II Appellant's Rule 59(e) Motion was proper because it was necessary to preserve for appeal the issue of whether Respondent repudiated the parties' contract which was raised to the court but not specifically ruled upon by it.

"A party *must* file [a Rule 59(e)] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis added). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." Ion, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

If a party is unsure whether he properly raised all issues and obtained a ruling, he must file a Rule 59(e) motion or an appellate court may later determine the issue or argument is not preserved for review. But in filing the motion, he may unwittingly forfeit the right to an appeal if an appellate court later determines the Rule 59(e) motion was unnecessary because he already had raised the issue and obtained a ruling. [Our Supreme Court] strive[s] to avoid an interpretation of procedural rules which routinely would place a party between the proverbial rock and a hard place.

Elam at 25, 780 Thus, parties are generally "free" to file an initial Rule 59(e) motion as "part and parcel of a party's 'single bite at the apple' in presenting his case to the trial court." Id at 21, 778

Here, during trial, Appellant argued to the lower court that Appellant presented evidence to show that Respondent had repudiated the parties' contract. However, the trial court did not specifically rule upon the issue of repudiation when it granted Respondent's motion for a directed verdict. Therefore, to preserve this issue for this Court's review, Appellant timely made a Rule 59(e) motion. See Appellant's Motion to Alter or Amend the Judgment and for a New Trial, pp 4 – 5, attached hereto as Exhibit B

Respondent now argues that Appellant disguised its Rule 59(b) motion as a Rule 59(e) motion because the possible relief sought, i.e. to alter or amend the judgment, could result in the granting of a new trial. This argument lacks merit because (1) the Rule 59(e) motion was necessary to preserve the issue of repudiation for appellate review and (2) Appellant's new trial motion was superfluous because the jury did not render a verdict.

First and foremost, Appellant clearly brought its Rule 59(e) motion to preserve the issue of repudiation for this Court's review.

Mr Nelson Thank you, Your Honor. We filed the motion as a 59 Motion, but really we're just here on Rule 59(e) Motion to Alter or Amend the Judgment.

Mr Nelson. And while there was some argument with Your Honor on that issue, and you heard us, and you actually made some comments in return, we don't think we got a clear ruling. That's why we filed this motion.

Mr Nelson I'm asking that Your Honor rule on the issue of repudiation.

The Court Okay

Mr Nelson Whether or not it was a jury issue that should have been submitted to the jury

To further clarify the nature of Appellant's motion, Appellant's counsel later pointed out the effect of its Rule 59(e) motion.

Mr Nelson I'm sorry, Your Honor While we're not making a 59(b) Motion for a New Trial, if Your Honor were to rule for us today, the result would be a new trial

The Court Okay

Mr Nelson So while we re not making a specific 59(b) motion that is what we're asking for

[Transcript of Record from the May 8, 2008 hearing on Appellant's Motion to Alter or Amend the Judgment and For a New Trial, P 3, lines 17 – 19, P 4, lines 10 – 22, P 5, lines 9 – 13, P 9, lines 8 – 13, attached hereto as Exhibit I]

Regarding Appellant's Rule 59(b) motion, which Appellant made out of an abundance of caution, such motion was actually unnecessary Typically, a motion for a new trial under Rule 59(b) is made *after* a jury verdict has been reached. See Adams v Duffie, 244 S C 365, 137 S E.2d 276 (1964) (application of "thirteenth juror doctrine" after verdict rendered in favor of plaintiff) Taylor v Devore, 253 S C 393 171 S.E 2d 158 (1969) (application of "thirteenth juror doctrine" after verdict rendered in favor of plaintiff found to be insufficient by trial court), Constant v Spartanburg Steel Products, 316 S C 86, 447 S E 2d 194 (1994) (new trial absolute motion made where defendant claimed large verdict was grossly excessive so as to the be the result of passion, caprice, prejudice or some other influence outside the evidence), Knoke v South Carolina Dep't of Parks, Recreation, and Tourism, 324 S C 136 478 S E.2d 256 (1996) (new trial absolute motion made where defendant claimed verdict was excessive), Rush v Blanchard, 310 S C 375, 426 S E.2d 802 (1993) (trial court granted defendant s motion for new trial *nisi remittitur*), O Neal v

Bowles, 314 S C 525, 431 S E 2d 555 (1993) (trial court denied plaintiff's motion for new trial *nisi additur*), Ralph King Anderson, Nuts and Bolts of South Carolina Substantive and Procedural Law, 2d ed., 232 – 256 (1998) (discussion of new trial motions in cases of “thirteenth juror doctrine” new trial absolute, and new trial *nisi*)

The difference in the timing requirements of Rule 59(b) and Rule 59(e) is for good reason. When a Rule 59(b) motion is required, it is normally because the jury has rendered a verdict that requires brand new arguments that could not have been foreseen at any time prior to the verdict. It makes sense that a Rule 59(b) motion be made “promptly after the jury is discharged.” There is no need to wait on a written judgment. Further, in the present case, the trial judge gave the parties significant time to argue for or against the directed verdict motion. It would be superfluous to require a Rule 59(b) to be made immediately thereafter

Contrarily, it does stand to reason that a Rule 59(e) motion not be required until after the party receives the trial judge's written order. Until an order is written and entered, the trial judge has discretion to change his mind or amend his oral ruling. Rhoad v State, 372 S C 100, 641 S E 2d 35 (Ct. App. 2007). Here, Appellant made its Rule 59 motion prior to receiving the written order because the trial judge did not ask Respondent's counsel to prepare a written order and because Appellant's counsel did not receive a written order promptly after the grant of the directed verdict

Had the trial court ruled on all of the issues presented to it during the directed verdict motion, Appellant could thereafter appeal from the court's decision without any need to make a motion for a new trial. However, as previously stated, because the trial court did not address repudiation at the time it granted Respondent's directed verdict motion, it was absolutely incumbent upon Appellant to make a Rule 59(e) motion was required to preserve this issue for appeal.

Respondent argues that because an amendment of the judgment could have resulted in a new trial in this case, this Court should interpret Rule 59(e) to require parties to also make a Rule 59(b) motion in conjunction with a Rule 59(e) motion presumably whenever a jury has been empanelled and subsequently discharged. Notably, this court need not address nor decide Respondent's novel interpretation of Rule 59(e) because here the trial court *did not* amend the judgment in such a way as to affect a new trial.

Respondent argues that there is no way the trial judge court could alter, amend, or otherwise reconsider its judgment besides the grant of a new trial. This argument has no merit. Specifically, a trial court may alter, amend, or otherwise reconsider its judgment by addressing all of the issues before it, yet still come to the same conclusion, such as the court in this case did.

In Getsinger v. Midlands Orthopaedic Profit Sharing Plan, 327 S.C. 424, 489 S.E.2d 223 (Ct. App. 1997), the trial court directed a verdict against the plaintiffs and then denied their Rule 59(e) motion to reconsider. This Court reversed the trial court's decision to direct a verdict and remanded the case for a new trial, although the opinion did not reference any Rule 59(b) motion. Although such was not part of this Court's holding, clearly this Court recognized that it had jurisdiction and authority to remand the case for a new trial without a Rule 59(b) motion being filed.

It is of no consequence that Appellant styled its motion a Motion to Alter or Amend the Judgment and For a New Trial under Rules (a) – (e), SCRCP. Motions should be treated based on their substance and effect as opposed to how they are styled. See Mickle v. Blackmon, 255 S.C. 136, 140, 177 S.E.2d 548, 549 (1970) (treating motion based on its "substance and effect" as opposed to how it was styled by plaintiff), Standard Fed. Sav. & Loan Ass'n v. Mungo, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991) (stating that it is the substance of the relief sought

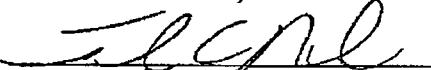
that matters "regardless of the form in which the request for relief was framed") Although Appellant styled its motion in the manner it did in an abundance of caution, a plain reading of the motion and review of the hearing transcript reveals that it was a Rule 59(e) motion in substance and effect

For these reasons Appellant's Motion to Alter Amend the Judgment was a proper motion that stayed the time for perfecting the appeal Therefore, this Court has jurisdiction to hear this matter and should deny Respondent's motion

CONCLUSION

Because Appellant served its Rule 59 motion before it ever received the written notice of entry of the order, the time to file and serve the notice of appeal was stayed until Appellant received written notice of entry of the order denying Appellant's Rule 59 motion Because Appellant filed its notice of appeal one week after receiving the written notice of entry of the order denying Appellant's Rule 59 motion, the notice of appeal was timely Therefore, this Court has jurisdiction to hear this matter and should deny Respondent's motion to dismiss

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Attorneys for Appellant

EXHIBIT A

00090

APP 100

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY
SHEEP ISLAND PLANTATION, LLC,
Plaintiff,
vs
BAR-PEN INVESTMENTS, LLC,
Defendant.

IN THE COURT OF COMMON PLEAS
9TH JUDICIAL CIRCUIT
CASE NO 06-CP-08-1650

SUMMONS

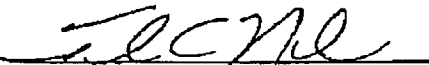
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2006 AUG 23 PM 5 02
CLERK OF COURT
BERKELEY COUNTY

TO THE DEFENDANT ABOVE NAMED

YOU ARE HEREBY SUMMONED AND REQUIRED TO ANSWER the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to the Complaint on the Clerk of Court for Berkeley County and upon the subscriber at his office 1004 Anna Knapp Blvd 2nd Floor, Mt Pleasant South Carolina 29464 within thirty (30) days after the service hereof, exclusive of the day of such service

YOU ARE HEREBY GIVEN NOTICE FURTHER that if you fail to appear and defend and fail to answer the Complaint as required by this Summons within thirty (30) days after the service hereof, judgment by default will be rendered against you for the relief demanded in the Complaint.

FUTERAL LAW FIRM, LLC



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email to sfuteral@charlestonlaw.net
Attorneys for Plaintiff

Dated August 22, 2006

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

SHEEP ISLAND PLANTATION, LLC,

Plaintiff,

vs

BAR-PEN INVESTMENTS, LLC,

Defendant

IN THE COURT OF COMMON PLEAS

9TH JUDICIAL CIRCUIT

CASE NO 06-CP-08-1650

COMPLAINT

(Jury Trial Demanded)

FILED
2006 AUG 23 PM 5 02
CLERK OF COURT
BERKELEY COUNTY

Plaintiff would respectfully show unto the court:

1 Plaintiff is a limited liability company formed and organized under the laws of South Carolina and doing business in the County of Charleston, State of South Carolina.

2 Plaintiff is informed and believes Defendant is a limited liability company formed and organized under the laws of South Carolina and doing business in the County of Berkeley, State of South Carolina and maintaining a registered agent in the County of Charleston, State of South Carolina.

3 This action is for the recovery of real property (hereinafter "the Property") or for an estate or an interest therein or for the determination in any form of such right or interest and for injuries to real property, such property being located in the County of Berkeley, State of South Carolina, commonly known as Tract 3A on Sheep Island Road, Summerville, South Carolina and more accurately described as follows

ALL that certain piece, parcel or tract of land, together with all improvements thereon, situate, lying and being in Berkeley County, South Carolina and known and designated as Tract 3A, containing 101 165 acres, more or less, as shown on that certain plat entitled " PLAT OF A BOUNDARY SURVEY SHOING THE SUBDIVISION OF TRACT 3 TO FORM TRACT 3A SURVEYED AT THE REQUEST OF BYRON S TONEY LOCATED IN BERKELEY COUNTY SC,"

prepared by Joseph O. Helman, R.L.S., dated April 18, 2005, and recorded April 19, 2005 in Plat Cabinet Q at Page 367E in the Office of the Register of Deeds for Berkeley County, South Carolina, said tract of land having such actual size, shape, dimensions, buttings and boundings as shown on said plat, reference to which is hereby made for a more complete description

BEING the same property conveyed to Bar-Pen Investments, LLC, a South Carolina limited liability company, by deed of Sheep Island Property, LLC, a South Carolina limited liability company, dated July 7, 2005, and recorded July 8, 2005 in Book 4827 at Page 260 in the Office of the Register of Deeds for Berkeley County, South Carolina.

Tax Map No 194-00-02-162

4 On or about December 14, 2005, E. Bruce Marshall and/or Jeremy S. Marshall (hereinafter "the Marshalls") entered into written contract with Defendant, a copy of which is attached hereto as Exhibit A and incorporated by reference, where the Marshalls agreed to buy and Defendant agreed to sell the Property for the purchase price of \$2,530,000.00

5 This contract constitutes a valid, legal, and binding agreement between the parties

6 The contract further provided for closing to take place no later than July 31, 2006

7 The contract provides that in the event of Seller's default, the Buyer may recover attorney's fees and actual costs incurred

8 Subsequently, the Marshalls assigned their rights under the contract to Plaintiff.

9 On or about July 13, 2006, Plaintiff and Defendant amended the contract to extend the closing date thirty (30) days in exchange for payment by Plaintiff to Defendant in the amount of \$50,000.00, and this amendment was confirmed in writing by Defendant

10 Plaintiff tendered payment to Defendant in the amount of \$50,000.00

11 On or about August 1, 2006, Defendant informed Plaintiff that it terminated the contract

FOR A FIRST CAUSE OF ACTION

(Specific Performance)

12 All prior allegations not inconsistent with this cause of action are realleged and incorporated by reference herein

13 The above-referenced contract with its subsequent amendment provides that Defendant will convey the property to Plaintiff by August 30, 2006

14 The contract with its subsequent amendment is legally valid.

15 The contract with its subsequent amendment is fair, just, and equitable

16 Up until the time Defendant terminated the contract, as alleged above, Plaintiff and the Marshalls had fully performed their obligations under the contract.

17 Plaintiff remains ready, willing, and able to perform on the contract.

18 The Property is unique in nature.

19 No adequate remedy at law exists for Plaintiff

20 Plaintiff is informed and believes it is entitled to Order requiring Defendant to convey the Property to Plaintiff under the terms of the contract, attached hereto as Exhibit A and incorporated by reference

FOR A SECOND CAUSE OF ACTION

(Breach of Contract)

21 All prior allegations not inconsistent with this cause of action are realleged and incorporated by reference herein

22 The above-referenced contract with subsequent amendment constitutes a valid, binding contract between Plaintiff and Defendant

23 Defendant's actions, as described above constitute a breach or unjustifiable failure to perform the contract

24 As a direct and proximate result of Defendant's breach, Plaintiff has sustained actual damages, consequential damages, and incidental damages, plus attorney's fees and the costs of this action

25 Plaintiff is informed and believes it is entitled to actual damages, consequential damages, incidental damages, attorney's fees, prejudgment interest, and the costs of this action.

WHEREFORE, Plaintiff prays for an Order requiring Defendant to convey the Property to Plaintiff under the terms of the contract, attached hereto as Exhibit A and incorporated by reference, or in the alternative, for judgment against Defendant for actual damages consequential damages, incidental damages, attorney's fees, prejudgment interest, and the costs of this action, and for such other and further relief as the Court may deem just and proper

FUTERAL LAW FIRM, LLC



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email to sfuteral@charlestonlaw.net

Attorneys for Plaintiff

Dated August 22, 2006

EXHIBIT B

00096

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY
SHEEP ISLAND PLANTATION, LLC,

Plaintiff

vs

BAR-PEN INVESTMENTS, LLC,

Defendant

IN THE COURT OF COMMON PLEAS
9TH JUDICIAL CIRCUIT
CASE NO 06-CP-08-1650

PLAINTIFF'S MOTION TO ALTER
OR AMEND THE JUDGMENT AND
FOR A NEW TRIAL

LEON MAR 21, 11 3 51
CLERK OF COURT
BERKELEY COUNTY, SC

TO CHARLES ALTMAN, ESQUIRE, ATTORNEY FOR PLAINTIFFS

YOU WILL PLEASE TAKE NOTICE that the undersigned will move before the Court within ten (10) days or as soon thereafter as counsel may be heard, for an Order, pursuant to Rule 59 (a) – (e), South Carolina Rules of Civil Procedure to alter or amend the judgment and for a new trial

BACKGROUND

This is a breach of contract action for damages. On or about December 14, 2005, Plaintiff entered into a contract with Defendant to purchase real estate for approximately 2.5 million dollars.

Among other things, the contract contained the following provisions:

33. EXTENSION AGREEMENT. If the transaction has not closed within the stipulated time limit because a contingency has not been satisfied through no fault of either party, then both parties agree to extend this agreement for a period not to exceed 15 consecutive days from the original closing date. Closing shall occur within this time extension, but in no event shall closing occur later than the above extension date.

At trial, the testimony showed that toward the end of June 2006, Berkeley County determined that proposed water and sewer lines would not be directed to the subject property as had been earlier anticipated. Thus, according to the testimony from Plaintiff's witnesses and the lender's underwriter, the terms discussed between Plaintiff and the lender changed to suit a loan for "raw land." Plaintiff's

realtor testified at trial that she thereafter explained the situation to Defendant's realtor and asked for an extension to the closing date. According to Bruce Marshall, one of Plaintiff's members, Plaintiff did not specify how much additional time it needed to close. On July 13, 2006, Defendant offered to sell Plaintiff a 30-day extension to the contract for \$50,000. Seven days later, on July 20, 2006, Defendant withdrew this offer. The evidence at trial showed that in addition to withdrawing its offer, Defendant also informed Plaintiff that there would be no extensions.

At trial, Plaintiff produced evidence that on July 21, 2006, Defendant and its realtor discussed the contract's 15-day extension, and Defendant informed its realtor that there would be no extension to the contract and that if Plaintiff attempted to use the 15-day extension, Defendant would litigate it. The evidence at trial also showed that on July 21, 2007, Mr. Marshall informed Defendant's realtor that Plaintiff may need a 'day or two' extension, and Defendant's realtor informed Plaintiff that there would be no extensions.

The original closing was scheduled for Monday, July 31, 2006. On Friday afternoon, July 28, 2006, Plaintiff's lender informed Plaintiff that it needed to bring an additional \$211,625.00 to closing. At trial, Plaintiff produced testimony that on the day of closing, Plaintiff's attorney informed Defendant of Plaintiff's problem in closing and requested a "day or two" extension. However, Defendant informed Plaintiff's attorney that there would be no extensions to the contract. Late afternoon July 31, 2006, Defendant terminated the contract in writing. The evidence at trial shows that on August 1, 2006, Defendant reaffirmed the termination on the basis that Plaintiff allegedly was in default of the contract. Plaintiff's realtor testified that after the closing date, she again asked for a 'day or two' extension, but Defendant refused. Finally, after the closing date, Plaintiff's attorney also requested a 'day or two' extension to close but again Defendant refused.

It should be noted that at trial, Aubrey Woody, a member of Defendant, testified “[i]f the contingency had not been met, they would be entitled to 15 days I don’t think there’s any questions about that.” [Cross Examination of Aubrey Woody, p 39, lines 8 – 10] Aubrey also gave conflicting testimony by, at first, testifying that he did not have any communication with the Buyer’s closing attorney on July 31, 2006, but then later reading from his deposition that it was possible that he had spoken with the Buyer s closing attorney [Cross Examination of Aubrey Woody, p 41, lines 3 – 6] Mr Woody admitted at trial that there is no notice provision in the 15-day Extension Agreement of the contract [Re-Cross Examination of Aubrey Wooddey, p 45, lines 5 – 9]

At the close of the three-day trial, Defendant moved for a directed verdict, and the trial court granted this motion largely on the basis that it found there was “no evidence” in the record to show that Plaintiff gave Defendant notice of Plaintiff’s intent to exercise a 15-day extension under Paragraph 33

LAW/ANALYSIS

STANDARD OF REVIEW

In ruling on motions for directed verdict or judgment notwithstanding the verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing motions. The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt.

Parrish v Allison, 656 S E 2d 382, 388 (Ct App 2007)

When considering directed verdict motions, the trial court does not have the authority to decide credibility issues or to resolve conflicts in the testimony or evidence. The issue must be submitted to the jury whenever there is material evidence tending to establish the issue in the mind of a reasonable juror.

Id

ARGUMENT

- I The court should alter or amend the judgment and grant Plaintiff a new trial where Defendant repeatedly repudiated any extension to the contract which thereby gave Plaintiff the option to initiate this lawsuit for damages regardless of whether Plaintiff requested a 15-day extension under Paragraph 33

It is black letter law that

Repudiation of a contract before the time for performance, which amounts to a refusal to perform it at any time, gives the adverse party the option to treat the entire contract as broken and to sue immediately for damages as for a total breach. There is no necessity in such case for a tender of performance or compliance with conditions precedent, or waiting for the time of performance to arrive. No notice need be given that the repudiation is treated as a breach.

Ralph King Anderson, Jr., *South Carolina Requests to Charge – Civil*, 2002, § 19-19

The evidence at trial, when viewed in the light most favorable to Plaintiff, clearly shows that starting on July 20, 2006 and even after the closing date Defendant repeatedly repudiated, orally and in writing, an extension under the parties' agreement. "Repudiation includes a refusal or declination to perform in accordance with the contract." *Id.* at § 19-18. The evidence shows that although Defendant was clearly aware of Plaintiff's right to a 15-day extension, Defendant told its realtor that Defendant would "litigate" that right. According to the evidence at trial, Mr. Woody proclaimed that he was a lawyer, he had plenty of money, and that he would go to court instead."

Because Defendant unequivocally repudiated the extension clause of the parties' contract, Plaintiff was allowed by law to "to treat the entire contract as broken and sue immediately for damages as for a total breach. Indeed, Plaintiff was under no obligation "for a tender of performance, or compliance with conditions precedent, or waiting for the time of performance to arrive." Moreover Plaintiff was not required to give Defendant "notice that the repudiation

is treated as a breach" by Plaintiff. Thus, the evidence shows that Plaintiff was legally justified to begin this suite by filing a lis pendens on August 4, 2006

When granting Defendant's motion for a directed verdict, the trial court neither addressed nor applied the law regarding repudiation to determine whether there was evidence that Defendant repudiated the contract. Consequently, the trial court never addressed whether Plaintiff was at all required to ask for an extension to close, formally or otherwise, when Defendant had repeatedly stated there would not be any extensions. Because Plaintiff presented overwhelming evidence of Defendant's repudiation, under which circumstances Plaintiff was not required to give Defendant any notice that Plaintiff sought an extension under Paragraph 33 of the parties' agreement. Accordingly, this court erred in directing a verdict and should grant Plaintiff's request for a new trial.

II The court should alter or amend the judgment and grant Plaintiff a new trial because the trial court lacked any authority to impose upon Plaintiff an obligation to give formal notice of a request for a 15-day extension to be entitled any extension.

The primary purpose of all rules of contract construction is to determine the intent of the parties." Goldston v. State Farm Mut. Auto. Ins. Co., 358 S.C. 157, 170, 594 S.E.2d 511, 518 (Ct. App. 2004). In determining the parties' intentions, the court must read the contract as a whole. S. Atl. Fin. Servs., Inc. v. Middleton, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003). When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect, and the court must construe it according to its plain, ordinary, and popular meaning. Moser v. Gosnell, 334 S.C. 425, 430, 513 S.E.2d 123, 125 (Ct. App. 1999).

Here, the agreement is utterly silent on whether Plaintiff was required to notify Defendant under Paragraph 33 of a 15-day extension, or the manner in which to do so. Yet, the trial court found that Plaintiff failed to produce evidence that it requested a 15-day extension under Paragraph 33. In

other words, the court's ruling suggests that it judicially added a notice requirement of some sort to the parties' agreement

Parties have the right to make their own contracts Torrington Co v Aetna Cas & Sur Co, 264 S C 636, 643, 216 S E 2d 547, 550 (1975), MailSource, LLC v M A Bailey & Assocs, 356 S C 363, 369, 588 S E 2d 635, 638-39 (Ct.App 2003) 'Succinctly stated, a court has no authority to rewrite a contract and impose unwanted obligations and terms under the guise of specific performance or judicial construction' Lowcountry Open Land Trust v Charleston Southern University, --- S E 2d ---, 6, 2007 WL 4754032 (Ct App 2007) (emphasis added)

To the extent the trial court's ruling suggests that notice was a condition precedent to the 15-day extension, such ruling is in error. In South Carolina, "a condition precedent may not be implied when it might have been provided for by the express agreement." Worley v Yarborough Ford, Inc, 317 S C 206, 452 S E 2d 622 (Ct App 1994) (citing 17A C J S Contracts § 338 (1963), 17A Am Jur.2d Contracts § 471 (1991))

Here, although the contract does expressly provide for written/prior notice as to other matters, the contract does not expressly state that any notice is required with regard to the 15-day extension. To the contrary, the contract clearly, explicitly, and unambiguously provides that the 15-day extension is not invoked until *after* the closing has not taken place

If the transaction has not closed within the stipulated time limit because a contingency has not been satisfied through no fault of either party, then both parties agree to extend this agreement for a period not to exceed 15 consecutive days from the original closing date

At trial, Defendant referenced Corbin on Contracts for the notion that "[n]otice ought to be given when information material to the performance of a contract is within the peculiar knowledge of only one of the contracting parties. Essentially, Defendant argued that it never knew w/ty Plaintiff

needed an extension. However, the evidence showed that the performance of the contract was within Defendant's knowledge. Plaintiff's realtor and closing attorney both testified that they had explained the situation to Defendant and its realtor. Specifically, Plaintiff's realtor told Defendant's realtor that issues with water and sewer created issues with Plaintiff's loan. Moreover, Plaintiff's attorney testified that he directly informed Defendant that Plaintiff was notified just before closing that the lender required that Plaintiff "prepay" interest by depositing \$211,625 into a money market account with the lender. Importantly, the evidence also showed that Defendant purposefully chose not to inquire regarding Plaintiff's "credit-worthiness or any other information needed for the loan processing" even though this information was available to Defendant pursuant to Paragraph 6 of the Agreement, and even though Defendant's realtor spoke with the lender regarding the closing itself.

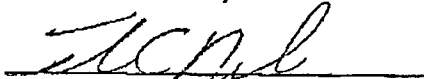
Because the Agreement is clear and unambiguous and there was no notice requirement provided for in the Agreement to invoke an extension to the closing date, this court should not rewrite the parties' agreement to require some form of notice, formal or otherwise. Nonetheless, to the extent that the agreement requires some sort of notice for an extension, there is ample evidence in the record that Plaintiff requested an extension both before and after the closing date. Considering that the agreement is silent as to notice, this court should not impose any requirements, such as notice in writing, notice which specifically references Paragraph 33, or notice which specifically asks for 15 days. Accordingly, this court should grant Plaintiff's motion for a new trial.

CONCLUSION

Viewing the evidence in the light most favorable to Plaintiff, and for all the reasons stated on the record and in this motion, this Court should grant Plaintiff's Motion to Alter and Amend the Judgment and for a New Trial.

Respectfully Submitted,

FUTERAL LAW FIRM, LLC



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Dated 3/24/08

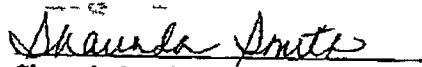
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The foregoing document was served on March 24, 2008, via hand delivery to the following addresses

The Honorable Thomas L. Hughston, Jr
9th Judicial Circuit
100 Broad Street, Suite 368
Charleston South Carolina 29401-2285

Charles S. Altman, Esq
Altman & Coker, LLC
171 Church Street, Suite 318
Charleston South Carolina 29401



Shaunda Smith

Legal Assistant to Stephan V. Futeral

2008 MAR 24 PM 3 51
CLERK OF COURT
BERNARD COUNTY SC

EXHIBIT C

00105

APP 115



March 31, 2008

The Honorable Thomas L. Hughston, Jr.
9th Judicial Circuit
100 Broad Street Suite 368
Charleston, South Carolina 29401-2285

RE Sheep Island Plantation, LLC v Bar-Pen Investments, LLC
06-CP-08-1650
Client ID 31207
Matter ID 9123174

Dear Judge Hughston

Please find enclosed for service upon you a clocked copy of a Plaintiff's Motion to Alter or Amend the Judgment and for a New Trial for the above-referenced case

Should you have any questions, please contact this office

Sincerely,

A handwritten signature in black ink, appearing to read "R. Castro", with a long horizontal flourish extending to the right.

Renee Castro
Paralegal to Thomas C. Nelson, Esq

/rc
/encl
cc Charles S. Altman, Esq

Local 843 284-5500 Toll Free 877 913 5500 Fax 843-284 5501
64 Anna Kings Blvd. 11th Floor, Charleston, South Carolina 29404
P.O. Box 1141, Mount Pleasant, South Carolina 29405
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00106

EXHIBIT D

1

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY
SHEEP ISLAND PLANTATION, LLC,
Plaintiff,
vs
BAR-PEN INVESTMENTS, LLC,
Defendant

IN THE COURT OF COMMON PLEAS
9TH JUDICIAL CIRCUIT
CASE NO 06-CP-08-1650

AFFIDAVIT OF STEPHAN V
FUTERAL, ESQ

PERSONALLY, appeared before me, Stephan V Futeral, who after being duly sworn, deposes and says

1 He is the Attorney for the Plaintiff/Appellant in the captioned action, is admitted to practice law in the State of South Carolina, and is in good standing with the South Carolina Bar Association.

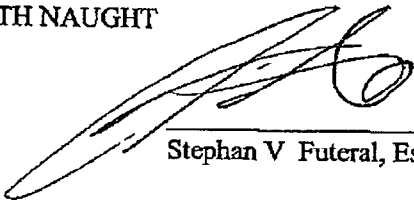
2 He filed the referenced action, now before the South Carolina Court of Appeals, on August 23, 2006, and when making this filing, he listed his email address as "sfuteral@charlestonlaw net," and this is the email address that he has registered with the South Carolina Bar Association and the only email he uses in his law practice

3 He never received any email, facsimile, mailing, or other transmission from the Clerk of Court for the County of Berkeley containing any written notice of the entry of The Honorable Thomas L. Hughston, Jr.'s order granting Defendant/Respondent's motion for directed verdict prior to serving Plaintiff/Appellant's Rule 59 motion on the trial judge and on counsel for Defendant/Respondent on March 31, 2008

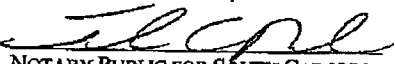
4 Upon a diligent search of the files and records of his office, his office never received any email, facsimile, mailing, or other transmission from the Clerk of Court for the County of Berkeley, State of South Carolina containing any written notice of the entry of Judge Hughston, Jr.'s order granting Defendant/Respondent's motion for directed verdict prior to serving Plaintiff/Appellant's Rule 59 motion on the trial judge and on counsel for Defendant/Respondent on March 31, 2008

5 To the extent any notice was sent or attempted to be sent by the Clerk of Court via email to the email address "sfuteral@mtpleasantlawyers.com," he states that this email address has not been used by him or by his law firm since prior to filing the Summons and Complaint in this action

FURTHER AFFIANT SAYETH NAUGHT


Stephan V. Futeral, Esq

SWORN to and subscribed before me
this 4 day of September, 2008


NOTARY PUBLIC FOR SOUTH CAROLINA

My commission expires 1/30/14

NOTARY SEAL

EXHIBIT E

00110

IN THE COURT OF COMMON PLEAS

CASE NO. 2006CP0801650

SHEEP ISLAND PLANTATION LLC
BAR-PEN INVESTMENTS LLC

BAR-PEN INVESTMENTS LLC
SHEEP ISLAND PLANTATION LLC

2008 MAR 13 PM 1 03

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE

☐ JURY VERDICT This action came before the court for a trial by jury
The issues have been tried and a verdict rendered

☐ DECISION BY THE COURT This action came to trial or hearing before
the court The issues have been tried or heard and a decision
rendered

☐ ACTION DISMISSED (CHECK REASON) ☐ Rule 12(b), 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 _____

IT IS ORDERED AND ADJUDGED

☐ See attached order, ☒ Statement of Judgment by the Court

Defendant's motion for directed verdict is granted.

Dated at Moncks Corner, SC, this 13th day of March, 2008.

T. L. Henshaw
PRESIDING JUDGE / CLERK OF COURT

This judgment/order was entered on the 13th day of March, 2008,
and a copy mailed first class this 13th day of March, 2008, to
attorneys of record or to parties (when appearing pro se) as follows

FUTERAL STEPHAN V

ALTMAN, CHARLES S

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

May P. Blum
CLERK OF COURT / DEPUTY CLERK

(FORM 4)

MAY-09-2008 09 21

CLERK OF COURT

98/

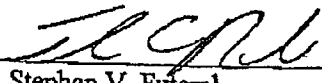
TOTAL P 02
P 02 00111

APP 121

EXHIBIT F

00112

FUTERAL LAW FIRM, LLC



Stephan V. Futeral

S C Bar ID 66427

Thomas C. Nelson

S C Bar ID 71178

Post Office Box 1543

Mt. Pleasant, South Carolina 29465-1543

Telephone (843) 284-5500

Facsimile (843) 284-5501

Email to sfuteral@charlestonlaw.net

Email to tnelson@charlestonlaw.net

Dated

5/15/08

Attorneys for Appellant

Other Counsel of Record.

Charles S. Altman, Esquire
Altman & Coker, LLC
171 Church Street, Suite 318
Charleston, South Carolina 29401
Telephone (843) 853-9907
Attorney for Respondent

William L. Howard, Esquire
Young Clement Rivers LLP
28 Broad Street
Charleston, South Carolina 29401
Telephone (843) 724-6669
Attorney for Respondent

EXHIBIT G

00115

APP 125

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Thomas L. Hughston, Circuit Court Judge

Case No 06-CP-08-1650

RECEIVED

MAY 16 2008

SC Court of Appeals

Sheep Island Plantation, LLC,

Appellant,

v

Bar-Pen Investments, LLC,

Respondent

PROOF OF SERVICE

I certify that I have served Appellant's Notice of Appeal on the following recipients at the addresses shown below by depositing a copy of same in the United States Mail, postage prepaid, on May 15, 2008

Charles S. Altman, Esquire
Altman & Coker, LLC
171 Church Street, Suite 318
Charleston, South Carolina 29401
Telephone (843) 853-9907
Attorney for Respondent

William L. Howard, Esquire
Young Clement Rivers LLP
28 Broad Street
Charleston, South Carolina 29401
Telephone (843) 724-6669
Attorney for Respondent

EXHIBIT H

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY
SHEEP ISLAND PLANTATION, LLC,
Plaintiff,
vs
BAR-PEN INVESTMENTS, LLC,
Defendant

IN THE COURT OF COMMON PLEAS
9TH JUDICIAL CIRCUIT
CASE NO 06-CP-08-1650

**AFFIDAVIT OF THOMAS C
NELSON, ESQ**

PERSONALLY, appeared before me, Thomas C Nelson, who after being duly sworn,
deposes and says

1 He, along with Stephan Futeral, is the attorney for the Plaintiff/Appellant in the
captioned action

2 He is admitted to practice law in the State of South Carolina and is in good standing
with the South Carolina Bar Association

3 He, along with Stephan Futeral, filed the referenced action, now before the South
Carolina Court of Appeals, on August 23, 2006, and when making this filing, he listed Mr Futeral's
email address on the Complaint as "sfuteral@charlestonlaw.net," and this is the email address Mr
Futeral regularly uses in his law practice He did not list his own email address on the initial
pleadings

4 He never received any email, facsimile, mailing, or other transmission from the Clerk
of Court for the County of Berkeley containing any written notice of the entry of The Honorable
Thomas L Hughston, Jr 's order granting Defendant/Respondent's motion for directed verdict prior

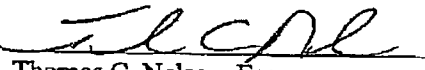
to serving Plaintiff/Appellant's Rule 59 motion on the trial judge and on counsel for Defendant/Respondent on March 31, 2008

5 Upon a diligent search of the files and records of his office, his office never received any email, facsimile, mailing, or other transmission from the Clerk of Court for the County of Berkeley containing any written notice of the entry of Judge Hughston's order granting Defendant/Respondent's motion for directed verdict prior to serving Plaintiff/Appellant's Rule 59 motion on the trial judge and on counsel for Defendant/Respondent on March 31, 2008

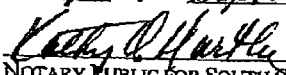
6 After realizing his office had not yet received the written notice, he contacted Ms Rhonda Colley with the Clerk of Court for Berkeley County and asked that she forward the order to his office. His recollection is that the order was forwarded to him via email, however, he cannot verify the same because a computer crash caused his emails from that time to be lost

7 After receiving Defendant/Respondent's Motion to Dismiss the appeal, he again contacted Ms Colley via email, and a copy of the email exchange is attached hereto

FURTHER AFFIANT SAYETH NAUGHT


Thomas C Nelson, Esq

SWORN to and subscribed before me
this 4th day of Sept 2008


NOTARY PUBLIC FOR SOUTH CAROLINA

My commission expires 1-31-2010

NOTARY SEAL

Thomas Nelson

From rcolley@co.berkeley.ca.us
Sent Tuesday, September 02, 2008 4:02 PM
To Thomas Nelson
Subject RE: Sheep Island Plantation v. Bar-Pen Investments 06-CP-08-1650

I believe to the best of my knowledge that it was faxed to you. I know we faxed another copy on May 9, but I am not sure of that first date. Generally, we are glad to fax an order to an attorney if it is a crucial matter, so I know we must have faxed you the order back in April as well.

Rhonda K. Colley
Berkeley County Clerk of Court's Office
CP Jury Docket Coordinator
rcolley@co.berkeley.ca.us
843-719-4430

"Thomas Nelson" <tnelson@charlestonlaw.net>

09/02/2008 03:58 PM

To: <rcolley@co.berkeley.ca.us>

cc

Subject: RE: Sheep Island Plantation v. Bar-Pen Investments 06-CP-08-1650

I can't remember. My computer crashed since that time and I lost some emails. I'm trying to put it all together, but I'm wondering if it were forwarded here by fax or email. I don't think you mailed it. Thanks for looking into it.

From rcolley@co.berkeley.ca.us [<mailto:rcolley@co.berkeley.ca.us>]
Sent Tuesday, September 02, 2008 3:26 PM
To Thomas Nelson
Subject RE: Sheep Island Plantation v. Bar-Pen Investments, 06-CP-08-1650

Tom,

I do not. When did I send the order out - was it in April or was it when we talked in May?

Rhonda K. Colley
Berkeley County Clerk of Court's Office
CP Jury Docket Coordinator
rcolley@co.berkeley.ca.us
843-719-4430

"Thomas Nelson" <tnelson@charlestonlaw.net>

09/02/2008 03:11 PM

To: <rcolley@co.berkeley.ca.us>

cc

Subject: RE: Sheep Island Plantation v. Bar-Pen Investments 06-CP-08-1650

Rhonda

Thank you

Do you have any record of the exact date and time of our conversation or when and how your later forwarded the order to our office?

Tom

From rcolley@co.berkeley.sc.us [mailto:rcolley@co.berkeley.sc.us]
Sent Tuesday, September 02, 2008 11:40 AM
To Thomas Nelson
Subject Re: Sheep Island Plantation v. Bar-Pen Investments, 06-CP-08-1650

Tom

I believe where the problem occurred was that we have and had Stephen Futeral's email address as Sfuteral@mtpleasantlawyers.com. If our office did not receive the form 4 email back as undeliverable we would not have known that it was not received by your office. (The office needs to change the email address for Mr. Futeral; however, I believe we were waiting to do that pending the outcome of this matter.) I printed a screen which shows the email address for Mr. Futeral as Sfuteral@mtpleasantlawyers.com at the time the email would have been sent. In fact, it had not been changed since March 3, 2004, and it shows that date on the print screen printed from Mr. Futeral's profile in our system. Also, we are capable of producing a printout which shows that the email in question was printed on March 13, 2008. Again, we do not have a way to know if the email to Mr. Futeral was not returned where that email went? We do/did not have you listed as an attorney to receive emails, notices, etc. in this case, so therefore, you would not have received the email.

Please let me know if I can be of any further assistance. Please let me know when the issue is resolved so that I may update Mr. Futeral's email address. Thank you!

Rhonda K. Colley
Berkeley County Clerk of Court's Office
CP Jury Docket Coordinator
rcolley@co.berkeley.sc.us
843-719-4430

"Thomas Nelson" <nelson@charlestonlaw.net>

09/02/2008 10:52 AM

To: <rcolley@co.berkeley.sc.us>

cc

Subject: Sheep Island Plantation v. Bar-Pen Investments, 06-CP-08-1650

Rhonda

I, along with Stephan Futeral represented the Plaintiff in the referenced matter where a trial was held in March before Judge Hughston and directed verdict was granted against us on May 13 2008 I don't know if you remember but you and I had a conversation around April 3 2008 regarding whether the written Form 4 order was delivered to my office

The timing of this delivery has become an issue in the Court of Appeals Please advise me what your records show as the manner of deliver of this written order to my law firm There is an email to Mr Altman attorney for the defendant dated March 13, 2008 indicating that the order was delivered via email only If such is true, could you see if an email was ever sent to Stephan (sfuteral@charlestonlaw.net) or me (tnelson@charlestonlaw.net) or to any other addresses besides Mr Altman

Because the dismissal of this appeal is at issue, I ask that you look into this matter at your earliest convenience If you need to discuss anything please call me

Thanks

Tom

Thomas C Nelson Esq
Futeral Law Firm LLC
1004 Anna Knapp Blvd 2nd Floor
Mount Pleasant, South Carolina 29464
(843) 284-5500
(fax) 284-5501
www.charlestonlaw.net

EXHIBIT I

00123

APP 133

1 THE COURT: All right, we're here in regard to a case
2 that I presided over the trial of up in Berkeley County a
3 few weeks ago This is Sheep Island Plantation, L L C ,
4 against Bar, B-A-R, Pen, P-E-N, Investments, L L C., Case
5 Number 2006-CP-08-1650

6 And the plaintiff is asking me to undo the directed
7 verdict that I granted at the close of the -- at the
8 conclusion of the testimony and before the case was
9 submitted to the jury

10 And is it Mr Nelson?

11 MR. NELSON Yes, sir

12 THE COURT Mr Nelson is here on behalf of the
13 plaintiff, and Mr Altman is here on behalf of the
14 defendant

15 Mr Nelson, tell me what you want me to do and why I
16 should do it

17 MR NELSON. Thank you, Your Honor We filed the
18 motion as a 59 Motion, but really we're just here on Rule
19 59(e), Motion to Alter or Amend the Judgment And one of
20 the main reasons we did that is when Your Honor made his
21 ruling, ---

22 THE COURT Yes?

23 MR. NELSON. --- to grant the directed verdict, ---

24 THE COURT Right

25 MR NELSON: --- there were several issues that were

1 raised to Your Honor And when you made your ruling, it
2 appeared that it was specifically on the issue that they
3 were entitled to a notice of the fifteen day extension
4 under the contract, and we don't think we -- we are
5 unclear if we got a clear ruling on whether or not there
6 was a -- you ruled on the issue of repudiation, whether or
7 not the sellers, by terminating the contract on July 31st,
8 constituted a repudiation and whether that issue should
9 have gone to the jury

10 And while there was some argument with Your Honor on
11 that issue, and you heard us, and you actually made some
12 comments you made in return, we don't think we got a clear
13 ruling That's why we filed this motion

14 THE COURT. All right

15 MR. NELSON. As to the service of the 59(e) Motion,
16 we never received a written notice -- or a -- we never
17 received the written notice of the entry of the Order from
18 the Court, so I think the time is still good for that
19 And the 59(b) is out, because we did originally file under
20 59(b)

21 And for those reasons, we'd like Your Honor to rehear
22 us on the issue of repudiation

23 THE COURT I'm not sure I understand what you're
24 asking me

25 MR. NELSON: The action was on a breach of contract

1 on a real estate contract

2 THE COURT Right I know that

3 MR NELSON. And there was a fifteen day extension,
4 and ---

5 THE COURT I understand all that, but I thought you
6 were asking for some permission to be heard in regard to
7 something, or something That's what I was saying, I
8 don't understand what you're asking

9 MR NELSON I'm asking that Your Honor rule on the
10 issue of repudiation

11 THE COURT: Okay

12 MR NELSON Whether or not it was a jury issue that
13 should have been submitted to the jury

14 THE COURT Okay All right Go ahead, then

15 MR. NELSON As to that issue, there's no clear law
16 in South Carolina or no good precedent on that And in
17 all the research we did, we kept falling back to Judge
18 Anderson's Request to Charge book to find language in
19 there, because that's all we could really find in South
20 Carolina

21 THE COURT: Let me -- let me -- I think I finally
22 understood late in the game, so to speak, what your --
23 what your position was on that, and that was, of course,
24 we had some dealings back and forth, by that I mean we had
25 some conversations back and forth There were -- there

1 THE COURT Okay

2 MR. ALTMAN So that's been removed, so we did not

3 have to address that We will not have to address that,

4 if they appeal

5 THE COURT: All right And just ---

6 MR. NELSON: Your Honor ---

7 THE COURT Go ahead

8 MR. NELSON- I'm sorry, Your Honor While we're not

9 making a 59(b) Motion for a New Trial, if Your Honor were

10 to rule for us today, the result would be a new trial

11 THE COURT: Okay

12 MR. NELSON: So while we're not making a specific

13 59(b) motion, that is what we're asking for

14 THE COURT Okay

15 MR. ALTMAN So, Your Honor, with regard to that, the

16 rule is, the law is that that motion has to be made at the

17 conclusion of the trial as soon as the jury is discharged,

18 or the party that is making that motion has to ask -- has

19 to ask the Court for ten days

20 THE COURT I gave ten days for any post-trial

21 motions I always do If I didn't, I always do.

22 MR. ALTMAN Your Honor, the ---

23 THE COURT I always give ten days for any post-trial

24 motions

25 MR. ALTMAN The transcript has you saying, "I grant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

SEP 05 2008

SC Court of Appeals

APPEAL FROM BERKLEY COUNTY
Court of Common Pleas

Thomas L. Hughston, Circuit Court Judge

Case No 06-CP-08-1650

Sheep Island Plantation, LLC,

--

Appellant,

v

Bar-Pen Investments, LLC,

--

--

--

Defendants,

PROOF OF SERVICE

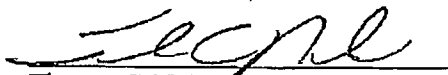
I certify that I have served Appellant's Return to Respondent's Motion to Dismiss on the following recipients at the addresses shown below by Federal Express Overnight, on September 4, 2008

Charles S. Altman, Esq
Altman & Coker LLC
171 Church Street, Suite 318
Charleston South Carolina 29401

William L. Howard, Esq
Young Clement Rivers LLP
PO Box 993
Charleston South Carolina 29402-0993

Respectfully submitted,

FUTERAL LAW FIRM, LLC



Thomas C Nelson

S C Bar ID 71178

Post Office Box 1543

Mt. Pleasant, South Carolina 29465-1543

Telephone (843) 284-5500

Facsimile (843) 284-5501

Email to tnelson@charlestonlaw.net

Dated.

9/4/08

Attorney for Appellant

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY) 06-CP-08-1650

Sheep Island Plantation, LLC)
Plaintiff,) Transcript of Record
vs)
Bar-Pen Investments, LLC) March 10-13, 2008
Defendant)

B E F O R E

Honorable Thomas L. Hughston, Jr.
Berkeley County Courthouse
Moncks Corner, South Carolina

A P P E A R A N C E S

Stephan V. Futeral, Esquire
Thomas Nelson, Esquire
Attorneys for Plaintiff

Charles S. Altman, Esquire
Attorney for Defendant

Grace L. Hurley, CVR-CM
Circuit Court Reporter

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00135

1 (On the record, Monday, March 10, 2008)
2 THE COURT All right, let me tell you about this
3 first case for trial a little bit about it The name of the
4 case is Sheep Island Plantation, LLC, that's a limited
5 liability corporation Sheep Island Plantation has brought a
6 claim against Bar, B-A-R, dash, Pen, P-E-N, Investments LLC,
7 another limited liability corporation growing out of a
8 contract dispute between them Apparently there was a
9 contract between the Plaintiff and the Defendant involving the
10 purchase and sale of a piece of property, about 101 acres of
11 land As I understand the property is located over towards
12 Summerville near the Dorchester, Berkeley County line,
13 somewhere over in that way on -- what highway is it on?
14 MR ALTMAN Sheep Island Road
15 THE COURT Sheep Island Road, Sheep Island Road, and
16 I'm not sure of that number is that 176 did you say? 176, I
17 believe is the number and the parties have a disagreement, a
18 dispute about the contract between them and whether one side
19 lived up to the contract or didn't or whether the other side
20 lived up to it or it didn't There's a big dispute between
21 them about this contract of sale, buying and selling this
22 piece of property that I've mentioned Each side claims that
23 the other side didn't do something they should have done or
24 failed to do something that they should have done and
25 therefore demands something of the other It is a contract

1 dispute between these parties as I said about this proposed
2 sale and purchase of about 101 acres of land over on Sheep
3 Island Road

4 And I'd, at this point, I'd ask the lawyers to introduce
5 yourselves to the jury and tell the jury the names of any
6 prospective witnesses that you know of that might be
7 testifying either for the Plaintiff or for the Defendant So,
8 we'll start with the Plaintiff Sheep Island Plantation, LLC
9 Tell me -- tell the jury your name and who's going to be
10 trying the case and any witnesses that you know of

11 MR NELSON My name is Tom Nelson I represent the
12 Plaintiff I'll be trying this case with Stephen Futeral
13 We're the two lawyers in the Futeral Law Firm The witnesses
14 we plan to call -- would you like them to stand Judge? We've
15 got three here

16 THE COURT That'll be fine if you've got them here

17 MR NELSON Three members of the Plaintiff LLC is
18 Bruce Marshall, Steve Hill and David Hilleshiem also Jeremy
19 Marshall and Walter Funk are members of that LLC and we also
20 plan to call Mark Knight who's a banker, Georgia Richard, who
21 is a realtor, Ed Carter who is an appraiser

22 THE COURT All right, thank you very much

23 Any member of the jury panel related by blood or marriage
24 or do you know in any way the three gentlemen that are here in
25 the courtroom and have stood or any of the other witnesses

1 whose names were just called out to you by the attorney? If
2 so, please stand
3 (No response)
4 THE COURT Anyone on the panel related by blood or
5 marriage or do you know in any way any of the people that
6 stood or whose names were called out?
7 Yes sir, your name and number?
8 MR HANNON My name is Ron Hannon, 64 I know Mr
9 Marshall
10 THE COURT How do you know him?
11 MR HANNON We're in the same business
12 THE COURT What is that?
13 MR HANNON Automobile business
14 THE COURT All right thank you very much for that
15 information
16 Yes, ma'am, your name and number?
17 Alicia Palmer, the Jeremy Walker I know a Jeremy Walker
18 I don't know ---
19 THE COURT Can you give us a little more information
20 to see if that's the same one
21 MR NELSON It's Jeremy Marshall I think she said
22 Walker
23 MS PALMER Oh, I thought you said Walker
24 THE COURT Jeremy Marshall, I believe it is
25 MS PALMER Okay

1 THE COURT Is that right?

2 MR NELSON Yes, sir

3 THE COURT All right, thank you Yes, sir, your name
4 and number?

5 MR KENNEDY I could be mistaken but if this is the
6 same Hill that was with Mullinex [spelled phonetically] and
7 Hill, I purchased a home from him in Sangaree

8 THE COURT All right you purchased a home from who?

9 MR KENNEDY Mullinex and Hill

10 THE COURT I see, and what's your -- the gentlemen
11 you're pointing to who are you?

12 MR HILL My name is Steve Hill and I'm a
13 homebuilder in Charleston

14 THE COURT All right, so you're the one that sold
15 one of the people that sold that home to him probably?

16 MR HILL Yes sir

17 THE COURT Is that what you're saying?

18 MR KENNEDY Yes, sir

19 THE COURT Okay thank you very much for that
20 information Anyone else?

21 MR ALTMAN What was that juror's number, please?

22 THE COURT Juror juror number tell me your name and
23 number?

24 MR KENNEDY 86, Gerald Kennedy

25 THE COURT All right thank you very much for that

1 information Yes, sir your name and number?
 2 MR PENDERGAST Charles Pendergast, 127 I believe I
 3 purchased a home from Steve Hill
 4 THE COURT How long ago was that?
 5 MR PENDERGAST Seven years
 6 THE COURT All right, thank you very much for that
 7 information Anyone else with positive response to that
 8 question?
 9 How about the attorneys involved, Mr Nelson and Mr
 10 Futeral, is that right?
 11 MR NELSON Yes sir
 12 THE COURT Anybody know them or have any dealings
 13 with them in the past or presently? Anybody know the lawyers
 14 involved representing the Plaintiff in any way? If so, please
 15 stand
 16 (No response)
 17 THE COURT No one is standing All right we'll
 18 switch to the other side
 19 MR ALTMAN My name is Charles Altman I'm with the
 20 firm of Altman and Coker My partner's name is Meredith
 21 Coker represent Bar-Pen Investments, LLC The members of
 22 that LLC are Mr Aubrey J Wooddy Jr , also known as Skipper
 23 Wooddy, Mr Joseph Bartone and a Mr Steve Pendley Mr
 24 Pendley is now deceased As far as the witnesses that we
 25 would call Mr Bartone Mr Wooddy and possibly some of those

1 mentioned by Mr Nelson

2 THE COURT All right, the same question anybody on
3 the jury panel related by blood or marriage or do you know in
4 any way any of those parties or the witnesses that may be
5 involved on the Defendant side? If so, please stand

6 Yes sir, your name and number?

7 MR ARD Jody Ard, 176 I know Mr Joe Bartone We've
8 done a lot of work for him in his personal home and a couple
9 of houses that he and his wife were building as well

10 THE COURT What kind of work?

11 MR ARD Painting cabinets building cabinets

12 THE COURT I see Thank you very much for that
13 information

14 Yes, sir, the next gentleman over on the second row

15 MR KIZER I know Joe, Joe Bartone as well, just
16 doing land development I know Mr Bartone is a land
17 developer and he lived in my neighborhood in Rivertowne at one
18 time

19 MR ALTMAN What's your number, please?

20 MR KIZER 89

21 THE COURT Thank you very much for that information
22 Yes, your name and number?

23 MR PAPPADAKES Number 124, James Pappadakes, Mr Woody
24 represents me in a real estate issue

25 THE COURT Who does?

1 MR PAPPADAKES Skipper Woody
2 THE COURT Is that?
3 MR ALTMAN Yes
4 THE COURT What is that connection?
5 MR ALTMAN I do not know, Your Honor
6 THE COURT You mean is this the person that can -- I
7 didn't catch it Is that somebody that is involved with your
8 firm?
9 MR ALTMAN Mr Woody, Mr Woody is a member of the
10 LLC and will be testifying
11 THE COURT I see and so, -- oh, it's a member of the
12 LLC and what's, tell me what you just said again
13 MR PAPPADAKES He represents me in a real estate deal
14 MR ALTMAN Mr Woody is an attorney
15 THE COURT We would not use him then
16 All right, yes, sir, your name and number
17 MR HANNON Ron Hannon Number 64 Steve Pendley was a
18 friend and a neighbor
19 THE COURT All right, thank you very much for that
20 information
21 Anyone else with a positive response to those the
22 parties or the witnesses for the Defense? If so, please
23 stand
24 (No response)
25 THE COURT No one else standing I don't think I

1 asked this I mean to When I was explaining the case to
 2 you, what this case is about, I meant to ask if anyone on the
 3 panel has any knowledge of any of the facts or circumstances
 4 that may be involved in the trial of this case, anybody have
 5 any knowledge of anything about this case, anything to do with
 6 this case? If so, please stand Anyone have any knowledge
 7 of any facts or circumstances that may be involved in the
 8 trial of this case? If so, please stand

9 (No response)

10 THE COURT No one is standing All right, I didn't
 11 include Mr Altman or his partners or whatever Anybody that
 12 has that knows Mr Altman in any way or ever had him
 13 represent you or knows in any way knows Mr Altman or any
 14 member of his firm? If so, please stand

15 (No response)

16 THE COURT No one is standing

17 MR NELSON Your Honor?

18 THE COURT Yes, sir

19 MR NELSON Could I add two more witnesses to that
 20 list?

21 THE COURT Sure, go ahead

22 MR NELSON Also we intend to call a lawyer His name
 23 is Benjamin Lafond He's in Summerville, and a realtor named
 24 Michael Rakes, also known as Mickey

25 THE COURT All right, with those additions to the

1 list of witnesses for the Plaintiff, anybody else have a
2 positive response to those two names? If so, please stand
3 Yes, sir, yes ma'am
4 MS CLIFFORD Did you -- did he say Mickey Rakes?
5 MR FUTERAL Yes, ma'am
6 MS CLIFFORD I'm working on a house with him
7 MR ALTMAN What's your number?
8 MS CLIFFORD 27
9 THE COURT 27, and I didn't hear the response but did
10 you all get it?
11 MR FUTERAL Yes, sir
12 THE COURT Okay
13 Has anyone on the jury panel formed or expressed an
14 opinion about any issue or matter that may be involved in the
15 trial of this case? If so, please stand
16 (No response)
17 THE COURT No one is standing Is there any member
18 of the jury panel aware of any bias or prejudice either in
19 favor of or against either side of this case? If so please
20 stand
21 (No response)
22 THE COURT You want to come down front and discuss
23 that with me? One at the time come on up
24 BAILIFF Juror 65 Your Honor
25 THE COURT I'll tell you all if I need to

1 All right, 65

2 (Whereupon, an on-the-record bench conference was held
3 with Juror Number 65, Kenneth A Harman, in the presence but
4 out of the hearing of the jury venire)

5 THE COURT What would you like to?

6 MR HARMAN I'm real good friends with a land
7 developer and I think he knows a couple of these people I
8 don't know if I'm going to be fair about this

9 THE COURT Why?

10 MR HARMAN Because I feel like these land developers
11 are crooks

12 THE COURT All right I think I'll excuse you then
13 (Whereupon, the following takes place in open court)

14 THE COURT Number 65 is excused

15 BAILIFF Juror 176

16 (Whereupon an on-the-record bench conference was held
17 with Juror Number 176, Jody Ard in the presence but out of
18 the hearing of the jury venire)

19 THE COURT Yes sir

20 MR ARD Yes, sir, I know Mr Bartone very well
21 I've done several jobs for him I don't know if that's
22 anything to do with it or not

23 THE COURT Okay well, knowing him, this gentleman is
24 just is not enough in itself but you think that your
25 knowledge of him would prejudice you ---

1 MR ARD Probably not

2 THE COURT --- one way or the other in other words,

3 would you favor his side or be against his side just because

4 he's on the case?

5 MR ARD I don't think so

6 THE COURT You think you could be fair and impartial

7 ---

8 MR ARD Yes, sir

9 THE COURT --- in spite of that relationship?

10 MR ARD I think so

11 THE COURT All right, good thank you

12 (Whereupon the following takes place in open court)

13 THE COURT He'll stay with us That was, but your

14 number was what?

15 MR ARD 176

16 THE COURT All right, thank you

17 Is there any member of the jury panel who knows of any

18 reason whatsoever why you could not be fair and impartial to

19 both sides of this case? If so please, stand

20 (No response)

21 THE COURT No one is standing

22 Is there any member of the jury panel who has any reason

23 whatsoever, knows of any reason whatsoever why you should not

24 be picked to serve as a juror in this case? If so please

25 stand

1 (No response)
2 THE COURT No one is standing
3 Any additional questions from the Plaintiff?
4 MR NELSON We'd just like to know if anybody on the
5 jury has or any member of the jury panel is a banker or a
6 realtor
7 THE COURT All right I'll let you ask that Ask it
8 to them
9 MR NELSON Any member of the jury panel or any close
10 family members realtors or bankers?
11 THE COURT Yes, sir, tell me your name and number?
12 Realtor or a banker?
13 MR KIZER Bryan Kizer, realtor, Bryan Kizer 89
14 THE COURT What's the -- who's a realtor?
15 MR KIZER I am
16 THE COURT You are?
17 MR KIZER Yes sir
18 THE COURT Okay thank you
19 Yes, ma'am, your name and number?
20 MS LAWRENCE It's 95, Claudia Lawrence, I work for
21 First Federal in their business internet banking
22 THE COURT Good, thank you
23 Yes ma'am, your name and number?
24 MS LEE Susan Lee, 96 My daughter is a realtor
25 THE COURT Good, all right anyone else with a

1 positive response? No one else standing

2 Any -- oh, oh, one more, okay yes ma'am, your name and

3 number?

4 MS CLIFFORD Pamela Clifford 27, I'm a realtor My

5 license are inactive right now

6 THE COURT All right, thank you

7 Any other questions from the Defense?

8 MR ALTMAN None Your Honor

9 THE COURT All right, thank you very much

10 We re still getting the list together to pick the first

11 jury and all and we'll need about a five minute recess at this

12 point It's not quite 20 minutes till 11 up there If you

13 would if you want to leave the courtroom, I'm talking to the

14 jury if you want to leave the courtroom you can Be back in

15 here at a quarter till 11 by that clock up there We'll pick,

16 we'll finish picking the jury then

17 *****OFF THE RECORD*****

18 (On the record)

19 THE COURT Thank you Please be seated I apologize

20 for keeping you waiting, but got tied up with something else

21 back there All right we're ready to pick a jury for this

22 case The Plaintiff will go first

23 All right, use the number on the left-hand side next to

24 the juror's name, one through 20 for the regular 12 jurors

25 and then on the next page 21 22 23 for the alternate

1 Members of the jury panel, the number that you heard
2 called out in no way corresponds to your juror number So,
3 don't try to figure out if they're talking about you by the
4 number that you hear or it does not correspond The Plaintiff
5 first

6 MR FUTERAL Juror number 2

7 THE COURT The Plaintiff strikes juror number 2

8 MR ALTMAN The Defendant strikes juror number 1

9 THE COURT 1

10 THE CLERK The Defendant strikes number one
11 Plaintiff?

12 MR FUTERAL Juror number 8

13 THE CLERK Plaintiff strikes number 8
14 Defendant?

15 MR ALTMAN Number 17

16 THE CLERK The Defendant strikes number 17
17 Plaintiff?

18 MR FUTERAL Number 23

19 THE COURT No, no, that's, that's for the alternates,
20 1 through 20 to start with and then we'll get to that, 1
21 through 20

22 MR FUTERAL Number 11

23 THE CLERK The Plaintiff strikes number 11
24 Defendant?

25 MR ALTMAN Number 15

1 THE CLERK Defendant strikes number 15
2 Plaintiff?
3 MR FUTERAL Number 20
4 THE CLERK The Plaintiff strikes number 20
5 Defendant?
6 MR ALTMAN Number 14
7 THE CLERK Defendant strikes number 14 As to the
8 alternate the Plaintiff will strike?
9 MR FUTERAL Number 23
10 THE CLERK Plaintiff strikes number 23
11 Defendant?
12 MR ALTMAN Number 22
13 THE CLERK Defendant strikes number 22
14 Gentlemen, if we'll please check our strikes
15 The Plaintiff strikes number 2, number 8, number 11,
16 number 20 and number 23 is that correct?
17 MR FUTERAL Yes ma'am
18 THE CLERK The Defendant strikes number 1, number 14,
19 number 15, number 17 and number 22, is that correct?
20 MR ALTMAN That is correct
21 THE COURT Any objection to the jury as it's
22 presently constituted by the Plaintiff?
23 MR FUTERAL None Your Honor
24 THE COURT Defendant?
25 MR ALTMAN None, Your Honor

1 THE COURT All right

2 THE CLERK Ladies and gentlemen, when I call your

3 name if you'll please come forward to serve on the jury and

4 please bring all your belongings Audrey G Molin, Alicia M

5 Palmer Helen D Melton, Bryan H Thibodeau, Jr , Joshua E

6 Dupree Michael A Adams Lisa R Pringle, James M Smith

7 Timothy J Combahee, John R Orvig, Charmayne E Smith Deven

8 B Weinburg

9 THE COURT Did we get Charmanyne E Smith?

10 BAILIFF She's here

11 THE COURT Okay

12 THE CLERK Shakerra M Parker

13 THE COURT Which one is Parker? There you go

14 You're the alternate juror Actually, we have a special seat

15 for you That's the seat that we reserve for the alternate

16 Now, you are Shakerra M Parker is that right?

17 MS PARKER Yes

18 THE COURT All right, that's -- you're the alternate

19 and that's the seat we reserve for the alternate So, if you

20 would, if you would sit in that seat at all times

21 Okay all right, actually we're not going to be able to

22 get started with the testimony and the trial of this case till

23 tomorrow morning at 9 30 So, I'm going to release you at

24 this time and ask you to be back with us tomorrow morning at

25 9 30, not out here in the courtroom, but the bailiffs are

1 going to show you out that door there and they'll show you the
2 jury room where I want you assemble tomorrow morning by 9 30
3 and we'll get started just as soon as we can after that Of
4 course, you don't know anything about really about this case
5 other than just the little bit that I told you earlier but
6 during the entire time that you're serving on the jury for the
7 trial of this case you cannot discuss the case with family,
8 friends or anyone else Anyone wants to know what you're
9 doing you tell them that you were picked for the jury for the
10 trial of a case and that the Judge, blame it on me, the Judge
11 specifically told you that you cannot discuss the case with
12 them The reason that would be improper is that you are to
13 decide this case based on the testimony and evidence will be
14 presented to you from that witness stand and my instructions
15 to you on the law So, to discuss the case with anyone else
16 would be improper during the entire time that you are on the
17 jury They're not one of the people that will make a
18 decision You're the 12 people that will make a decision in
19 this case Therefore, it is improper for you to discuss the
20 case with anyone while you're serving on the jury You can
21 tell them all about it once it's over but until it is over
22 you're not to discuss the case with anyone

23 So, with that instruction I'll let you go and ask you to
24 be back with us tomorrow morning by 9 30 Have a nice day a
25 nice evening See you tomorrow morning at 9 30

1 (Whereupon, the following takes place outside the
2 presence of the jury)

3 THE COURT All right, the lawyers are free then till
4 tomorrow morning at 9 30

5 MR ALTMAN You're going to hear the motion for
6 summary judgment?

7 THE COURT Why don't you wait around here and let us
8 pick this jury and then we'll hear from you okay?

9 MR FUTERAL Your Honor could we approach for a
10 moment?

11 THE COURT Yes

12 (Whereupon, a bench conference was held)

13 *****OFF THE RECORD*****

14 (On the record, Tuesday, March 11, 2008)

15 (Whereupon, the following takes place outside the
16 presence of the jury)

17 THE COURT Thank you Please be seated

18 All right, I believe we have a Defendant's motion for
19 summary judgment

20 MR FUTERAL Your Honor, would you like me to catch
21 that door before we begin in case any jurors come in?

22 BAILIFF I'll take care of it Thank you

23 MR FUTERAL Okay

24 THE COURT Tell me why I should grant the motion for
25 summary judgment

1 MR ALTMAN Yes, sir, Your Honor, this matter the
2 entire matter began December of 2005 The Plaintiff, actually
3 Plaintiff, two of the Plaintiff's principals, Mr Bruce
4 Marshall Mr Jeremy Marshall, entered into a contract with
5 Bar-Pen Investments, LLC, my client, to purchase a 101-acre
6 tract of land on Sheep Island Road in Berkeley County The
7 terms were the payment of \$2,530 000 \$10 000 was an earnest
8 money deposit The Plaintiff or the people who entered into
9 the contract, the Marshalls, were to -- had certain rights
10 They had to get a loan They had the right to get a loan
11 They didn't actually have to have the loan from our
12 standpoint They just had to pay the money, but they had, I
13 think, 15 days to apply for the loan, 45 days to get the loan
14 They also had a 90-day due diligence period At the end of
15 the 90-day due diligence period they wanted to move forward,
16 the \$10,000 went hard it became nonrefundable, applicable but
17 nonrefundable In addition, they were to pay \$40,000 more as
18 an additional earnest money deposit, and they paid that and
19 the \$10,000 became nonrefundable That was done in a timely
20 manner
21 The closing dates on the transaction, on a time is of the
22 essence basis, were to be between July 15th and July 31st
23 2006 From the time the \$40 000 was paid until sometime in
24 July there was no discussions, nothing was heard, everything
25 was going along as far as we knew just fine, had no idea of

1 any problems, nothing

2 Around the 10th of July, 2006, the real estate agent, a
3 real estate broker for what was now Sheep Island Investments
4 comes to the real estate agent or broker for the seller and
5 says something about that the buyers would like a 30-day
6 extension of time to close does not give they do not give a
7 reason The seller responds by saying, "We will give you a
8 30-day extension if you pay us \$50,000 that will be non-
9 applicable and nonrefundable and you will have until August
10 31st to close "

11 Around the 16th of July, the seller, not having heard
12 anything, the seller sends their closing documents to the
13 closing attorney, says, "When are we going to close? What's
14 going on?" A few days later I believe around July 20th or
15 July 21st, having had no response to the offer for the
16 extension of time, the seller in the same manner they had
17 conveyed the offer for the extension of time and everybody
18 agrees to this, says "We haven't heard from you We
19 withdraw the offer There is no longer an offer for an
20 extension of time on the table By the way, we need a closing
21 date We don't have one " So, now, we're within 10 days or
22 11 days of the absolute final closing date Again, time is of
23 the essence

24 Within the next few days, they are given a closing date
25 of July 31st at four o'clock So they're going right to the

1 last minute, but again, at this point we've been not told
2 anything We don't know anything is going on Everyone is
3 prepared to close from the seller's standpoint

4 Some time in the afternoon of July 31st, the seller gets
5 some indication from somewhere that there is not going to be a
6 closing Mr Aubrey Wooddy or Skipper Wooddy who is an
7 attorney and is one of the members of Bar-Pen, sends a letter
8 to Mr Benjamin Lafond, the closing attorney, stating, "We
9 understand that there's a problem with the closing It may
10 not take place We are prepared to go forward with the
11 closing We're ready, willing and able Your clients don't
12 close the contract's terminated That's pursuant to the terms
13 of the contract you've got" they're sending it Don't hear
14 anything Nobody shows up at the closing Nobody is there
15 Nothing happens

16 Approximately 5 10 p m on the 31st Mr Lafond sends an
17 e-mail to Mr Wooddy stating that he is going to -- his client
18 has dropped off a check for \$50,000 for the extension "I
19 will have it couriered to your office in the morning " Your
20 Honor, Mr Wooddy is an early riser He is -- he also leaves
21 work on the early side He did not get the e-mail until he
22 appeared at his office the next morning, August 1st He goes
23 into the office He sees the e-mail from Mr Lafond and
24 responds to it, "The offer for the extension was withdrawn 10
25 days ago Your clients are in default period There is

1 nothing else there I will have -- when the check arrives I
2 will have it returned to you "

3 Later that morning the check is delivered with a very
4 short letter from Mr Lafond saying ``Enclosed is the \$50,000
5 check for the extension " Mr Wooddy sends it back

6 Approximately or slightly over three weeks later this
7 lawsuit is filed It is filed claiming that there was a 30-
8 day extension no mention of financing problems, nothing else
9 just that they're entitled to a 30-day, they were entitled to
10 a 30-day extension because it was agreed to, and " by
11 returning the check you have breached the contract " They
12 asked for specific performance and a claim for breach of
13 contract

14 Answer is filed, some discovery is done, and a summary
15 judgment motion is filed That summary judgment is scheduled
16 for hearing sometime in April or May of last year
17 Approximately a week before that hearing we get a request
18 from the Plaintiff to be allowed to amend their complaint We
19 deny that because we were close to the summary judgment
20 hearing Judge Young, who heard that motion denied the
21 motion because the Plaintiff was claiming they had this new
22 cause of action The complaint is amended, and may I say
23 really a hundred percent change because they dropped the claim
24 of the extension, the 30-day extension and for the first
25 time, for the first time mentioned the fact that they had a

1 problem with financing and they were entitled to a 15-day
2 extension under paragraph 33 of the contract

3 At no time prior to the amendment did the Defendant, the
4 seller have any idea that that was the basis for a claim that
5 there was any problem with the financing or anything that was
6 going on Your Honor, paragraph 33 says "If through no
7 fault of either party there is a problem with a contingency
8 then there's an automatic 15-day extension, time is of the
9 essence " At no time is there a communication to the seller
10 within a timeframe where they could even help, if there was an
11 entitlement to the 15-day extension, there's notice given to
12 them They had no idea that this is the problem They had no
13 idea why there was a problem with financing They had no idea
14 that there was a problem with financing

15 So, now we go through discovery again and we take
16 depositions and we ask questions and we ask questions of
17 Mr Bruce Marshall, whose deposition we take individually
18 and as the 30(B)(6) designee for the Plaintiff, and we ask
19 him about the financing problem, and we ask him about what
20 was the reason for the 30-day extension request in early
21 July With regard to that issue he says that there was a
22 problem with water and sewer and they needed some time to
23 look into it, but they did not think that \$50,000 was
24 reasonable so they didn't take anybody up on the offer, there
25 was no communication he thought it was communicated but he

1 had no proof that any issue was communicated back to the
2 seller and he said, pardon me, Your Honor, he tells us that he
3 told his real estate agent to tell the seller, ``Well we'll
4 -- we wanted -- might want to exercise that later " There's
5 no communication, there's no issue that that was communicated
6 When we asked him about the 15-day extension, he says " Oh
7 yeah, I knew about that from the beginning " I said, ``Did
8 you communicate that to the seller?" ``Well, I talked to my
9 attorney and I talked to my real estate agent and I told them
10 to do it I said ``Do you have anything in writing showing
11 that was communicated?" He says, ``No, sir, I don't " The
12 real estate agent doesn't tell us anything about it, but when
13 we ask Mr Lafond about the notice to the seller he says that
14 he missed paragraph 33 He just didn't, he just plain missed
15 it He had no idea it was there until it was brought to his
16 attention shortly before his deposition When I asked about
17 why there was no explanation in his letter of the 31st to the
18 seller, July 31st about the extension or anything about it,
19 what the terms were or anything he said, ``I just made a
20 mistake " Now, Your Honor, you can't be expected to do
21 something unless you know you need to do it and that's what
22 the Plaintiff is contending here That you didn't -- " We
23 didn't tell you you needed to do it We didn't tell you we
24 needed help, but you know what you needed to do it anyway "
25 and that doesn't make any sense and I don't think the law

1 supports that We've handed up a memorandum that talks about
2 that, but also, Your Honor, there's another issue and we have
3 a supplemental memorandum that I don't believe I filed yet,
4 but I'd like to hand that up when I finish what I'm saying
5 In the deposition of Mark Knight, Mark Knight is the loan
6 officer at the bank We asked him questions about why there
7 was a problem with financing whose, who did what He tells
8 us that the problem was because of what the buyer didn't do
9 What the buyer didn't do was tell the bank who the members of
10 the LLC were going to be until the 26th of July, five days
11 before the closing Your Honor the 26th, a Wednesday, 29th
12 and 30th are Saturday and Sunday Within two days the bank
13 submitted a commitment letter the first commitment letter
14 that the seller, I mean, excuse me, the purchaser ever had
15 There was no commitment letter at any time That was never
16 communicated We had no idea^{at that} We found that out in
17 discovery but they did not tell the bank, their lender who
18 the members of the LLC were going to be So the bank could
19 not prepare a commitment letter When they found out they
20 started working as hard as they could The banker, Mr
21 Knight, also tells us that the borrower knew they needed more
22 people because there was not sufficient financial strength
23 with Mr Marshall's son and Mr Hilleshiem who were the
24 original people who were going to do this We learned that
25 Mr Marshall was only going to have a one percent interest and

1 was not going to be a guarantor and was not shown as a
2 guarantor In fact, Your Honor, at no time did every person
3 who was going to be a member of the LLC, the purchasing LLC,
4 ever sign the commitment letter, and they tell us they didn't
5 realize until the very end, that that's what they -- what
6 their problem was, but their problem was their own making
7 They knew They had seven months, they had seven months to
8 get their ducks in a row and they laid back and said, "You
9 know, we'll get it done We'll get it done We'll get it
10 done," no communication, nothing The bottom line is that in
11 order to take advantage of paragraph 33, the 15-day extension
12 they needed to communicate the right to that, not communicate
13 it nine months after the right ended, but communicate it
14 before it began They did not do it, and even if they did
15 that, even if they had communicated it, the uncontested facts
16 are it was there fault that they didn't get their loan in time
17 because they didn't provide the bank with the information they
18 needed to do that I might add one more thing to show that
19 they did not on the 31st they were looking for the 30-day
20 extension They had no idea they missed their 15-day, they
21 didn't even know they were supposed to tell, Mr Bruce
22 Marshall wrote a letter to the bank on August 2nd, 2006
23 explaining what was going on He says that two of the
24 partners didn't come up with their money "We were trying so
25 hard We had suggested to deposit the interest carry,"

1 which they say is their problem with financing, ``and we have
2 sent the money for a 30-day extension that they've denied
3 but we're going to talk to an attorney about that '' He does
4 not mention the 15-day extension anyway They weren't looking
5 for a 15-day extension They didn't know they were entitled to
6 a 15-day extension and they can't come in what turned out to
7 be nine months later and say ``We are, we're entitled to it ''

8 Lastly, Your Honor, at no time within that 15 days did
9 they tender, did they say they were ready, willing and able to
10 close They didn't have the money in place nothing happened
11 Your Honor there is no basis for this suit, and I would ask
12 to be able to respond to anything the Plaintiff might offer
13 Thank you Your Honor

14 THE COURT Be glad to hear from you as to why I
15 should not grant the summary judgment

16 MR FUTERAL Thank you, Your Honor

17 If I may approach I've got a memorandum to file with the
18 court

19 MR ALTMAN Your Honor, pardon me, but may I present
20 you with our supplemental brief?

21 THE COURT Sure

22 MR ALTMAN And I might point out to the Court we have
23 not seen -- we have a provided a copy of this to the Plaintiff
24 and we have not seen their memorandum at all

25 MR FUTERAL I just handed it to Mr Altman

1 Your Honor, for starters I want to sort of back up for a
2 moment if you will, and just talk about the pleadings
3 themselves Mr Altman has pointed out to the Court that the
4 pleadings originally didn't assert these theories, if you
5 would, that my clients were entitled to close on this
6 transaction under a 15-day extension clause, and as Mr Altman
7 pointed out to the Court Judge Young allowed us to -- well
8 the Court, in essence I don't know if it was Judge Young
9 himself, but in any event our motion to amend the pleadings
10 was granted, and as the law provides, when that motion is
11 granted, those pleadings relate back to the original filing of
12 the complaint So I don't believe that Mr Altman's argument
13 to the Court that somehow the facts and circumstances of this
14 case have changed as a result of the pleading is something
15 that this Court should consider in making its determination,
16 and in fact, pardon me I've put my reading glasses down
17 somewhere In fact, really nothing has changed about these
18 facts and circumstances It's just the advancement of the
19 theory of the case

20 Your Honor, on the first page of our memorandum in
21 opposition we set out one of the pertinent contractual
22 provisions in this case This was that our client should
23 obtain a loan for a maximum 80 percent loan to value ratio
24 within 30 consecutive days from the agreement and provide the
25 seller with written satisfactory loan approval within 45 days

1 It also provides that should the buyer fail to make the loan
2 application or receive the loan approval and to diligently
3 pursue the application, the seller shall have, and I
4 emphasize, the option to terminate this agreement with written
5 notice I'm hoping Your Honor can see this from a distance
6 but I will read it off here

7 MR. ALTMAN Your Honor may I get in a position to see
8 what he's showing to the Court?

9 THE COURT Sure

10 MR. ALTMAN Thank you

11 MR. FUTERAL I wanted to aid the Court and hopefully
12 the jury in understanding the timing of events in this
13 particular case, Your Honor

14 The Defendant purchased this property for about 1.44
15 million on July 7th, 2005. They sell it to our clients on
16 December 14th, 2005. At some point, the testimony in this
17 case will be from Mr. Marshall and he has testified this way
18 along with his son, Jeremy Marshall, in their depositions,
19 that in January 2006 they began the process of trying to
20 obtain a loan, in this case from BB&T as shown on the chart
21 here. There's also testimony in this record that by January
22 31st, 2006, BB&T was not going to make the loan for them.

23 Consequently, as seen on the time line, in February of
24 2006, there is testimony and exhibits in the record to show
25 that our clients then began the application process with South

1 Coast Now, I want to point out to Your Honor that pursuant
2 to the contractual terms they were supposed to have applied by
3 January 13th and they were supposed to have provided a letter
4 of loan approval by January 28th That never happened in this
5 case by those time lines and the seller never exercised its
6 option to terminate on that basis So, here we have a multi-
7 million dollar transaction I will point out to the Court
8 that Mr Woody, one of the members of the Defendant
9 corporation, of course, 30 some odd years as a commercial and
10 residential real estate attorney also in his deposition,
11 along with one of the other members who will testify in this
12 case, both seasoned veterans in investing in both commercial
13 and other properties, and own a bunch of them They're
14 dealing with our clients with whom they've never had any
15 dealings before in a multi-million dollar transaction, yet
16 never ask nor insist upon nor terminate the agreement for
17 failure to provide them any information that they had actually
18 received the loan So, they waived that, and in fact, later
19 on the members testify, in particular attorney Woody, that
20 they weren't concerned about that at the time of closing and
21 the reason being, Your Honor, is right about here in March of
22 2006 my clients had at that time basically ponied up \$50,000
23 non-refundable It was the \$10 000 earnest already paid
24 pursuant to the terms of the contract then converted into a
25 non-refundable sum, and they also provided them an additional

1 \$40,000 non-refundable So then there is between March and
2 July when we're getting down to the closing date a letter
3 issued from South Coast on February 14th, 2006 This is the
4 lender from the buyers It is not a commitment letter It's
5 basically a letter that says to whom it may concern, "We were
6 looking at providing them this loan," and the testimony is
7 that this was provided through the real estate agents to the
8 seller in this transaction, the Defendant

9 Now, we get down to July, right about July 20th There
10 are problems at this time, and Mr Altman has argued to this
11 Court that his clients has absolutely no notice of any
12 problems, nor did they have any notice that our clients sought
13 an extension of time Well, our clients, Mr Marshall and
14 others, have testified in this case that there was a problem
15 Initially the problem, Your Honor, was they weren't sure how
16 the water and sewer was going into that particular
17 neighborhood There is testimony from the Plaintiff's members
18 and the lender, the representative from South Coast, there was
19 discussions between them as to whether the loan was going to
20 be for 65%, Your Honor or 75% loan to value, and that really
21 depended upon, according to the testimony, whether water and
22 sewer was within this one hundred tract of land

23 Foreseeing a problem with the installation of water and
24 sewer, the buyers in this case then contacted the seller and
25 asked for a 30-day extension of time as Mr Altman has

1 indicated The seller then said, "We'll take \$50,000 for
2 that 30-day extension. Meanwhile, within a number of days
3 from that transaction the seller learns that my clients are
4 looking to turn around and resell the property after they
5 purchase it potentially at a substantial profit Now, Your
6 Honor, for what it's worth in the five month period that the
7 sellers held this property they bought it for 1-44 and they
8 sold it for 2 5 million That much increase in five months
9 The market is hot, and what they have is not a commitment but
10 some documentation that is in the record here that there was a
11 third party that was willing to purchase this property for
12 over 3 million Now, ironically, Mr Marshall approaches Joe
13 Bartone, who is one of the members of the Defendant LLC, and
14 asks him if he's interested in buying the property, not
15 realizing Joe Bartone is the Defendant in this case or part of
16 it Then coincidentally within a number of days of the
17 Defendant finding out that the buyers were looking to resell
18 which would have been their business, they withdraw their
19 offer to accept \$50,000 for a 30-day extension

20 So, the testimony from the witnesses for our client is we
21 just went ahead with the notion that we were going to close on
22 the 31st and for all intents and purposes from the discussions
23 had by my client's representatives and the lender, that did
24 not appear to be a problem until right about July 20th

25 July 20th is when the Defendant's realtor, Mickey Rakes,

1 who has been deposed in this case e-mails to the Plaintiff's
2 realtor that Defendant will grant no extension of time Now,
3 this e-mail is in relation to, Your Honor, that \$50,000 30-day
4 extension that my clients had been asking for, but also says
5 unequivocally no extension Your Honor, by Friday July 21st,
6 there is notation by Mickey Rakes, the Defendant's realtor,
7 that Mickey Rakes and Skipper Wooddy, the Defendant's member,
8 had a discussion about the 15-day extension of time and
9 according to Mr Rakes Mr Wooddy said that if my clients
10 tried to use the 15-day extension clause he would quote,
11 unquote, litigate it In other words circumstantial evidence
12 he knew there was going to be a problem He knew that the 15-
13 day extension clause was in play He's an experienced real
14 estate lawyer and this is their contract and he is saying he's
15 going to litigate it if they ask for it Then later that
16 afternoon Mr Rakes tells one of the members of the Plaintiff,
17 Mr Bruce Marshall there will be no extensions of time Your
18 Honor, at this point we're not talking about 30 days for
19 \$50,000 My client was asking for two to three extra days
20 period

21 I will back up and point out that the contract provides
22 under paragraph 33 that if the contract or the sale doesn't
23 close on or before the 31st regarding one of the contingencies
24 through no fault of the parties, then they're going to have a
25 15-day extension, and here is the precise language from that,

1 Your Honor, that's what the contract in part provides up on
2 the screen, "should the buyer fail to make a loan
3 application," oh I'm sorry I'm on the wrong slide There
4 it is, Your Honor, this was under the contingency section or
5 just prior to it in the contract

6 THE COURT Well, I guess the question becomes then
7 did your client try to close within 15 days

8 MR FUTERAL Well, here's what happened and why they
9 didn't close

10 THE COURT I guess it's a simple answer, yes or no

11 MR FUTERAL The Defendants prevented them from doing
12 so

13 THE COURT How did they prevent them from doing it?

14 MR FUTERAL I'll illustrate The testimony in this
15 case ---

16 THE COURT Other than saying, "We're not going to
17 close " Did your clients communicate ---

18 MR FUTERAL Yes

19 THE COURT --- the desire to close to the seller
20 within 15 days?

21 MR FUTERAL Yes, yes, sir

22 THE COURT What proof is there of that?

23 MR FUTERAL They did

24 THE COURT What proof is there of that?

25 MR FUTERAL Let me cite to portions of the

1 depositions and otherwise, Your Honor, starting on page six of
2 nine of our memorandum of law we've indicated there's a
3 genuine issue of material fact as to whether the Plaintiff
4 provided Defendant notice to invoke a 15-day extension First
5 ---

6 THE COURT What is the proof of that?

7 MR FUTERAL That's what I'm getting to, Your Honor
8 First, we're looking at the notes of Mickey Rakes where he
9 made a chronological notation of his conversation and was
10 deposed on this Mickey Rakes called Skipper Woody on July
11 21st told him about my message from Bruce Marshall Your
12 Honor, one of the members of the Plaintiff in this case "I
13 asked Skipper about the extension clause in the contract He
14 said if they tried to use it he would litigate it " Then on
15 July 21st he called -- he returned my client's phone call
16 "He wanted me to know that they were working diligently
17 towards closing and he asked about a day or two extension "
18 He wasn't even asking for 15 days He just needed a day or
19 two "I told him the partners made it clear there would be
20 no extensions " July 31st, their realtor is talking with the
21 Plaintiff's realtor "She was nervous that the closing might
22 not go off today and wanted to know the possibilities of a
23 day or two extension," not even 15 "I told her I felt she
24 should have the closing attorney relay the info and request
25 directly to Skipper because he had drawn the line of a firm no

1 with me I called Benji " This is the closing attorney for
2 the Plaintiff, "told him that Georgia had informed me the
3 closing might not happen He said that was a possibility
4 Told him this was the last day per the contract, time was of
5 the essence and the sellers had made it clear there would be
6 no extensions " And all what's happening here, Your Honor,
7 is that we are asking for the extension, even ---

8 THE COURT You didn't have to ask for it You had
9 it

10 MR FUTERAL Yeah, we had it

11 THE COURT So, why didn't you close?

12 MR FUTERAL Because they denied us the ability to
13 close

14 THE COURT You had, you had the extension You had
15 the ability to close at any time in that 15 days

16 MR FUTERAL Yes, sir, I agree I think ---

17 THE COURT Well, where is the evidence you tried to
18 close within the 15 days?

19 MR FUTERAL Your Honor, the evidence that we were
20 trying to close within 15 days was the fact that we were
21 telling them we're going to need two or -- one to three extra
22 days and the Defendants are repeatedly telling us no, no, no

23 THE COURT Well, I understand that, but you had it
24 You didn't need their permission

25 MR FUTERAL Your Honor, it wasn't as if they were ---

1 THE COURT You didn't need their permission
2 MR FUTERAL We needed them ---
3 THE COURT You should have set up a closing
4 MR FUTERAL Your Honor, we needed them to come to the
5 closing
6 THE COURT You didn't have to -- all you had to do
7 was tell them, ``Here's the closing This is it ''
8 MR FUTERAL Your Honor, we -- you're in essence, let's
9 assume for ---
10 THE COURT You had your 15 days You didn't tell
11 them ``We're ready to close ''
12 MR FUTERAL Actually, Your Honor we had indicated to
13 them that we would be able to close within a day or two
14 There is testimony in the record that there was communications
15 between the parties and their agents that we would be able to
16 close within one to three days So, that means no closing
17 date was set within the 15 days because we didn't know if it
18 was going to be one or three or 15 Second of all, we
19 received two communications from Mr Woody, the first being
20 on the 31st saying ``You are in default We give notice of
21 termination '' Now, Your Honor once the Defendant has
22 terminated the agreement it serves no useful purpose for us to
23 try and insist and say pretty, pretty, pretty please can we
24 have our 15 days
25 THE COURT Well, you didn't have to ask them for it

1 MR FUTERAL We had to have them show up, Your Honor

2 THE COURT Well, that's true, but all you've got to
3 do is schedule the closing, if they don't show up then you're
4 in good shape

5 MR FUTERAL Your Honor, there is nothing in the
6 contract itself that says when we invoke the 15 days we
7 actually have to set up a closing and then have them not show
8 up so we would have further evidence of their breach

9 THE COURT Makes sense

10 MR FUTERAL Well, what they had done is they had
11 already breached at that point by telling us we were in
12 default and, "We are terminating the agreement itself " In
13 other words it would have served no useful purpose As a
14 matter of a fact ---

15 THE COURT It would have at this point

16 MR FUTERAL --- here's what the clients were so
17 desperate to have that closing set up they did do something

18 THE COURT What did they do?

19 MR FUTERAL They sent the \$50,000 check that the
20 Defendants had previously rejected, even with a 15-day closing
21 period They were willing to pay ---

22 THE COURT That was for the 30-day extension which
23 they had withdrawn

24 MR FUTERAL No, sir, actually according to the
25 testimony of Bruce Marshall and David Hilleshiem who are both

1 members of the LLC, when asked why did you send that \$50,000
 2 afterwards knowing that they had withdrawn the 30-day
 3 extension, their testimony unequivocally was, ``We were
 4 desperate to get this closing set up We were willing to pay
 5 even 50, even though the contract didn't require it, just to
 6 be able to close but we had been told repeatedly, `We're not
 7 closing,' Skipper Woody made it clear, `We are not closing on
 8 anything past the 31st, '' and that's explanation, Your Honor,
 9 as to why we didn't then set up a closing date and have Benji
 10 Lafond do these things and so on and so forth because again
 11 they had made it unequivocally clear it didn't matter about
 12 the 15 days and as a matter of a fact in discovery come to
 13 find out that's reflected by Skipper Woody and Mickey Rakes
 14 ``We'll litigate it if they try to use it '' So, as Your Honor
 15 now knows, as we now know it would have served no useful
 16 purpose and it was clear to them ---

17 THE COURT It would have served a useful purpose
 18 It would have avoided what we've got right now

19 MR FUTERAL Well, no, Your Honor, I think based on
 20 the testimony that I've seen in this case and the evidence
 21 had we set up a closing they weren't going to show and we'd be
 22 right here

23 THE COURT That would have been that would have been
 24 to your advantage

25 MR FUTERAL It would have been more evidence of the

1 same that we already have evidence of Your Honor That's
2 that's the thing Nothing in the contract said that when they
3 -- when they've breached we had to go forward and set up a
4 closing and so, ---

5 THE COURT What was their breach?

6 MR FUTERAL Their breach was sending us communications
7 saying, "Because you didn't close you were in default and we
8 are terminating the agreement, just terminating it "

9 THE COURT I mean, if that under the contract was not
10 correct then you, you know you ---

11 MR ALTMAN We're saying they've breached it We had
12 15 days and they terminated it wrongfully That's exactly
13 what our argument is

14 THE COURT But under your contract it wasn't
15 terminated because you had the 15 days

16 MR FUTERAL Until the Judge and the jury decides that
17 it wasn't lawfully terminated this is where we find ourselves
18 Your Honor, I mean, we couldn't drag Skipper Woody to a
19 closing if he was refusing to go He had unequivocally
20 terminated it and our argument is he had no legal basis for
21 terminating, and here's why After the fact what they're
22 going to try and argue to the jury and to Your Honor is ---

23 THE COURT I mean, they can say it's terminated but
24 whether it is depends on the terms of the contract So, it
25 wasn't because you had the 15 days but then you didn't do

1 anything about it You can't, you can't terminate unless
2 you've got a right to You're saying they didn't have a right
3 to So, it wasn't terminated So, it was up to you to do,
4 your client to do something within the 15 days

5 MR FUTERAL Your Honor what we did within the motion,
6 what we did within the 15 days, of course, since Mr Woody
7 wasn't going to come is we filed a Lis Pendens and demanded
8 specific performance Obviously my clients would have been
9 more than willing within the 15 days to close, but their
10 position all along was, "You breached," you Plaintiffs
11 "You are not entitled to the 15 days period "

12 THE COURT Where does it say where does anybody say
13 you're not entitled to the 15 days?

14 MR FUTERAL Well, I'll refer to some portions here of
15 the record in this case One moment, Your Honor

16 All right, this is the deposition testimony, I have
17 deposition testimony first from Mr Marshall In his
18 deposition Mr Marshall testifies as follows he contacted both
19 his closing attorney and his realtor to ask them what was the
20 status of getting more time He was told by both of them that
21 the Defendants made it clear there would be no extensions He
22 was asked, "What did you do then?" "We had a \$50,000 check
23 already made out that originally we had It was kind of a
24 desperation move because we definitely wanted the property
25 We definitely wanted to close on the property We knew that

1 we could close on the property given another day or two So
2 David Hilleshiem took the check that we had over to Benji
3 Lafond," who by the way, Your Honor then delivered it the
4 next day directly to Mr Woody's office asking to be able to
5 close

6 Question, "You were prepared to close on the 31st?"

7 Answer, and in this case, Your Honor, the reason why they
8 didn't close is the lender threw an additional requirement of
9 211,625 for the buyers to bring to the table He says,
10 "Except for that figure we did not know about it Everything
11 else was fine " "Correct, you had all the other money you
12 needed?" "We had all the money we needed "

13 He was asked, "What happens if you can't close by the
14 31st with the time of the essence clause?" Answer, "Then
15 we'd rely back on the 15-day extension if that's not due to
16 fault of your own " "When did you realize the 15-day
17 extension might come into play?" "Immediately that day "
18 "Immediately that day?" "Yes, after Mr Woody told Benji
19 Lafond he could not close that day not one day after "

20 "Did you notify anybody there was a 15-day extension?"
21 "They knew " "Who knew?" "Mr Woody knew " "How did you
22 know that?" Well he's testifying that he had seen Mickey
23 Rakes's notes at that point, and then he was asked, you know,
24 basically, "Why didn't you go forward with the closing?" He
25 said, "We didn't have a reason to " "You think that Mr

1 Lafond or Ms Richard talked to the seller about the problem
2 on the 31st?" He says, "I told them and the message was
3 relayed to Mr Wooddy and Benji told me Mr Wooddy said "I
4 will not give you even one more day '"

5 Your Honor, then there is the testimony of Mr Rakes and
6 here's why I'm saying it serves no purpose to keep pushing
7 them at this point He testifies, first of all, he does
8 testify that he spoke to the bank several times Mr Altman
9 told you they had no notice of any problems regarding the loan
10 or otherwise Mr Rakes actually testifies right around
11 pages 27 of his deposition, question, "Did you all ever
12 contact or did you ever contact the bank to verify anything in
13 terms of the loan process?" Answer, "I requested information
14 from Georgia, the realtor, as to who the bank was and at the
15 end I had contacted the bank, at the very end whenever it
16 appeared there was a problem " So they did know about it
17 He testifies right around page 32 of his deposition he was
18 asked, "If you look at paragraph 32 it provides for a 15-day
19 extension '"

20 THE COURT 32 or 33?

21 MR FUTERAL I'm sorry page 32, lines one through ---

22 THE COURT Is it paragraph 32 or 33?

23 MR FUTERAL I'm sorry It's paragraph 33 of the
24 agreement

25 THE COURT Let me make sure

1 MR FUTERAL Page 32 of his deposition, it says, "If
2 you look at paragraph 32 of the same contract it provides for
3 a 15-day extension Had any discussions ever been had between
4 you and any member of the Defendant as to whether or not that
5 extension should apply?" Answer, "I had a conversation with
6 Skipper Woody just telling him that the clause was in there
7 Skipper was out of town This is when we got down to close
8 the closing, but my communications with Skipper I told him
9 about this in this paragraph " We asked him about the
10 general substance of his conversation on page 33 of his
11 deposition He says he reminded him that there was obvious --
12 that there was a clause, an extension clause in the contract,
13 "And then we discussed it further in-depth because it says
14 through no fault of either party " "So, did he believe that
15 this closing might not occur by July 31st by fault of the
16 buyers?" "I can't speak for what he believes," etcetera,
17 but he references the fact that Skipper Woody said he would
18 litigate it

19 Then we asked Mr Rakes, their agent "Do you believe
20 they were entitled to a 15-day extension?" He says, "They
21 were not because they were past their due diligence period "
22 This is on page 35 of his deposition Quote, "We live to the
23 rules of the time is of the essence The seller was ready
24 willing and able to close, and in my professional opinion, I
25 did not believe they were due the extension either " In

1 other words, they're denying it to us, Your Honor

2 THE COURT Well, if you're claiming you're entitled
3 to it you don't have to have their permission

4 MR FUTERAL I agree, Your Honor but ---

5 THE COURT Okay so if you set up a closing and if
6 they don't show up, you got it

7 MR FUTERAL I understand but I don't think the law
8 would require us to do the impossible when they've made it
9 clear they're not going to show up It wouldn't have mattered
10 if we had set up a closing They had ---

11 THE COURT We wouldn't be here today arguing about
12 it

13 MR FUTERAL Well, that assumes Your Honor ---

14 THE COURT I wouldn't be, I wouldn't be having to
15 decide this question

16 MR FUTERAL Oh, you mean the summary judgment motion

17 THE COURT Yeah

18 MR FUTERAL As opposed to the lawsuit

19 THE COURT Not whether, yeah, wouldn't be, wouldn't
20 be any question

21 MR FUTERAL Well, let me tell you about these last
22 bits of testimony and see if this makes a difference to Your
23 Honor This is the testimony of Benji Lafond, who is the
24 closing attorney in this case He testifies that he had a
25 conversation directly with Skipper Wooddy Now, this would

1 have been the attorney we would have used to set up that
2 closing within the 15-day period, and what he says is as
3 follows, he says on page 62 of his deposition that he talked
4 to Skipper ``Did anyone to your knowledge between August 1st
5 and August 15th convey to the seller that the purchaser was
6 entitled to a 15-day extension?`` He says well, not to his
7 knowledge, but he goes on to provide ``And based on Skipper's
8 letter to me from August 1st, I mean, he said the contract was
9 terminated and he wasn't going to close I mean, going
10 through the mechanics we were there We could have closed,
11 you know, if had given any indications that the sellers would
12 be willing to close and he told me flat out on the phone they
13 were not going to close that the contract was dead on the
14 31st if they didn't close on the 31st I mean it would have
15 been you know, he basically says it would have been futile to
16 try and close based on his conversation with Mr Woodydy ''
17 Then he says pardon me, then he just basically goes on
18 to provide towards the end of his deposition that the
19 client's ``Ours have been surprised by the lender's
20 additional requirement It would have closed within a day or
21 two but ultimately the Defendants in this case had refused ''
22 Now, I also deposed Mr Woodydy and I asked him about the 15-
23 day extension This was their position on it I asked him
24 if prior to the closing if there was any contingency that was
25 not satisfied? He said, ``To our knowledge the financing

1 contingency had been satisfied " I asked him, "Had every
 2 contingency under the contract prior to the closing date been
 3 satisfied?" Answer "It was our belief they had " I asked
 4 him about notations He doesn't recall having spoken to
 5 Mickey Rakes where Mr Rakes discussed with him the extension
 6 clause and he responded they would litigate I asked him on
 7 page 29 of his deposition line 21 "Okay what I'm wondering
 8 is and I'm not trying to put words in your mouth and if I
 9 understand correctly, this comment regarding the extension of
 10 time does not relate to Paragraph 33?" That was Mr Rakes's
 11 notes regarding the litigation "I think it does in this
 12 sense, that we believed there were no contingencies So my
 13 response back to Mickey was if there are no contingencies they
 14 can't use paragraph 33 to extend the closing "

15 Then, pardon me, Your Honor One moment, Your Honor
 16 Your Honor, I'm looking for a specific portion of Mr Woody's
 17 deposition testimony and Mr Nelson is going to look that up
 18 for me because I don't want to misquote what he had testified
 19 to, but, Your Honor, the point of my argument in all of this
 20 is, along with what had factually taken place in this case,
 21 which pretty much culminates with Exhibit Number Nine in Mr
 22 Woody's deposition where the day after the closing Mr Woody
 23 says ---

24 THE COURT The day after what closing?

25 MR FUTERAL The day after the closing would have

1 taken place on the 31st Mr Woody sends a fax to the
2 closing attorney for the Plaintiffs and says, Tommy, this is
3 the July 31st letter and that's the wrong exhibit number I
4 need the August 1 Mr Woody says he hand delivers a letter
5 to Benji Lafond's office saying, "The seller has terminated
6 the agreement between the parties because of Sheep Island
7 Plantation, LLC's, failure to close " Your Honor, what this
8 amounts to is an anticipatory breach of contract as we can
9 see Even before the 31st they're saying they're not going to
10 give them any extensions of time, and I believe under South
11 Carolina law any anticipatory breach on the part of the
12 Defendant would forgive any obligation we had to perform as
13 Your Honor has suggested somehow set up a closing that would
14 never in reality take place They had already indicated by
15 the 20th and the 21st they would never give an extension, not
16 one day, knowing that the 15-day period lay within the terms
17 of the contract and ample evidence to show it had been
18 requested That's an anticipatory breach on their part and
19 therefore, legally and I would say as a matter of equity or
20 fairness, we should be forgiven from taking any further steps
21 to try and set up a closing that was never going to happen
22 after the 31st

23 I don't want to ask the Court to wait while I look for
24 Mr Woody's, the portion of his deposition transcript I
25 would ask the Court's permission after Mr Altman speaks if I

1 could at least address the Court on that particular point of
2 his testimony

3 THE COURT All right

4 MR FUTERAL Thank you Your Honor

5 MR ALTMAN Your Honor, a couple of points, first of
6 all I think what may be most interesting, and I absolutely
7 agree with your comments about if they tendered performance

8 THE COURT I'm not surprised that you would agree

9 MR ALTMAN I'm not surprised you said that I
10 expected you to, but I think it's a very important point but
11 interestingly not so ---

12 THE COURT Well, get back to his point though, if
13 your client says "We're not going to close under any
14 circumstances," you know, doesn't that kind of forgive them
15 for not trying to set it up? I don't know

16 MR ALTMAN No sir, because we ---

17 THE COURT Why not?

18 MR ALTMAN --- because we had not been any reason to
19 do anything

20 THE COURT I don't know if they had to They
21 didn't have to give you a reason

22 MR ALTMAN Certainly they did They had to give us,
23 say that, "It's because of a contingency that was not
24 satisfied through no fault of our own," and that's not the
25 case Interestingly they don't address the fault question and

1 you have ---

2 THE COURT Well, that's just -- apparently the -- I
3 could see how there could be a conflict about that So, if
4 there's a conflict about that you know, that through no fault
5 of their own and all did they really have to give you any
6 notice? You were bound to give it to them, whether they you
7 know, if that was the -- if that turned out in fact to be the
8 case

9 MR ALTMAN Your Honor, they never were able to
10 perform They never tendered -- they couldn't tender and the
11 fact is they didn't have their loan They never signed the
12 loan commitment They never had the money The money was
13 never in the bank Their bank statement shows they didn't
14 even have the down payment that was required They never
15 signed the commitment letter, all of the people never signed
16 the commitment letter When Mr Knight was asked, "Did you
17 go after them for," them being the buyer, "for your
18 commitment fee which was supposed to be paid?" He said, "We
19 couldn't We didn't get all the signatures on the commitment
20 letter So we couldn't have gone after the fee if we wanted
21 to because of all of them had not signed " I asked the
22 question about why it took so long, what was the problem and
23 my question, "And any delays that were caused were caused by
24 the borrower is that a fair statement?" The answer "Yeah,"
25 and that's Mr Knight the bank loan officer He has talked

1 about the fact he didn't know about who the members were going
2 to be until two days before the commitment letter came out
3 Your Honor, interestingly, too is the commitment How much is
4 the commitment for? Is it for 80 percent which is what the
5 contract called for? No it was for a hundred percent The
6 loan was \$2,530,000 and that's what caused, part of what
7 caused them the problem that we later found out

8 Mr Futeral says within a few days after July 31st they
9 filed their lis pendens My records indicate the case was
10 filed on August 23rd, 2006 You know technically you may
11 have a relation back as he points out on his nice chart here,
12 but the fact is when they filed, when they filed they asked
13 for the 30-day extension no mention of the 15-day right
14 They didn't know about the 15-day right The August 2nd
15 letter I mentioned earlier, Mr Marshall writing Mr Knight,
16 "When we saw the funds would not be there, we carried a check
17 to the property owner in the amount of \$50,000 hopefully so
18 they would honor their e-mail granting us a 30-day extension
19 for the additional \$50,000 " Wasn't sent in good faith
20 This is almost contemporaneous with the last day they could
21 close He didn't say we gave them \$50,000 for good faith as
22 Mr Futeral argues He says, "We were trying to get the 30-
23 day extension " That that's Mr Marshall doing that
24 That's nobody else doing that Mr Lafond, the 15-day
25 extension, everybody is talking about the entitlement to the

1 15-day extension They knew it Okay, question, "Okay,"
2 this is page 57 of Mr Lafond's deposition line 23, "Okay, at
3 any time between August 1st and August 15th, 2006, did you
4 convey to Skipper Woody, to any broker, to anyone under the
5 terms of the contract that the purchaser was entitled to a 15-
6 day extension Answer, "No, I missed that " Question, "You
7 missed that?" Answer, "Flat missed it " The reason they
8 didn't tender payment, the reason they didn't schedule a
9 closing is they didn't realize it was there

10 THE COURT I guess both sides didn't

11 MR ALTMAN No, Your Honor, by Mr you know, he
12 talks about the August or either July conversation with Mr
13 Woody in the airport, they knew the 15 days was there but
14 they didn't know why Remember, in -- after 90 days we get
15 \$50,000 in our pockets What does that tell me? That tells
16 me that they knew they had their financing or we believed they
17 had financing for good reason because you don't give \$50,000,
18 you don't throw \$50 000 around, you don't walk away from
19 \$50,000 if you don't have financing on this size transaction
20 We had every reason to believe they had their financing We
21 didn't need anymore proof that they had their financing We
22 didn't know why they weren't going to close We didn't know
23 why they couldn't close All we knew is that they weren't
24 closing Did somebody say "Yeah, I told them they needed a
25 day or two," yeah, but why do you need the day or two We

1 don't know why Nobody tells us why they needed the day or
2 two Nobody tells us it's because of a contingency, that they
3 believe, nobody communicates to us We cannot be held to be
4 required to do something that we don't know about If we had
5 been told about it, Your Honor, I don't think we would be
6 here but they didn't tell us All we knew was they didn't
7 close We didn't know why We said the contract is over and
8 we had an absolute right to do that We had an absolute right
9 to do it If they felt they had a right they should have
10 said "Closing is scheduled for August 10th or August 12th or
11 August 5th, if you don't show up we're coming after you," but
12 they didn't do that because they couldn't do it or they didn't
13 know about it or a combination thereof, and in any event, un-
14 contradicted testimony, it was their fault the buyers' fault
15 they didn't get their loan in time as it turns out The
16 conversation in the airport they didn't know about it at the
17 time because they didn't find out about it until discovery,
18 had nothing to do with anything They can't now go back and
19 come back and say, "Well we knew that they weren't going to
20 do it for that reason " They didn't know about it then
21 Your Honor, the fact is that they should have tendered
22 closing They didn't do it They should have said "We're
23 entitled to it " They didn't do it, and now they're coming
24 in as it turns out nine months later and saying, "Oh, we
25 realize it now " So, Your Honor, I believe this case is

1 perfect for summary judgment Thank you, Your Honor

2 THE COURT All right give you another chance

3 MR FUTERAL I appreciate it, Your Honor

4 You know, sometimes when you're zinging these things tend
5 to zag and Your Honor raised questions that I guess I really
6 hadn't thought of in that fashion but the more I think about
7 it or at least I understand Your Honor's concern I don't
8 have access to the Internet here to pull up any South Carolina
9 cases for Your Honor but I am looking at Williston on
10 Contracts for example, and I think the law in South Carolina
11 would be fairly black letter to this extent as well I'm
12 quoting from Williston on Contracts "When either party to
13 the contract absolutely refuses to perform it in advance of
14 the time set for performance and before the time arrives for
15 that performance distinctly and unqualifiedly manifests that
16 refusal to the other party, a breach by anticipatory
17 repudiation occurs " Here would be my point, Your Honor in
18 our timeline here Your Honor is saying, "Well, they had to
19 request and try and set up a closing and then there was a
20 breach," but according to Williston and the South Carolina
21 cases that if I could call back to my office I'm sure I could
22 pull some on anticipatory breach says that right here, Your
23 Honor beginning on July 20th, 11 days before closing they had
24 already breached this contract giving rise to our cause of
25 action There was an anticipatory breach saying "We will

1 not honor a 15-day extension period *

2 THE COURT Well where do you see that? What

3 evidence is there of that?

4 MR FUTERAL Again, that would be the Defendant's e-

5 mail, realtor e-mailing ours

6 THE COURT Saying what?

7 MR FUTERAL Defendant, quote, "will grant no

8 extension of time" Defendant's notes from its realtor that

9 it would litigate the 15-day extension clause, Defendant's

10 realtor telling the Plaintiff directly "There are absolutely

11 no extensions, not one day," Defendant's realtor telling the

12 Plaintiff's lawyer "Absolutely no extensions, not a single

13 day," and then, of course followed by Defendant's written

14 termination notice, but the breach started taking place or

15 actually took place on the 20th when they told our realtor

16 our agent, "no extension of time," quote

17 THE COURT I don't -- the problem is though I don't

18 think either side was really looking at the 15 days at that

19 point

20 MR FUTERAL Well, actually, we were looking at a day

21 or two I understand your ---

22 THE COURT But no, I mean, but looking at say we --

23 well, "How can you deny us this 15 days when the contract

24 says we've got it?"

25 MR FUTERAL Well, that would be the conversations I

1 guess between our closing attorney and Mr Woody asking about
2 that particular issue, that, of course, would be, the jury
3 would then hear testimony of Mr Rakes and Mr Woody even
4 discussing the 15-day extension So, all the parties knew it
5 was there Mr Marshall testified he knew it was there and
6 they wanted it, but the \$50,000 as I indicated was completely
7 a desperate move on our clients knowing that they weren't
8 going to give them what they were contractually entitled to
9 They didn't want a lawsuit, Your Honor They just wanted to
10 close and that's why they were willing to even pony up another
11 50 Your Honor, I've found the portion of Mr Woody's
12 deposition that I'm talking about

13 THE COURT All right

14 MR FUTERAL And what I asked him was basically

15 "Well, would you" ---

16 MR ALTMAN Your Honor, could I ask Mr Futeral to
17 tell me where he's quoting from so I can follow?

18 MR ALTMAN Oh, I'm sorry I am looking at page 57
19 It's 56 here and 57 down here 57, I'm starting around line
20 11, "Would you agree with me it wouldn't have served them any
21 useful purpose to insist upon an additional closing date if
22 you " and I was basically going to ask him had already
23 terminated it He said, "That's not necessarily true You
24 never -- we never knew that they didn't have their
25 financing " This is what Mr Altman is arguing to the Court

1 as well We didn't know they did not have their financing
2 Well, as Your Honor has pointed out there was no requirement
3 that we give them specific details as to why we didn't close,
4 and I will tell you the evidence in this case is Defendant
5 didn't care whether we were at fault or not They were not
6 going to give any extensions past the 31st They didn't want
7 to know Their realtor was in conversation with the bank,
8 knew that there was a potential problem according to his
9 testimony but didn't inquire any further Mr Wooddy didn't
10 pick up the phone He is the seller's -- he is not only a
11 member of the Defendant, but he was also the one preparing the
12 seller's docs He was involved in the closing as an attorney
13 He's not picking up the phone to call anybody and say "What
14 is going on here or what is the problem?" There is plenty of
15 testimony on the part of the Defendant's agents that they knew
16 that there were problems at the closing I mean, the realtor
17 is telling the Defendant's realtor, "We have problems,
18 doesn't look like we're going to close by the 31st "

19 Your Honor, to the extent your decision falls on this,
20 some arguments regarding fault I mean, we didn't even go
21 down that path and if Your Honor would like to hear me out,
22 I've pointed out in our memorandum the lender's affidavit
23 where he specifically states that the Plaintiff met with him
24 frequently, was always attentive and prompt in responding to
25 the lender's requests, quote "I never had to ask for

1 anything twice or follow up with the buyers as the great
2 diligence they showed allowed me to process their application
3 with relative ease for a loan of this size," and he further
4 testified that that \$211,000 requirement was something he
5 never discussed with our clients, the borrowers, that it was
6 decided on the 28th which is a Friday before a Monday closing
7 that they would have to pony up this additional sum
8 Basically what the bank said is, "All of your interest
9 payments you're supposed to make for one year we want them all
10 in advance in a money market account at our bank and then
11 we'll take our monthly interest payments out of that "

12 As to the hundred percent financing issue raised by Mr
13 Altman the testimony in this case is replete that our clients
14 never asked for a hundred percent financing The bank did the
15 commitment letter at a hundred percent unilaterally Mark
16 Knight testified, "Well, we thought it would make things
17 easier for the borrowers, it would make things less
18 confusing " As far as I can tell the bank was just trying to
19 look -- make some more money, but our clients never asked for
20 a hundred percent They anticipated getting 65

21 Thank you, Your Honor

22 THE COURT Well like I say, like I've indicated, if
23 there had been a closing your client could, the Plaintiff had
24 said within that 15 days "We're ready, willing and able to
25 close," and then the Defendant had refused to close, we

1 wouldn't have this problem I just don't know whether there's
2 anything in the record that would forgive that You say the
3 thing that would forgive that is that they told you we're not
4 going to close under any circumstances Maybe that can be
5 construed that way but even if you had pointed out the 15-day
6 period and claimed that and everything they wouldn't have
7 closed, I don't know That's the, that's the only thing that
8 maybe would save you

9 MR FUTERAL Well, and, and to help the Court, there is
10 the express intention by Mr Wooddy that he would litigate it
11 if they tried to use it, meaning -- Your Honor says we
12 wouldn't be here today

13 THE COURT All right, who is it saying that?

14 MR FUTERAL That is Mr Wooddy who is riding herd for
15 the Defendant on this real estate transaction

16 THE COURT What do you mean riding herd?

17 MR FUTERAL He was the one who brought the deal to the
18 other investors

19 THE COURT Who is he, the broker or what?

20 MR FUTERAL No, sir, he is one of the members of
21 Defendant, Bar-Pen Investments and also the lawyer
22 representing Bar-Pen Investments simultaneously

23 THE COURT Well, I mean, but saying that We're
24 not going to give, " they don't have to give it, I mean, you
25 know, you've got to have something to say "We're ready,

1 willing and able to close within that 15 days "

2 MR FUTERAL Well, actually, there is testimony in the
3 record to show that Benji Lafond and others told him, "If you
4 give us a day or two " which would have been within the 15
5 days, "we can close " There is, so there is evidence of
6 that

7 THE COURT Okay, all right, this is certainly a
8 close question and everything I'm going to deny the motion
9 for summary judgment and we'll see I may have I may deal
10 with it again at the directed verdict stage All right, you
11 all ready to start the trial?

12 MR FUTERAL Sir we have actually a motion for summary
13 judgment as well on one issue Hopefully it's quicker than
14 this last argument

15 THE COURT What is that?

16 MR FUTERAL Your Honor, we filed a motion in February
17 and the basis for the motion is this, Paragraph 22, which is
18 default, it says that, "Buyer or seller fails to perform any
19 covenant of this agreement the other may seek to elect any
20 remedy provided by law including, but not limited to,
21 attorney's fees and actual costs or, " this is disjunctive,
22 "or terminate this agreement with a five-day written notice"
23 Here the sellers in this case, the Defendant elected to
24 terminate the agreement They didn't file any lawsuits or
25 anything of that nature We have set on page three of our

1 memorandum basically your basic, well your basic rules of
2 contractual interpretation, contract ---

3 THE COURT Well, what is it you want me to do?

4 MR FUTERAL Your Honor, to the extent that they are
5 requesting attorney's fees and costs at the conclusion of this
6 case we think they are barred as a matter of law for asking
7 the Court that because they chose ---

8 THE COURT I'll deal with that later on

9 MR FUTERAL Okay, thank you, Your Honor

10 MR ALTMAN Your Honor, if I may, there's one other
11 issue I apologize Shortly before, it's a motion in limine,
12 shortly before I left on vacation, two weeks, less than two
13 weeks ago we were notified that the Plaintiff had obtained an
14 expert witness My partner took that expert witness
15 deposition last Friday, I believe last Friday or the Friday I
16 left, the 29th and we obtained the transcript in text form
17 sometime last week, which I did not see until I returned and
18 we did not receive the actual transcript until yesterday
19 Your Honor we were unable to obtain a witness to testify in
20 opposition, to contradict that We do have a bank appraisal
21 which shows a substantially different number than what they're
22 trying to show here but we believe that waiting until the
23 late date and now trying to come forward with an expert
24 witness knowing the situation as it is that they should not be
25 allowed to use that witness

1 THE COURT Well, I'll decide that during the trial

2 MR ALTMAN Thank you sir

3 THE COURT All right, let me see the lawyers back
4 here just a minute

5 *****OFF THE RECORD*****

6 (On the record)

7 (Whereupon, the following takes place outside the
8 presence of the jury)

9 THE COURT All right, you all ready to bring the jury
10 out?

11 MR FUTERAL Your Honor, may it please the Court, a
12 couple of house -- one housekeeping matter, and also I wanted
13 to hand up a copy of our pretrial brief

14 THE COURT All right

15 MR FUTERAL I think Your Honor has the gist of it at
16 this point but ---

17 MR ALTMAN Your Honor we would hand up ours also

18 THE COURT All right

19 Bring the jury out

20 MR FUTERAL Hold them back, Your Honor

21 THE COURT What?

22 MR FUTERAL I apologize There was one other thing I
23 was going to show you This was the housekeeping matter I
24 talked about Your Honor in opening we have the contract
25 which of course, is not in dispute as to this being the

1 contract what the terms were and so on Of course, it's
2 obviously not in evidence at this point but I wanted to show
3 Your Honor and counsel what I had intended to at least show
4 the jury in opening which is selected portions It's only
5 three slides of the actual language of the contract itself,
6 what the purchase price was, the provision here regarding
7 failure to make the loan application they'll have the right
8 to terminate the agreement, and the 15-day contingency period
9 I have three slides

10 Now, I asked counsel if he would consent to allowing me
11 to use this to open with, and he's, as I understand, objecting
12 because it's not in evidence but I think it's still within
13 Your Honor's discretion, and of course, if you'll inquire as
14 to both parties, neither one of us is going to object to its
15 introduction since it is the basis of this lawsuit this
16 contract in particular

17 THE COURT Anything you want to say about that?

18 MR. ALTMAN Your Honor, as Mr. Futeral said, it is,
19 you know, there is a contract The fact is it's not in
20 evidence I don't think it's appropriate to show the jury
21 something before it's in evidence

22 THE COURT Well, I -- unless you have some reason to
23 object to the contract coming in I think I would allow it

24 MR. ALTMAN Your Honor, I don't have any reason

25 THE COURT All right, okay, anticipating it'll come

1 in, I'll allow it Bring the jury in I'm going to hold
2 back, hold back Juror Number 119 I'm going to ask him to
3 serve as foreman of the jury That's John Orvig, John Orvig,
4 O-R-V-I-G I'm going to ask him to serve as foreman

5 (Whereupon, the following takes place in the presence of
6 the jury)

7 THE COURT Let's see, are you Mr Orvig?

8 MR ORVIG Yes, sir

9 THE COURT Please sit in that first seat there, Mr
10 Orvig, and I'm going to ask you would you mind serving as the
11 foreman of the jury?

12 MR ORVIG Yes, sir that's fine

13 THE COURT All right thank you very much If you
14 would occupy that seat at all times during the trial That's
15 the seat we reserve for the foreman and the alternate juror,
16 Ms Parker, you can sit down You can sit down That's you
17 right?

18 MS PARKER Yes, sir

19 THE COURT That's the seat that we reserve for the
20 alternate juror So, if you would sit there let the foreman
21 sit there the rest of you are free to sit anywhere you'd like
22 in the jury box as such time as you come and go through the
23 courtroom I'd ask the clerk to swear the jury

24 (Whereupon, the jury was sworn by the Clerk)

25 THE COURT First of all I want to apologize for

1 keeping you back there in the jury room for over an hour I
2 always hope that everything is going to go according to
3 schedule but sometimes it does not I want to let you know
4 actually we've been here since nine o'clock this morning
5 trying to get the case in a posture where we could get started
6 with the trial There were some pretrial matters that I had
7 to deal with I did not anticipate they would take as long as
8 they did Again, I apologize to you for keeping you back
9 there in that jury room for over an hour but it was
10 unavoidable

11 Now we are ready to start trying this case The oath
12 that you just took was an oath whereby you swore you would
13 decide this case based on the testimony and the evidence that
14 will be presented to you from that witness chair there and my
15 instructions to you on the law I don't know a whole lot more
16 about this case at this point in time than you do All I know
17 is what I told you yesterday before you were selected as a
18 jury in this case This is a dispute between two companies,
19 individuals that were involved with two limited, what are
20 called limited liability corporations which is a type of
21 corporation that the law recognizes in South Carolina
22 involving a piece of real estate There's no question they
23 agree that they had a contract for the sale and purchase of a
24 piece of real estate One side claims that the other side did
25 not live up to the obligations under that contract and

1 therefore certain things didn't happen or did happen or
2 whatever You'll learn about this dispute through the
3 testimony that will be presented to you from the witness
4 stand You are the sole judges of the facts of this case I
5 don't have anything to do with the facts My job is to make
6 sure that the parties follow the rules in presenting the facts
7 to you In doing that, they will present testimony, they'll
8 bring people up here to tell you what, for them to tell you
9 what they know about this dispute There may be times during
10 the course of that testimony as I said where some dispute will
11 come about the rules, whether someone can testify or whether
12 someone cannot, whatever When an objection comes that's when
13 usually a lawyer gets up and says something like, "Your
14 Honor, I object," and hopefully they have some reason as to
15 why he objected to the question that's been asked or answer
16 that's been given

17 When the lawyers do that they're talking to me They're
18 not talking to you They're calling a possible violation of
19 one of those rules to my attention Don't concern yourself
20 Do not concern yourselves with those objections I may rule
21 on it, whether I overrule, sustain it, whatever, because it
22 has absolutely nothing to do with your job in this case which
23 is to be the finders or the judges of the facts of this case
24 Probably unless the answer to their objection is obvious to me
25 I'll probably send you to the jury room so that I can hear

1 from the lawyers as to what the objection is why they object
2 how they think I should rule I'm not trying to hide anything
3 from you by doing that It's just that we've found over the
4 years that that's the best and easiest way for the lawyers and
5 me to deal with those objections Let me hear them Let me
6 make my decision, bring you back in, you can go on with the
7 testimony So, that's one of the things that may happen
8 during the course of this trial

9 Now, each of you has a notepad and a pen I do allow
10 jurors to take notes during the course of a trial Some
11 people think that's not a very good idea They think it may
12 distract you from what is actually being said and done by the
13 witnesses If you do take notes do not allow your note-
14 taking to distract you Notes are to be used only as memory
15 aides, Notes are not entitled to any greater weight than the
16 recollection or the impression of each juror as to what the
17 testimony or evidence actually was Those will be your notes
18 and your notes only No one will be looking at them, checking
19 on them, anything of that sort At the conclusion of the
20 trial I'd ask you to tear out any notes you may have made,
21 take them with you, tear them up, whatever you want to do
22 So, if you have not already done so I'd ask you to put your
23 name, initials or some identifying mark on the first page so
24 that you can easily identify that as your notebook because
25 when you left the courthouse, like to go to lunch today, I'd

1 ask you to leave that here bring it back with you when we
2 start the trial again If we go into tomorrow you'll leave
3 your notepads with the clerk They'll be secured overnight
4 Again no one will be checking on them, anything of that sort
5 but it makes it easy for you to identify for you to identify
6 which one is your notepad when you get it back

7 Now, how are you and I going to go about learning about
8 this case First of all, I'm going to allow each attorney to
9 make a brief opening statement to you These are not an
10 argument Arguments will come at the conclusion of the case,
11 but I do allow each side to introduce themselves a little
12 further and to tell you a little bit more about what their
13 position is in regard to this case, the claim that the
14 Plaintiff makes and the response to that claim by the
15 Defendant After -- it's not testimony Only the testimony
16 will come from the witnesses, but I do allow them to explain
17 their case, explain their position to you, outline the case to
18 you

19 After those opening statements we will have witnesses who
20 will come up here, first from Plaintiff who makes this claim
21 goes first calls any witnesses he wishes you to hear from
22 Then we'll switch and the Defendant have the opportunity to
23 call any witnesses it wishes you to hear from After both
24 sides have had a full and fair opportunity to present all the
25 testimony and evidence that they want you to consider in this

1 case, then we will have closing arguments, the summations from
2 the attorneys and after that I'll discuss with you more fully
3 what your duties and responsibilities are as a jury in this
4 case and the law that applies to the case and then you go to
5 the jury room and you'll deliberate The 12 of you will
6 decide whether the Plaintiff should prevail or whether the
7 Defendant should prevail in this case, whether your verdict be
8 for the Plaintiff or for the Defendant under the facts and the
9 law Keep in mind what your job is going to be at the
10 conclusion of the case

11 Would you like to make an opening statement to the jury?

12 MR FUTERAL Yes, Your Honor, I would

13 May it please the Court A promise made is a debt
14 unpaid, and we're here today to collect on a debt because of a
15 promise that was made by the Defendants in this case, Bar-Pen
16 Investments, I shall call them the sellers

17 You all have sort of looked at the real estate market
18 All you have to do is turn on the news or look at a newspaper
19 and things have turned around, but back in say 2005 real
20 estate property is on fire and I don't mean literally I mean
21 sales There is money to be made by the buying and selling of
22 real estate So in December of 2005 the Defendant will
23 become sellers, bought a hundred acres of property for about
24 \$1 4 million and about five months later turned around and
25 made a promise to sell it to the Plaintiff in this case we

1 shall call them buyers made a promise to sell it to them for
2 2 5 five months later The market is hot However, the
3 Defendants the sellers, never actually went through with that
4 transaction They did not keep that promise

5 This is a page from the contract, the title page showing
6 you that the buyers were to purchase this property for
7 \$2 530,000 This contract has a lot of provisions in it that
8 deal with what happens if somebody doesn't do something
9 they're supposed to? What happens if somebody defaults and
10 doesn't keep up with the contract? What happens if somebody
11 breaches it? In paragraph six of the contract between the
12 seller and the buyer, it says that if the buyers fail to make
13 a loan application or to receive approval within said period
14 and to diligently pursue the application the seller shall
15 have the option to terminate this agreement, the option, with
16 written notice That period is referring to in the contract
17 says 30 days from the date they entered into the contract the
18 buyers had to go out there and try to get a loan The
19 contract also says 45 days later they had to provide proof to
20 the sellers that they had gone out and were going to obtain
21 the financing

22 The buyers didn't do this You're going to hear
23 testimony from the members of the organization that is the
24 buyer who's the Plaintiff in this case Sheep Island Plantation
25 and the members of that organization are going to testify

1 regarding their dealings with lenders trying to obtain a loan,
2 to try to get two and a half million dollars, come up with
3 some investors and the like to be able to close on the loan
4 You're going to hear testimony both from the sellers and the
5 buyers that the buyers just continued to go through with the
6 transaction, even though they never received anything under
7 the contract within 45 days saying that they had this loan
8 The buyers in this case, and they're seated in the
9 courtroom with us today, consists of three gentlemen, Mr
10 Hill Mr Marshall, Mr Hilleshiem They will testify and
11 Mr Hill he does real estate He builds neighborhoods
12 residential Mr Marshall will testify he's been in the
13 business before of delivering anything from Merita bread and
14 at one point was involved with Low Country Mag and Tire Mr
15 Hilleshiem is also involved as a small business owner with Low
16 Country Mag and together they came to form Sheep Island
17 Plantation for the purpose of buying this particular property
18 There were others involved that you'll hear from, but together
19 they formed the corporation that was going to buy the
20 property The sellers two of who are with us, one of whom
21 has passed away, consists of a lawyer from Mt Pleasant, who
22 will testify also that he was the lawyer doing the documents
23 and advising his own company as to what to do in this
24 transaction and the other gentlemen he is the owner of much
25 commercial property, at one point and maybe still a marina in

1 the local area, both of whom have done numerous business
2 transactions, buying and selling substantially large and
3 expensive pieces of property over many years

4 So the contract provides for notice and the testimony
5 will show you that they did not give, I'm sorry not notice,
6 they never gave any document showing that they had loan
7 approval

8 Paragraph 33 of this particular contract says "If the
9 transaction has not closed," in other words everybody comes
10 to the table if you've bought a house sit down, sign all the
11 documents get your deed, get your keys and move on, but they
12 have not closed on this hundred acre transaction within the
13 stipulated time limit which the contract provides the original
14 closing date to be July 31st 2006, if it hasn't closed within
15 the stipulated time limit because a contingency has not been
16 satisfied through no fault of either party then both parties
17 agree to extend this agreement for a period not to exceed 15
18 consecutive days from the original closing date

19 What you will hear from the buyer's witnesses is that
20 they went to obtain a bank loan from one bank and were shot
21 down They went to obtain a loan from another lender, South
22 Coast, and you will hear from a representative of that lender
23 that they worked closely with that lender for a period of
24 months during this period between contract and closing date to
25 get their loan together The lender will testify that the

1 buyers in this case did everything they were supposed to do,
2 that they were diligent, that they gave documents, that they
3 cooperated with the bank The buyers will testify that the
4 Friday before the Monday closing they finally got a document
5 from the bank called a commitment letter that said what the
6 terms of the loan were and in that was inserted a requirement
7 that the buyers bring an additional \$211,000 to this
8 transaction which was their interest payments for a solid year
9 and that they had to prepay their interest for one year by
10 putting it into the bank with the lender and that this took
11 them by surprise

12 The testimony will reveal both from the buyer and the
13 seller that the buyer then began asking for additional time to
14 close, not 15 days but one to three and you will hear from the
15 realtor from this seller and you will hear from the lawyer and
16 member of the seller that when the subject of an additional
17 period of time came up 15 days, well, one or three days they
18 responded by saying absolutely not and the testimony will
19 reveal through the testimony of the bank, South Coast, and
20 through the testimony of the seller's realtor, that they were
21 at least aware that there were going to be problems with
22 closing by the 31st There is some inkling that those
23 problems might be financial in nature There'll be testimony
24 from the lender's representative that the seller's realtor was
25 calling him on the phone and asking about the loan process

1 You will then hear testimony from the sellers themselves where
2 they will claim they did not know that anybody was asking for
3 an extension or that there were going to be any problems with
4 closing on the 31st You will hear testimony from the
5 seller's realtor who will testify that he spoke with the
6 seller and they said if they tried to get a 15-day extension
7 they would litigate it That's what I do for a living
8 That's what they do Litigate means try it

9 There will also be some other testimony that at one point
10 the buyers were concerned about water and sewer being
11 delivered into the neighborhood and the manner in which that
12 was going to take place and actually asked for a 30-day
13 extension and would have been willing to pay the seller's
14 demand of \$50,000 That never materialized, but they had 15
15 days under the contract itself, and so, if a promise made is a
16 debt unpaid we are here today, the buyers who didn't get to
17 buy, asking you the jurors to make the seller pay their debt
18 Thank you

19 THE COURT Mr Altman

20 MR ALTMAN May it please the Court

21 Ladies and gentlemen of the jury, I introduced myself
22 yesterday My name is Charles Altman I have the privilege
23 of representing the Defendants As Mr Futeral stated two of
24 the Plaintiffs, two of the Defendants or the sellers are in
25 court today The third one unfortunately passed away

1 I listened to Plaintiff's attorney's opening and I just
2 see the case differently, the facts show it differently
3 There's a contract which was up on the screen a few moments
4 ago and Mr Futeral has chosen to take down The contract is
5 dated in December of 2005 The closing was to take place
6 between July 15th and July 31st, 2006 seven months later
7 The purchaser, the buyer had seven months to get their ducks
8 in a row, seven months to get everything put together The
9 closing date we'll talk about you'll hear this term, time is
10 of the essence Your time is of the essence means and the
11 Judge will tell you, don't believe me, believe the Judge when
12 he charges you later, means that this is the time by which it
13 must be done, if you don't do it by this date it's all over
14 Everything has to be completed by a date This contract said
15 it had to be done within that two-week period, couldn't be
16 done before July 15th couldn't be done after July 31st
17 Certainly there is a provision in the contract that says 15-
18 day extension if there's a contingency through no fault of the
19 party

20 The question is going to be -- well two questions One
21 is was there fault and you're going to hear that there was
22 fault on behalf of the buyer for not getting their ducks in a
23 row They weren't prepared The other issue is if I need to
24 do something for somebody if I need to cooperate with
25 somebody, if I am required to do something I need to be made

1 aware I need to know what I need to do I can't go along
2 and all of a sudden say, "Well, you didn't do that So,
3 you're at fault You've breached the contract because you
4 didn't know what you didn't have to do," and that's going to
5 be shown here that at no time, at no time prior to, actually
6 April of 2007 did the seller know what the buyer's problem
7 really was and that was financing

8 In the beginning and I'm going to drop back, the buyers
9 and the contract is in the name of Mr Bruce Marshall and/or
10 Jeremy Marshall, who is the son They went to the bank, the
11 bank that turned them down Mr Hill wasn't involved and
12 there'll be testimony to show that Mr Hill wasn't involved
13 until July 26th of 2006, two days before the commitment letter
14 was issued by the bank, and there'll be testimony that the
15 commitment letter couldn't be issued by the bank because the
16 buyer didn't have their ducks in a row They weren't
17 prepared That's not the seller's fault That's the buyer's
18 fault, and then they couldn't meet their obligation and that's
19 what this case is all about There'll be testimony from the
20 buyer's side There'll be testimony from the seller's side
21 What I'm saying up here and what Mr Futeral said up here a
22 few moments ago that's not what you all are supposed to decide
23 the case on When we give our closing arguments that's not
24 what you decide the case on It's what the witnesses tell you
25 and the evidence, the documents that you are shown and that's

1 what you decide the case on, but I think it clearly shows that
2 the seller acted properly throughout this entire transaction

3 I about forgot something that was very important, whether
4 we knew there was financing You will hear testimony that
5 that contract said that the down payment, we're talking about
6 commercial We're not talking about somebody going out and
7 buying a house for \$200,000 or \$300,000 or \$100,000 and
8 putting a thousand, \$2 000 down We're talking about a two
9 and a half million dollar commercial real estate transaction
10 that required a \$10,000 initial deposit and at the end of 90
11 days if the buyer was going to go through with it had all of
12 their ducks in a row and inspected the property they were
13 going to take that \$10 000 and it was going to become non-
14 refundable They couldn't get it back unless the seller did
15 something wrong, and also they'd have to pay another \$40,000,
16 \$50 000 It's on the table, not refundable to them That
17 tells you that they're conveying a message, ``We've got all
18 our ducks in a row We've got our financing We're ready to
19 go '' That's what we believe, that's how we reacted Again,
20 I ask you to listen very closely to the testimony and make
21 your decision on what you hear from that chair, not what you
22 hear from me and not what you hear from Mr Futeral Thank
23 you very much

24 THE COURT Call your first witness

25 MR FUTERAL Thank you, Your Honor

1 We'd like to call Mr Bruce Marshall to the stand,
2 please

3 Whereupon, Earl Bruce Marshall was called to the stand,
4 duly sworn by the Clerk and testified as follows

5 THE CLERK Have a seat and state your name and spell
6 your last name for us, please

7 MR MARSHALL My name is Earl Bruce Marshall My last
8 name is spelled M-A-R-S-H-A-L-L Your Honor I'll try and
9 talk as loud as I can, but I've got a little scratchy throat
10 and I ll try to do the best I can

11 DIRECT EXAMINATION

12 BY MR FUTERAL

13 Q Mr Marshall would you please introduce yourself a
14 little bit to the jury For example, tell us how old are you?

15 A I just turned 50 years old

16 Q Okay, and where do you live?

17 A I live in [REDACTED] in Goose Creek
18 which is in the Pine View Subdivision

19 Q Okay are you married?

20 A Yes sir I am married

21 Q All right, how long have you been married?

22 A I've been married 30 years

23 Q Any children?

24 A Yes, sir, I've got two children One's Brandon

25 Marshall He's 21 years old He just had his first son and

1 that's my first grandson and then I have my older son, Jeremy
2 Marshall, who's 24 years old and I love him to death and I
3 hope he gets married one day and has some children himself,
4 but he likes, you know, having his own right now but I love
5 him to death and I just hope things work out for him, so

6 Q Tell us a little bit if you would about your work
7 history

8 A My original when I was younger I was playing baseball
9 and I had a chance to go to the Naval Academy and play
10 baseball for the Naval Academy and I fell in love with a
11 beautiful woman by the name of Jennie Squires and we ended up
12 getting married and I took a position with Merita Bread
13 Company and I stayed there probably almost 20 years working
14 for Merita Bread Company and then I entered into doing a
15 little bit of car sales with my brother part-time doing that
16 while I was still working for the bread company, and then
17 after I started doing the car sales it picked up a little bit
18 and I got out of the bread business because I was getting up
19 at two o'clock in the morning and wasn't getting home till
20 eight nine o'clock at night and my life needed a change
21 since I was having children and stuff So, I wanted to spend
22 more time with the kids, you know, and do some recreation
23 They both loved baseball They played baseball since they
24 were eight years old I coached baseball myself for almost 18
25 years I coached the Goose Creek American Legion baseball

1 team for five years I'm a member of the First Baptist Church
2 in Goose Creek

3 After the car business kind of picked up, we opened up a
4 little auto repair facility and on Ladson Road and we ended up
5 growing so quickly that we ended up selling that piece of
6 property and we moved to Goose Creek and opened up a really
7 large garage and we called it Low Country Mag and Tire and I
8 owned Low Country Mag and Tire from 1996 until 2005 when Mr
9 Hilleshiem made an offer to buy the shop

10 I was going to take some time off and kind of retire I
11 had been doing it semi-retire You I don't think anybody
12 can ever retire the way things are today, but I decided I --
13 Mr Hilleshiem made me an offer to stay and help, help out
14 around the shop and work there part time and we worked out an
15 arrangement and I still work there today

16 Q And what do you do there?

17 A I do more in the consulting, I help them with the
18 computers and I help them with financing, you know, write
19 checks for vendors, and I kind of oversee the shop a little
20 when he's not there

21 Q Okay, now, at some point you came to learn of a potential
22 purchase of a hundred acres of property?

23 A Correct

24 Q Can you tell us where that hundred acres of property was
25 located and where it is located rather?

1 A It's right near the new school as you're going out 176
2 right off Sheep Island Road It's 101 acres and it corners on
3 a piece of property that is completely paved and that will --
4 ultimately goes all the way back to Summerville and it makes
5 an L It's like a big L and the left side of the road is
6 called Leisure Lane So, it's completely 101 acres pretty
7 much it looked like it used to be and I'm pretty sure it was,
8 it was a like pine forest for like the timber companies It
9 was like a big timber company piece of property

10 Q Would you kindly tell us how you came to learn that this
11 property was for sale?

12 A I always talking to people about little things that you
13 might can invest in and maybe make a little money, you know a
14 little extra money, and after I had sold the shop I had some
15 extra money, but my son was actually ended up buying the shop
16 from me in about 2002 He got ---

17 Q Pardon me When you say my son you have two of them
18 Which son are you referring to?

19 A Yes, sir I apologize

20 Q That's okay

21 A I've got two sons One of them's name is Jeremy
22 Marshall He's the older of the two and he took over the shop
23 in about 2002 and ran it and when they sold -- I had actually
24 transferred the shop into his name to help him start building
25 his credit because most of these lenders won't hardly give you

1 credit starting out in anything, you know, as far as cars,
2 anything So, somebody in life has to start the guy, the kids
3 out just to get them started So, I was a guarantor on the
4 loan to help him get started and eventually we got the shop
5 refinanced and put into his name in about 2002 somewhere like
6 that

7 Q Tell us about, tell us about the property itself though,
8 how you came to find out that it was for sale, getting into
9 that

10 A I had been talking to different real estates agents and
11 then I -- my wife also works for Prudential as an accountant
12 in the corporate office and she referred me to Georgia Richard
13 and Georgia ---

14 Q Who is Georgia Richard?

15 A Georgia Richard is a real estate agent with Prudential
16 real estate

17 Q Okay

18 A And she, she came by and she took us out, myself and my
19 son, Jeremy, to look at the property

20 Q Okay, the 101 acres?

21 A The 101 acres, yes, sir

22 Q Okay, so, tell us what happens from there after you look
23 at the 101 acres with your son

24 A We start talking about it and start talking about, you
25 know, wanting to own some land We're not sure about

1 something that big and it was a first time experience for
2 anything, doing anything that big

3 Q Had you ever purchased raw this is raw land, right?

4 A Yeah just like little two acre sections, nothing big or
5 anything like that

6 Q Had you ever built any homes or anything of that nature?

7 A Yes sir, I had done a little bit of homebuilding, yes
8 sir

9 Q Okay, how big were any of your projects?

10 A Like I said the biggest thing I had did was like two
11 acres and we put maybe four houses on those two acres

12 Q Okay, when you're looking at this 101 acres what were
13 your thoughts at the time as to what you would do with it?

14 A Well we had mixed thoughts on what we were going to do
15 with it Originally, we thought we'd like to take a chance
16 and ultimately end up buying the property and that we would go
17 ahead and put in a contract for it and that we would actually
18 end up either developing it or actually maybe later, you know,
19 selling off some of it and keeping some of it or just selling
20 the whole thing off

21 Q Okay, at some point did you decide to enter into a
22 contract to purchase that property?

23 A Yes, sir, I think we talked to Georgia pretty firm about
24 it around December the 14th and I think we -- she brought us a
25 contract on December the 15th

1 Q Okay

2 MR FUTERAL No objection, Your Honor

3 (Whereupon, Plaintiff's Exhibit One introduced into
4 evidence and appropriately marked)

5 THE COURT Might tell the jury at this point
6 anything that's introduced into evidence, such as this
7 contract that's come into evidence without objection as
8 Plaintiff's Exhibit One, I believe, sometimes they want to
9 pass it around for the jury to look at, but anything that's
10 introduced into evidence you'll have it with you in your jury
11 room at the conclusion of the case when you are considering
12 your verdict So, don't worry about it if you don't get to
13 see it now or whatever You'll have it with you in the jury
14 room at the end of the case Go ahead

15 MR FUTERAL Thank you, Your Honor

16 BY MR FUTERAL

17 Q Mr Marshall, let me hand you what has been marked as
18 Plaintiff's Exhibit Number One Now, that's the contract that
19 you were referring to that was presented to you by Georgia
20 Richard, correct?

21 A Yes, sir, it is

22 Q All right and if you'll look up on the screen would
23 that be the same contract that you're looking at paragraph
24 number three that you're purchasing the property for two and a
25 half million and some change?

1 A Yes, sir, that's correct

2 Q Okay, Mr Marshall, who drew up this contract? Did you?

3 A No, sir, I did not draw up the contract

4 Q All right, did your realtor draw up this contract?

5 A Yes, sir, actually there was a contract prior to this
6 and we made a lower offer on the property and the sellers
7 wanted more for the land than what we offered and so, this
8 was the second contract that they brought back to us and I
9 believe Georgia Richard of Prudential did bring this contract
10 to us

11 Q Yeah, but this -- so what you're saying then is you gave
12 a contract and you got one back from the sellers then, this
13 one?

14 A This is the final contract, yes, sir

15 Q Okay, sir, I want you to look at paragraph number six on
16 the first page of that contract Do you see it?

17 A Yes, sir

18 Q All right now first of all, if you would look with me
19 it says that your obligation under the agreement was
20 contingent upon you obtaining a loan, correct?

21 A Yes, sir that's correct

22 Q And that you have applied for a maximum of 80 percent
23 loan to value

24 A Yes, sir, that's correct

25 Q Can you explain to the jurors what your understanding

1 would be of contingent upon obtaining a loan and the 80
2 percent loan to value?

3 A Contingent upon obtaining a loan ---

4 MR ALTMAN Your Honor, I'm going to object to that
5 We have a written document that speaks for itself The jury
6 can read that and determine what it means

7 THE COURT What paragraph are you talking about?

8 MR FUTERAL Number six, Your Honor

9 THE COURT I overrule your objection I'm going to
10 allow it

11 MR FUTERAL I'm sorry, Your Honor?

12 THE COURT I overrule, I overrule the objection
13 I'm going to allow the question

14 BY MR FUTERAL

15 Q All right, Mr Marshall, without going into great detail
16 basically what is the contract saying there?

17 A I said it says the buyer's obligation under this
18 agreement is contingent on the buyer obtaining said loan and
19 it says that we would apply for no more than a 80 percent loan
20 to value

21 THE COURT It doesn't say no more It says for a
22 maximum of

23 Q For a maximum of

24 A Yeah, I'm sorry Sir, you're correct It says the
25 buyer shall apply for a maximum 80 percent loan to value, make

1 application for

2 Q Within 30 consecutive days from the execution of this
3 agreement Do you see that?

4 A Yes, sir, that's correct

5 Q Would you look at the last page of the document the
6 agreement and tell me what the date was of the last person who
7 signed this agreement?

8 A It looks like on 11-21 of '05

9 Q I'm sorry, 11

10 A I'm sorry I'm sorry I got the wrong thing, got so
11 much, 12-19 of '05

12 Q Okay, so, that was the last person who executed this,
13 this was your son Jeremy Marshall signed it on that date,
14 correct?

15 A Yes, sir

16 Q All right, now, you didn't actually get or actually
17 apply for a loan within the 30 days as specified under
18 paragraph six did you?

19 A Yes, we did

20 Q All right, tell us about that, please?

21 A Okay immediately after the contract was signed and we
22 got it back from the sellers I took the contract over to the
23 guy, the gentleman at BB&T Bank The gentleman's name is Ed
24 Byes [spelled phonetically] The reason I started the loan
25 application with myself and Jeremy was and actually the

1 contract was more done in Jeremy's name than mine because I
2 was trying to help him establish credit we -- the banker Ed
3 Byes had all our financial information on hand We had been
4 dealing with Mr Byes for six, seven years He knew
5 everything about us He had our financials and ---

6 Q You're talking about he knew about Low Country Mag and
7 Tire and all?

8 A Yeah, yes, sir he had done the loan on the business for
9 us with Low Country Mag and Tire So, every year we had to
10 give him new financial statements and everything that he would
11 need So we thought that would be the best gentleman and he
12 made mention to us he'd like to take the opportunity to try
13 and get the loan on this for us

14 Q Did BB&T ever give you the loan?

15 A No, sir, they turned us down for the loan

16 Q Do you recall approximately when they turned you down for
17 the loan?

18 A It was, it was before the 45 day period

19 Q Okay after BB&T turned you down for the loan what then
20 if anything, did you do?

21 A Well, before the 30 day period was over for us to apply
22 make application for a loan another lender had came into our
23 business trying to get us to switch our business over to him
24 at Low Country Mag and Tire, the business that Dave had
25 purchased from me

1 Q All right, and which lender is this?

2 A This was South Coast Bank in Goose Creek right across
3 from the Wal-Mart

4 Q And who was the representative from South Coast Bank that
5 had approached you all for your business?

6 A There was actually two people that came in One of
7 them's name was Linda Byrd The other person's name was Mark
8 Knight I think Linda Byrd was like more the manager but
9 Mark Knight is the vice president of South Coast Bank from
10 what I understand

11 Q Did you ever have any discussions with Mr Knight
12 regarding getting financing for this contract?

13 A Yes, sir we talked to him about getting financing on
14 this contract I gave him a copy of it He said it was
15 something that he'd love to take the chance to look at and
16 then hopefully maybe could do the loan for us

17 Q Can you please tell us when you first had any
18 conversations with Mr Knight about getting South Coast to do
19 the loan?

20 A It was within the first 30-day period

21 Q Okay

22 A We had talked to him about it

23 Q Did you continue any conversations with him after BB&T
24 denied you the loan?

25 A Yes, sir, we, we had told him the reasons why BB&T had

1 talked to us about turning us down for the loan and gave us
2 some idea Even BB&T gave us some other ideas about coming
3 back to them and doing the loan, to form a corporation, get
4 some -- few more partners in there, try and get a few, some
5 more financial strength to go with ourselves and then come
6 back to them and apply for the loan At the meantime, we had
7 already applied with South Coast Bank and they seemed really
8 receptive, more receptive than BB&T to doing the loan for us

9 Q It would be correct though that you never produced to the
10 sellers within 45 days both written satisfactory loan
11 approval?

12 A No, sir, we did not get it, get loan approval within the
13 45 days but we got a letter from Mark Knight from South Coast
14 prior to the 45 days that we had delivered to the sellers
15 telling them that we had made application with South Coast and
16 that they were going to do everything they could possibly to
17 do this loan for us and they said that they thought it was
18 something that they could do and that they want to take the
19 opportunity to really pursue it and we loved the opportunity
20 to get the chance for them to do it for us

21 MR ALTMAN No objection, Your Honor

22 (Whereupon, Plaintiff's Exhibit Number Two admitted into
23 evidence and appropriately marked)

24 Q Mr Marshall, I've handed you Plaintiff's Exhibit Number
25 Two Is this the letter from South Coast Community Bank?

1 A Yes, sir, this is the letter that Mark Knight from South
2 Coast Community Bank sent to us so we could provide to the
3 sellers showing them that we were diligently trying to pursue
4 the loan even though we didn't get loan approval within the 45
5 days we were still trying to get the loan and doing everything
6 possible to get the loan

7 Q Okay, so, he says in this letter here for example that
8 you've been in discussions with them and other investors
9 regarding the purchase of this property, correct?

10 A Yes, sir, it sure does

11 Q Okay, and that they're talking to you about I guess
12 making the loan either to you or perhaps a real estate holding
13 company that you might form

14 A That's correct We told them that we had every
15 intentions, if you go back to the original contract we had
16 told them originally where it said the property shall be
17 deeded in the name of to be determined we had told them that
18 we were going to form a corporation and we were going to call
19 it Sheep Island Plantation, LLC

20 Q When you say we told them who are you referring to?

21 A We told the bank

22 Q All right, did you ask the bank for this money?

23 A No, sir, the banker volunteered this and gave it to me so
24 Georgia Richard could get it and give it to the sellers

25 Q Okay, and Georgia Richard is?

1 A The agent for Prudential Realty

2 Q Okay, you all's agent

3 A Yes, sir, our agent

4 Q Real estate agent

5 A She's a buyer's agent for us yes sir

6 Q Now, as we see here under paragraph six it says if you
7 fail to make a loan application or to receive approval within
8 the period, as we know to be 45 days for approval, and to
9 diligently pursue the application, the sellers shall have the
10 option to terminate this agreement after the 45-day period

11 Did you ever receive any written notice or communication from
12 the seller that they were terminating this agreement?

13 A No, sir, they never contacted us in any way

14 Q All right, so it looks as if you and your son signed off
15 on this contract for two and a half million and some change
16 Tell us what happens after that and you've told us you went to
17 BB&T and South Coast Carry us forward, please

18 A Okay, now the 45 days has passed and to be honest with
19 you we thought the sellers would come to us and possibly
20 terminate the contract based on the letter in there

21 Q But they didn't

22 A We never heard a word from them, nothing whatsoever

23 Q Okay so then what do you do?

24 A So, we continued just going on trying to obtain the loan
25 continuously, continuously all the way through the closing

1 date

2 Q All right, describe to us and I want to kind of stay
3 chronologically so we can all follow When you say we tried
4 tell us who is we and what it is you did to try and continue
5 to obtain the loan

6 A Okay after we had talked with Ed Byes at BB&T Bank he
7 made some suggestions about bringing on other partners to
8 bring more security to our partnership that we were going to
9 form in order to make sure that we could obtain this loan
10 So, we brought on David Hilleshiem, which who was my boss at
11 Low County Mag and Tire He said he would love to be involved
12 in this and then we had a customer that continually came in
13 and we had talked to him about it by the name of Walker Funk
14 and Walker Funk said he would like to be -- join the
15 partnership and ---

16 Q Mr Funk ultimately did not join up correct?

17 A Yes, he did join up

18 Q Oh, he did?

19 A Yes, he did

20 Q Okay

21 A Yeah, he would have been in So, the partnership at that
22 time was going to consist of Jeremy Marshall, my son and
23 myself I was only going to be a one percent owner in it and
24 my -- David Hilleshiem and Walker Funk

25 Q All right, you just mentioned that you were only going to

1 be one percent owner of the company

2 A Of the corporation

3 Q Of the corporation

4 A Yes, sir

5 Q And what were the other percentages again? I'm sorry?

6 A The total originally that we talked about that it was
7 going to be split up 33 and a third percent It was going to
8 be David Hilleshiem 33 percent, Jeremy Marshall 33 percent,
9 which I would have one percent, and then Walker Funk would
10 have been 33 percent

11 Q Okay, how did you arrive at just taking one percent on
12 -- as far as you were concerned?

13 A We were trying to get Jeremy's credit built up so in the
14 future that he could be able to do things on his own and so,
15 we would kind of step back and sit back and kind of
16 financially help back him so he could get his credit
17 established so maybe one day he could be like the sellers and
18 be able to buy and sell things on his own without needing Dad
19 to do it for him

20 Q Okay, so, you were trying to help your son out?

21 A Absolutely

22 Q All right, all right, so, I'm sorry I interrupted you
23 with a question Please continue

24 A Okay, the contract from there said that we had the 45
25 days They knew that we didn't have loan approval, but we

1 just kept on going forward because they never said anything
2 from us We had originally put 10,000, we had originally put
3 \$10,000 down which was, which was the original escrow money
4 that we had put down and then we just kept going on trying to
5 do the loan

6 MR ALTMAN No objection

7 (Whereupon, Plaintiff's Exhibit Number Three entered into
8 evidence and appropriately marked)

9 Q Mr Marshall, you've just been handed Plaintiff's Exhibit
10 Number Three Can you tell me what that is, please?

11 A That was the \$10 000 we put down that in the original
12 loan process as earnest money on the \$2 530,000 loan

13 Q Okay, so, that's a check made out to Prudential
14 Carolinas Realty which was part of well basically showing them
15 that you had good faith and intentions of buying that
16 property, right?

17 MR ALTMAN Objection, Your Honor

18 Q Well, what is the purpose of giving them a \$10,000 check
19 as you understand it?

20 A It was basically showing good faith to -- that we were
21 going to proceed and try and obtain a loan to purchase this
22 property

23 Q Okay, do you know whether the sellers in this case ever
24 obtained or received that 10 000 in funds that was made out to
25 your real estate company?

1 A As far as I know they asked for that money They took
2 that money and they cashed that check and they disbursed that
3 money

4 MR ALTMAN No objection, Your Honor

5 (Whereupon, Plaintiff's Exhibit Number Four admitted into
6 evidence and appropriately marked)

7 Q Sir, you've just been handed Plaintiff's Exhibit Number
8 Four What is this?

9 A Part of our contract that we had talked to them about
10 letting us put into that contract we knew that we were going
11 to eventually, if we obtained the loan, we were going to
12 eventually form a corporation with the intent of
13 incorporating We were going to assign the property over to
14 that corporation

15 Q Okay, so, this document here releases the \$10,000

16 MR ALTMAN Your Honor, I'm going to object That's
17 not what the witness testified to

18 MR FUTERAL Okay

19 THE COURT Ask another question

20 MR FUTERAL All Right

21 BY MR FUTERAL

22 Q What does this document do, sir?

23 A This allows us to release the money to the sellers and
24 whenever they're ready to I guess cash it

25 Q Okay, so, you signed off saying?

1 A It's a release of earnest money so they could take the
2 money and disburse it between themselves

3 Q And it says \$10 000 to Bar-Pen per contract?

4 A Yes sir, \$10 000 per Bar-Pen per contract

5 MR ALTMAN No objection Your Honor

6 (Whereupon, Plaintiff's Exhibit Number Five admitted into
7 evidence and appropriately marked)

8 A May I say something about that?

9 THE COURT Ask the question you've got, wait till he
10 asks you the question

11 A Yes, sir

12 Q All right, I've just handed you Plaintiff's Exhibit
13 Number Five Do you see it up on the screen?

14 A Yes, sir

15 Q All right, what is this?

16 A This is a second check that we had written Bar-Pen, LLC,
17 the sellers for \$40,000 that could -- would be paid to them
18 after we met our due diligence period and when I say in due
19 diligence period, after the 45 days to obtain the loan they
20 required us to go ahead and look at the land or they made it
21 into the contract that we had 45 more days for us to go out
22 and look at the land, have the land checked out, get
23 engineering done on it, anything we wanted to do, and have it
24 checked out and if it checked out then they were requesting
25 that we give them another \$40,000 that they could disburse at

1 the end of that 90-day period, which was 45 days past the
2 original due diligence period

3 Q Okay, so, do you know whether they took the 40,000 and
4 cashed it?

5 A Oh yes, sir, they, they came and got the \$40,000 and
6 cashed it

7 Q Would you look at Plaintiff's Exhibit Number One again
8 for me, please?

9 A Okay, yeah

10 Q Specifically look at paragraph 34, if you would, please

11 A Yes, sir

12 Q Tell me when you're there

13 A I'm there

14 Q Do you see where it says midway, "Buyer agrees to make
15 an additional 40,000?"

16 A Yes, sir, would you like

17 Q Would you read that out loud slowly please?

18 A Yeah, and I'll try and do my best here today for you all

19 It says, "The buyer agrees to make an additional \$40,000

20 deposit directly to the sellers at the end of the said due

21 diligence period This \$40,000, plus the original 10,000

22 deposit become non-refundable should the buyer not close for

23 any reason whatsoever as stipulated in paragraph 34 above the

24 paragraph 33 Buyer authorizes the escrow agent to disburse

25 the original \$10,000 deposit to the seller at the end of the

1 said due diligence period "

2 Q Now, at some point, and I don't know whether before or
3 after you paid over this \$50,000, what if any corporate or LLC
4 entity were you trying to form?

5 A We started trying to form an LLC in March called Sheep
6 Island Plantation, LLC We eventually did form Sheep Island
7 Plantation, LLC

8 Q All right, would you look at the very back, last page of
9 Plaintiff's Exhibit Number One the one that is titled
10 addendum?

11 A Yes, sir

12 Q All right can you explain to the jurors what this
13 addendum this last portion of the contract
14 provides?

15 A Okay, the addendum to the contract what it provided was
16 us to be able to form this corporation and they agreed to it
17 and they signed off on it and said they had no problem with us
18 being able to assign this contract over to anybody we wanted
19 to prior to closing

20 Q Can you explain your understanding of what assign this
21 contract means?

22 A To me to assign a contract is to be able to sell it or
23 do anything with it and I can assign it to anybody I want to
24 prior to the closing of the contract

25 Q And when you say I you mean you and Jeremy?

1 A I, I, Jeremy or the partnership, yeah

2 Q Okay

3 A At this time it was just I and Jeremy

4 Q And here it says, "purchase agreement may be assigned
5 to any entity or LLC prior to closing", correct?

6 A Yes, sir, that's exactly what ---

7 Q And it's signed by both the buyers or the buyers
8 here Did you ever get any executed copies from the
9 sellers?

10 A Yes, we did

11 Q Okay, did you in fact, ever assign this contract for
12 the 101 acres to another entity?

13 A Yes, sir, we assigned it over to the Sheep Island
14 Plantation, LLC, corporation that we had formed

15 MR ALTMAN Your Honor may I -- may we approach?

16 There's a question about the language in here and I'd like to
17 discuss that

18 THE COURT Members of the jury panel, we'll take a
19 short break at this time I'm going to ask you to go to the
20 jury room We'll take about a five-minute recess

21 (Whereupon, the following takes place outside the
22 presence of the jury)

23 THE COURT What is it?

24 MR ALTMAN Your Honor, sometimes technically I get
25 too involved, but what this document does says that these

1 people have agreed to assign, not that they have assigned the
2 contract

3 THE COURT Okay, you can bring that out on cross

4 MR ALTMAN Okay I think the intent is there I'm
5 just pointing that out

6 THE COURT All right, well we'll take a short
7 recess

8 MR ALTMAN Thank you, Your Honor

9 *****OFF THE RECORD*****

10 (On the record)

11 (Whereupon, the following takes place outside the
12 presence of the jury)

13 THE COURT All right, bring the jury back in

14 (Whereupon, the following takes place in the presence of
15 the jury)

16 THE COURT All right, you may continue to examine the
17 witness

18 MR FUTERAL Thank you, Your Honor

19 Your Honor, one moment, Your Honor I -- for the record

20 this being Plaintiff's Exhibit Number Six, I'm not sure
21 exactly where we left off whether it is with objection or ---

22 THE COURT Any objection to the introduction of
23 Plaintiff's Number Six?

24 MR ALTMAN No Your Honor

25 (Whereupon, Plaintiff's Exhibit Number Six entered into

1 evidence and appropriately marked)

2 BY MR FUTERAL

3 Q Mr Marshall, before we broke you were talking about
4 your rights under the agreement to assign this contract to
5 another entity I've handed you Plaintiff's Exhibit Number
6 Six which is also up on the screen here Can you explain to
7 the jurors what this document is?

8 A Yes, sir

9 MR ALTMAN Again, Your Honor, it's a written
10 document It speaks for itself

11 Q Mr Marshall, who drafted this document?

12 A I did

13 Q Okay are you a lawyer?

14 A No, sir, I'm not a lawyer

15 Q Have you drafted a lot of letters of assignments to
16 purchase?

17 A No, sir huh-uh

18 Q All right, so, you have this document drafted for who to
19 sign?

20 A The partners of the corporation, Sheep Island
21 Plantation, LLC

22 Q Namely yourself and your son?

23 A Yes, sir

24 Q All right, and why did you draft this document?

25 A Because we knew we were going to form the corporation

1 and we weren't going -- know at this time we were no longer
2 going to be trying to get the loan under our names, a loan
3 It was going to be -- the loan was going to be that we applied
4 for with Mark Knight was under the name of Sheep Island
5 Plantation, LLC

6 Q So this is what then?

7 A This is an assignment letter giving us authorization to
8 do this

9 Q All right so, you and your son agreed to assign it over
10 to Sheep Island, LLC?

11 A Correct

12 Q Which had not yet been formed?

13 A Right It was in the process of being formed We were
14 just waiting on everything to come back from the Secretary of
15 State

16 MR ALTMAN No objection, Your Honor

17 (Whereupon, Plaintiff's Exhibit Number Seven admitted
18 into evidence and appropriately marked)

19 Q At the time that you signed, you and your son signed
20 this document on March 1st had you sent off any paperwork to
21 the Secretary of State's office to form this limited liability
22 company?

23 A Actually we did it through Benjamin Lafond our attorney
24 He did the paperwork and we just basically signed it He
25 handled all the corporation paper

1 Q Okay You're looking at Plaintiff's Exhibit Number Seven
2 which is up on the screen What is that?

3 A This is the certificate of existence of the corporation
4 for Sheep Island Plantation, LLC, a limited liability company,
5 and it's dated March the 23rd, 2006, and at that time we
6 became a corporation of the State of South Carolina

7 Q Okay, and who were the members of that corporation?

8 A At that time it was Jeremy and I, David Hilleshiem and
9 Walker Funk

10 Q Okay, now while you're forming corporations and doing
11 these assignments what if anything else are you doing with
12 respect to the contract alone or anything as regards to this
13 particular property?

14 A As I told you we talked to Mark Knight and explained the
15 situation that we were going to be ---

16 Q That's, that's the lender, right?

17 A I'm sorry Mark Knight of South Coast Bank and we
18 explained to him what all we were doing Every day that we
19 got a chance we'd give him a call, let him know what was going
20 on If we were in the area we'd stop by and talk to him We
21 told him we had formed a corporation He asked each
22 individual partner of that corporation that was going to be on
23 the loan to start bringing in their financial information,
24 anything that they would need to obtain the loan

25 Q Do you recall when he asked you all to do this

1 approximately?

2 A Well, we started carrying him information, you know,
3 probably in February, which past that 45 day period, and we
4 just continued, anytime he asked us for anything whatsoever we
5 had it there to him that day

6 Q Well, what kinds of things in particular did you get to
7 him?

8 A Well, he asked for financial statements on each of the
9 people that were going to be on the loan package He asked
10 for tax returns He asked for a copy of the -- once it, once
11 it got formed the LLC He asked for copies of the contract
12 that we originally had, you know, that we gave him, but I
13 mean, anything that he asked for we gave it to him

14 Q And what if any delays were there on your end in getting
15 them this information?

16 A We never delayed ~~anything~~ I'm telling you, if Mr
17 Knight called us that day we're like ten minutes away, either
18 me, David Hillehiem or Jeremy Marshall, we would go straight
19 to the bank and carry him anything he needed and if he for
20 some reason was leaving the office, he would come by and pick
21 it up from us

22 Q Would you look back at Plaintiff's Exhibit Number One
23 the contract for me, please?

24 A I ve got a lot of stuff up here

25 Q That's okay

1 A Yes, sir

2 Q All right, you entered into this contract on December
3 14th, 2005, correct?

4 A Yes, sir, that's correct

5 Q All right on page five of six though it talks about
6 that the closing shall take place no sooner than July 15th and
7 no later than July 31st Did you or anybody on behalf of
8 Sheep Island pick these closing dates?

9 A No, sir, we did not

10 Q All right, do you have any reason to know why the
11 sellers when they gave you their contract said you can't close
12 until July 31st, some several months later?

13 A I thought it was odd for some -- but the sellers chose
14 the dates I assumed, so

15 Q So, you all didn't ask, "Hey, we need several months to
16 do this"?

17 A No we never asked for that much time

18 Q They just gave it to you?

19 A They said that's when we were going to close

20 Q Okay, but not before the 15th, correct?

21 A Not before the 15th

22 Q Okay, all right, now, as you're dealing with the bank
23 itself regarding the loan, what if anything are you doing with
24 the dirt, I mean, the 101 acres? Are you doing anything?

25 A Well, I'm going to go backwards a little bit for you so

1 you understand a little bit After that 45-day period that
2 they had the right to terminate the contract there was a
3 second part of the contract that says we got 45 days to go
4 check the land out, check it, soil test, anything that we
5 wanted to do

6 Q This is your due diligence period?

7 A This is part of our due diligence period

8 Q Do you know what paragraph that is in the contract that
9 talks about due diligence?

10 A I think it is -- it's number eight on the second page of
11 our contract and which it says the option to terminate after
12 due diligence, "Seller grants the buyer a 90-day right to
13 terminate this contract from the date of this agreement during
14 which time the buyer may do any of the following," which is
15 pretty much what I talked about we were doing

16 Q I'm sorry You talked about the lender and so-on Did I
17 miss something?

18 A I'm talking about we started having engineering testing
19 done on the land

20 Q Okay

21 A And spending money to check it out to make sure that
22 everything checked out so it was something definitely we did
23 want to purchase during our due diligence period

24 Q When you talk about having engineering done on the land
25 for those of us who might not know what are you talking about

1 having done?

2 A Well, they were doing topographical surveys They were
3 doing soil boring tests to make sure that the soil was good,
4 you know, for plumbing, sewer, water, whatever it was going to
5 ascertain the strength to hold housing in there if there was
6 contamination There was a lot of stuff out there like old
7 cars and parts and trash pile ups that if there was oil in
8 that stack and maybe somebody had been dumping stuff and what
9 it was going to take to fix it up

10 Q Do you remember which company you may have hired to do
11 the engineering work?

12 A We hired a company by the name of Trico Engineering

13 Q All right, who paid Trico Engineering?

14 A I personally wrote a check to Trico Engineering for
15 \$41 000 and that was just half of the project We still had
16 probably after we would have closed the loan there would have
17 been probably another 40 \$50,000 that we would have owed
18 them

19 Q This check that you wrote for 41,000 is this before or
20 after you formed the LLC?

21 A Is it before we formed the LLC?

22 Q Yeah, were you paying these costs before you actually had
23 the LLC?

24 A Oh, it was after

25 Q After?

1 A It was after, yes sir
2 Q Why didn't you write ---
3 A I didn't have a copy of it in front of me
4 Q That's okay Why didn't you write a check from a
5 corporate account or had you established one by then?
6 A Well it was my personal money I was putting it in
7 there trying to help the partnership out get going and we
8 hadn't obtained the loan or anything yet and not a whole lot
9 of money had been put into the bank accounts yet because we
10 were still waiting on the corporation to be formed
11 Q Okay, had this deal gone through what if any expectations
12 did you have about the 41,000 that you paid?
13 A I would have left it under the partnership unless they
14 wanted to refund it back to me
15 MR ALTMAN I'm going to object to him entering this
16 one, Your Honor
17 THE COURT What is it?
18 MR ALTMAN It's a bill ---
19 MR FUTERAL If we may approach
20 THE COURT Yes What's your objection?
21 MR ALTMAN Your Honor, it's a bill that's directed
22 to someone other than Mr Marshall or Sheep Island Plantation
23 It's not a bill to any party to this action
24 THE COURT All right, is the bill you're talking
25 about you paid \$41,800?

1 A Yes, sir

2 THE COURT I'll allow it I overrule the objection

3 (Whereupon, Plaintiff's Exhibit Number Eight entered into
4 evidence and appropriately marked)

5 BY MR FUTERAL

6 Q Mr Marshall you've been handed Plaintiff's Exhibit
7 Number Eight Is this the bill from Trico Engineering
8 Consultants for 41,000 looks like \$800, but it's -- is that
9 right 41 800?

10 A It was \$41,800 at this time The money they had already
11 spent on our due diligence period checking the land out and
12 they sent us a bill and I think the \$800 wasn't due yet It
13 was something else they had to go do They were waiting on
14 the testing to come back from soil testing

15 Q Okay, and this says it was invoiced on January 31st '06
16 and it was due by March 2nd '06, is that correct?

17 A That's correct

18 Q Now, why is this bill sent to C R Thompson and Sons,
19 LLC in North Charleston?

20 A C R Thompson and Sons were some of the people that we
21 had talked to about possibly developing the property for us,
22 and they were going out there seeing what could be done, what
23 needed to be done, just kind of instructing us along the way

24 Q Okay so, did C R Thompson pay this bill or did you?

25 A No sir, I paid this bill out of my own personal

1 checking account

2 MR ALTMAN Your Honor again, I'm going to object to
3 this This is a printout of something from a bank showing a
4 payment of \$2 780 This was not provided to us during
5 discovery until late last night I received a phone call,
6 Your Honor, I received a phone call from my office as I pulled
7 up in the parking lot here today I had not seen this until
8 we walked into the courtroom

9 MR FUTERAL If I may approach Your Honor, so you can
10 have a copy

11 MR ALTMAN It was faxed to my office sometime late
12 last night

13 THE COURT Ask questions about it

14 MR FUTERAL If I may have it marked for
15 identification purposes Your Honor

16 (Whereupon, Plaintiff's Exhibit Number Nine marked for
17 identification)

18 BY MR FUTERAL

19 Q Mr Marshall, let me show you or what I've shown you
20 which has been marked as Plaintiff's Exhibit Number Nine
21 Sir do you recognize this document yes or no?

22 A Yes, I do

23 Q All right, can you tell us what this document is?

24 A This document is a copy, it's the bottom portion of a
25 cashier's check that I withdrew the \$41,000 in a cashier's

1 check out of my account at South Carolina Federal Bank, check
2 number 113266 paying the \$41,000 to Trico Engineering
3 Q Okay, and this is -- it's actually South Carolina Federal
4 Credit Union, correct?
5 A Yes, sir, South Carolina Federal Credit Union yes, sir
6 Q So, it's a receipt for a cashier's check that you took
7 out of your account
8 A It's actually part of the cashier's check It's just the
9 other side of it
10 Q Okay
11 MR FUTERAL Your Honor, at this time we'd like to move
12 Plaintiff's Exhibit Number Nine into evidence
13 MR ALTMAN Your Honor, we ---
14 THE COURT Go ahead
15 MR ALTMAN --- we object to it This is not --
16 there's no proof of payment There's no proof that this was
17 in fact delivered It was a check Again, we did not receive
18 this It was not properly produced to us in time to review it
19 or ask any questions about it and we do not feel it's
20 appropriate to be entered into evidence
21 THE COURT I overrule your objection
22 (Whereupon, Plaintiff's Exhibit Number Nine entered into
23 evidence and appropriately marked)
24 BY MR FUTERAL
25 Q Mr Marshall, do you know whether this cashier's check

1 was delivered to Trico Engineering?

2 A Yes sir, that check was personally delivered to me to a
3 gentleman by the name of K Wood Self [spelled phonetically]
4 who was our engineer on this project and it was cashed

5 Q Okay, and these would have been the folks that had you
6 purchased it were they going to do more for you?

7 A Yes, sir, they had more to do This was just part of it

8 Q Okay what if any other engineers or any other folks did
9 you have working on this property?

10 A We had another group that we talked to about breaking the
11 property up in lots and laying it out for us So, if we were
12 going to break it up in lots and sell it off as lots they gave
13 us different scenarios, one like 73 lots could be put on it,
14 but they'd been bigger lots like about one acre lots Then
15 another proposal they gave us was to break it up into like
16 half-acre lots and they drew that up and there was a plan for
17 that and then the final one was the minimum size lot that you
18 could build and still be in code with Berkeley County specs
19 that they would allow you to go no smaller than a 33 percent
20 lot

21 Q So, do you remember the name of this outfit that you were
22 talking about?

23 A It's an engineering firm and I'm sure you've got the
24 paperwork, but I don't remember the name of it, sir

25 Q Okay, so, they're drawing up specifications and

1 measurements and things for you?

2 A Yes, sir, they're drawing up plot plans and they're

3 drawing up breaking the lots up into different lots in case we

4 decided that's the route we were going to go and develop the

5 land and break it up in lots

6 Q Were you billed for any of this work?

7 A Yes I was

8 Q All right, did you pay any of the bills?

9 A Yes, sir, it's been paid

10 Q Do you recall what the bill amounts were for?

11 A No, sir, I sure don't but I know they were about 5

12 \$6 000 in bills

13 Q If I were to show you the bills or what may be the bills

14 might it refresh your recollection as to what you've paid?

15 A Yes, sir

16 Q All right

17 MR ALTMAN Your Honor, again, this is not a bill

18 directly to Mr Marshall or to Sheep Island Plantation, LLC

19 THE COURT Let me ask a question about it Did you

20 pay it?

21 A Yes, sir

22 THE COURT All right, I overrule your objection

23 (Whereupon Plaintiff's Exhibit Number Ten admitted into

24 evidence and appropriately marked)

25 Q Mr Marshall, let me hand you what has been marked as

1 Plaintiff's Exhibit Number Ten Would you take a look at
2 those please?

3 A Yes, sir, I have those in my possession

4 Q Okay, you've got three pages here?

5 A Yes sir there was two different bills here One of
6 them was for \$4525 and the second bill was for a \$1583 87

7 Q And the last bill?

8 A I'm sorry I missed the last one \$420

9 Q Okay, did you pay these bills?

10 A Yes, sir, these bills have been

11 Q All right, now on these bills it says Sheep Island Road
12 tract land planning Do you see that?

13 A Yes, sir

14 Q But the bills appear to be sent to Sun Marsh Development
15 Group, attention Mr Buddy Martin

16 A That's correct Mr Martin was one of the guys that had
17 talked to us originally about wanting to invest some money
18 with us We had already had some engineering drawings done at
19 73 lots and I think the other one was about 185 lots but they
20 were like one acre lots He said "Let's see if we can cut
21 these lots down and get them a little bit smaller so we can
22 get more lots out of the property " So, we took it to the
23 engineer that he used and he broke it down to get it to the
24 bare minimum size lot that Berkeley County still approved that
25 would have been a good size lot

1 Q Okay, and you paid all three of these?

2 A Yes, sir they've all been paid

3 Q All right, and these appear to be invoiced to you, if
4 you'll look at them, on -- well, one is June 23rd Do you see
5 that?

6 A Yes, sir

7 Q And one is July 18th This is a couple of weeks before
8 your closing on July 31st Do you see that?

9 A Yes, sir

10 Q Do you know why you got a bill August 14th, one month
11 after the closing date for this \$420?

12 A Why it came on that date I don't know The work was done
13 prior to that, but we were continuing throughout the whole
14 loan process trying to get engineer work done to get this get
15 this loan done and approved and whatever we were going to do
16 with the property

17 Q Okay, I want to -- I want us to switch from what you're
18 doing with the dirt essentially with these engineers and so
19 on Let's go back to the loan now

20 A Okay

21 Q The contract originally provided or did provide that you
22 would close no sooner than 15th but no later than 31st,
23 correct?

24 A That's correct

25 Q When you are -- I'm digressing here for a second I am

1 switching gears When you're dealing with the dirt itself
2 what if any issues do you have regarding water and sewer for
3 this particular piece of property?

4 A Okay, originally there was no water or sewer going to
5 this property but we had met numerous times with the Berkeley
6 County officials that oversee the process of water and sewer
7 One of them at that time's name was Jim Roshire [spelled
8 phonetically] and he was the Berkeley County supervisor and
9 one of the people working under him's name was Madaline
10 Robinson There was also a gentlemen that we had to talk to
11 by the name of Mica Miley with Berkeley County Sewer and
12 Water We had two or three meetings with him and the
13 original, we were originally told when Jim Brashear was in
14 office up to prior to like June the 30th of 2006 that water
15 and sewer would be coming to our property and it would be
16 coming up the direction of Highway 176 and ---

17 Q So, if I understand, and pardon me, at this point in time
18 you don't -- you literally don't have water and sewer pipes
19 going to this 101 undeveloped acres

20 A No sir, but they're building a new school up there off
21 176 and the water and sewer was going to be to that point and
22 they were supposed to bring it up to the Sheep Island Road
23 property, but then something happened after Mr Roshire got
24 voted out of office and they changed their minds

25 Q What do you mean they changed their minds?

- 1 A They changed their minds which way water and sewer was
2 going to flow Water and sewer was going to get up to Sheep
3 Island property is what they told us the first time, and as it
4 got up to right near the closing date, they had changed their
5 mind that water and sewer was no longer going to go past the
6 school It would need to be brought off of Jedburg Road and
7 it was going to have to come a completely different direction
8 than what they originally had told us
- 9 Q All right, so, if they're going to change the direction
10 of the water and sewer, what, you know, what different does
11 that make to you?
- 12 A Well, what it could do is it could change the cost of our
13 land development if we were going to go ahead and develop the
14 land It was going to end up costing us more money and it
15 also changed the time frame in which time you would get water
16 and sewer to the property
- 17 Q Now, let me back up for a second when you applied for a
18 loan with South Coast how much did you ask for?
- 19 A We asked for 80 -- we asked for 75%
- 20 Q Okay now, your contract provided you couldn't ask for
21 more than 80 percent when you went for your loan, right?
- 22 A Well, I've got a little different opinion on that but it
23 says we cannot apply for more ---
- 24 Q Okay
- 25 A --- than an 80 percent maximum loan of \$2,530 000

1 Q Okay, so, you applied for 75%?

2 A We only applied for 75%

3 Q Okay, what if any effect would this water and sewer
4 business have on your loan?

5 A It would increase the cost that it was going to take us
6 to develop the property which meant we were going to need more
7 money

8 Q Okay, what if any conversations did you have with your
9 lender regarding this water and sewer issue and the increased
10 cost?

11 A As we were talking as the loan process was ongoing and we
12 were under the assumption that we were going to get a 75%
13 loan to value of the property, we knew this was going to
14 increase our cost in the property So, we were going -- as
15 far as what we were going to need to come out of pocket and
16 spend So we were going to have to spend more money We'd
17 have to go in our pocket deeper or we're going to have to go
18 back to the loan, the bank and ask them for more money

19 Q All right in your conversations with the lender did you
20 ever ask them -- now, we know you passed that 45 day period
21 and just continued on

22 A Yes, sir

23 Q You guys did So, after that period did you ever ask
24 them where that commitment letter was or when was it coming?

25 A I talked to Mark throughout this loan and I kept telling

1 them that, you know, we were doing everything that we could to
2 obtain the loan and we were past the 45-day period and he was
3 trying to get the loan done for us and he continually told us,
4 "We are going to get this loan done and we're going to get
5 this loan done by the closing date by 7-31 of 2006 "

6 Q Okay, prior to entering into this June period and
7 dealing with water and sewer, what if any problems was the
8 bank saying you might have with this loan?

9 A The problem -- when we originally talked with Mark he
10 gave us a lot of different scenarios from the beginning to the
11 end We talked numerous different situations, number of
12 different things what we were going to do with the property
13 what we weren't going to do with the property, how it was
14 going to effect the loan When we found out that the water
15 and sewer wasn't going to come in the direction that it was
16 coming and we had applied for a 75 percent loan he said some
17 of the things we might have to do is think about start
18 thinking about that we were going to have to change it to what
19 we call the raw land loan and when they changed it from a
20 regular loan that they do 75 percent on, they were expecting
21 us probably to get in there and develop the property

22 Q Okay

23 A As it went on and Berkeley County changed their mind on
24 different things he said, "You're probably going to have to
25 go ahead and start thinking doing this loan as a raw land

1 purchase " When we were going to do it as a raw land
2 purchase, that changed the amount, he was going to only lend
3 us 65% of the value of the property

4 Q All right, this may sound funny but did you or any
5 members of Sheep Island, LLC, do anything to influence
6 decisions regarding the water and sewer, in other words making
7 it go another direction or stalling it?

8 A No, sir, we ---

9 Q Did you have any hand in that?

10 A We were we were kind of dumbfounded because we were
11 always told it was coming up Highway 176

12 Q All right, so, if the lender is telling you 75 percent
13 for, if you're going to develop it as a neighborhood but 65 if
14 it's just land ---

15 A Uh-huh

16 Q --- what did that mean to you financially? When I say
17 you, I mean the buyer?

18 A Well as we had already find the partnership together
19 that meant that we had to reach in our pocket and pull out
20 another \$253 000

21 Q Okay

22 A That we did not expect to have to do prior to the
23 original contract we had, you know, applied for with Mark

24 Q Okay now prior to this issue of it going from 75% to
25 65% what if anything was the lender telling you about the

1 terms of the loan? Did Mark Knight tell you anything about
2 what you'd have to bring to closing, how much the loan was
3 going to cost you or anything?

4 A The original, the -- originally we had sat down and
5 talked with Mark because we wanted to do this loan We wanted
6 to buy the property We always wanted to buy the property and
7 we sat down with Mark when the very first day and he told us
8 he could probably do a 75% loan There was some discussion in
9 there about maybe we might put some interest money in the bank
10 and I think we volunteered to do it He, he ---

11 Q Did he tell you you were going to have to bring X amount
12 of dollars to closing?

13 A Correct, well, when we -- well, that's what I was
14 getting ready to tell you When we were first talking about
15 it he said that we could put some interest in there if we
16 wanted to It wasn't going to be a bank requirement at that
17 time that we had to do anything like that but when it was
18 going to be a 75% loan, I think it was going to be like right
19 around \$632,000 that we were going to have to come up with and
20 we were thinking that we probably would have to put some
21 additional money in there, you know, to -- we had we had been
22 told we put maybe one, two months, three months worth of
23 interest payment in the bank and, and then go from there

24 Q Right, when did he tell you it would be around 600 and
25 something thousand dollars that you would have to bring to the

1 table?

2 A When we first went in to meet with him the very first
3 time ---

4 Q All right

5 A --- he calculated it on his calculator

6 Q Okay now, tell me when he's telling you six hundred and
7 something from the beginning of your meetings what if
8 anything are you or any members of Sheep Island doing to
9 gather up this 600 and something?

10 A Most of the partners already had the money We were
11 just waiting for him to tell us when it needed to be put in
12 the bank He told us all along that the money did not have to
13 go into the bank till the last day of closing

14 Q Okay, so, the day you sign all the documents that's when
15 the money has to be there

16 A Yeah, and he said it only had to be in the bank one hour
17 prior to closing

18 Q Okay, and the money that had to be into the bank that
19 early you weren't trying to raise it, you all already had it?

20 A We had the \$632,000 to put down doing the 75% loan

21 Q Do you recall who had what amounts?

22 A Walter Funk had his third

23 MR ALTMAN Your Honor, I'm going to object to this

24 There's no basis laid for how he knows the money was there

25 There's no evidence that shows when the money was

1 available

2 THE COURT I overrule your objection Go ahead

3 A They showed, he showed me financial -- Walker Funk showed
4 me financials, showed me he had the money in his bank account
5 and David Hilleshiem showed me his financial accounts and
6 showed me where he had the money available I personally know
7 Jeremy had the money available because I handle everything for
8 Jeremy

9 Q Okay, was any of this information also provided to South
10 Coast?

11 A Yes, all that information was told to South Coast and
12 provided to them

13 Q Okay, so, help take me forward here When you get down
14 to water and sewer and changing it from 75 to 65 percent loan
15 they're going to lend you less money, what if anything did you
16 do to raise additional money?

17 A Well, we called -- actually at that time when we thought
18 that it was going to cost us more to do the loan and we
19 started talking to some other partners about entering the
20 contract with us, about strengthening our partnership so we
21 could get more money with each individual having to come out
22 of pocket so much money

23 Q Okay, and would I be correct this is about June and
24 heading into July ---

25 A This is about June heading into July, yes, sir

1 Q All right, tell us at this time what if any conversations
2 are you or anybody acting on you all's behalf having with the
3 sellers regarding this whole issue?

4 A I called Georgia Richard, who was our agent I told
5 Georgia that we were having a little bit of a problem with the
6 water and sewer, that they were changing the directions which
7 was going to change the amount of money that we were going to
8 need to come up with I asked Georgia to make a call to the
9 sellers and ask them for the possibility of getting an
10 extension on that contract so we could go back to the bank and
11 maybe negotiate or give us more time to get the money into the
12 bank

13 Q All right, how long of an extension were you asking for?

14 A We originally asked for just an extension We didn't
15 even ask for any certain extension

16 Q All right, now, looking back at Plaintiff's Exhibit
17 Number One paragraph 33, you had already had a 15-day
18 extension if you couldn't close

19 A Right

20 Q All right, at this point in time did you anticipate that
21 you couldn't close by the 31st?

22 A No we had every intention to close by the 31st, even if
23 we had to go back to each individual partner and try and get
24 more money together which we would have been scraping Some
25 people said they would have to get some equity lines on their

1 house or bring on another partner, and so, we started looking
2 to bring in some other people to help us out with the
3 financing of the contract

4 Q Financially at that time when you were asking for a 30-
5 day extension or thereabouts did you have the finances as you
6 understood it to be able to close on the 31st?

7 A We had the financing to do the 75% loan prior to we
8 finding out that the water and sewer issue was changing

9 Q Prior to the 31st when the financing went from 75% to
10 65% did you have, meaning the buyers, the finances to be able
11 to close on the 31st?

12 A No sir, we did not have it all at that time

13 Q Okay, why not?

14 A Because it had increased, the additional 10 percent had
15 increased what we had to come out of pocket an additional
16 \$253,000

17 Q But you said you were talking to other investors up until
18 this point

19 A Correct

20 Q Did you find anybody else who could make up that
21 shortfall?

22 A As we were talking through the loan process the whole
23 time with Mark Knight, we told him that we were entertaining
24 and talking to some other people to bring them in to help us
25 financially make our partnership stronger So, it would take

1 less burden off each individual and we found two or three
2 people that were interested into entering into the partnership
3 with us One of them's name was John Bordine The other
4 one's name was Cecil Curtis and then Mr Steve Hill

5 Q Okay

6 A This, that gentleman right there

7 Q The two two individuals you first named did they ever
8 come into this organization or pledge money?

9 A They pledged the money to put it in there, but it never
10 materialized So, we didn't keep them into the partnership

11 Q You're talking about after it didn't close on the 31st

12 A After it didn't close, yeah

13 Q Okay

14 A They were supposed to have money in there prior to
15 closing so we could still close and close on time and they
16 were dragging their feet and all the other partners knew they
17 were going to have to go into their pockets to make up the
18 difference So, we just decided we weren't going to even
19 accept them into our partnership

20 Q So, you were just going to try and close on the 31st

21 A We always planned on closing on the 31st We never
22 intended not to close, but just in case it did go beyond it we
23 were trying to let the sellers know the problems that were
24 going on

25 Q All right, the 30 days that you ended up asking for is

1 that under paragraph 33 or not part of paragraph 33?
2 A It's not part of paragraph 33, but it's not something --
3 the 30 days was something that they told us they would give
4 us
5 Q Okay
6 MR ALTMAN No objection
7 (Whereupon, Plaintiff's Exhibit Number 11 admitted into
8 evidence and appropriately marked)
9 Q Mr Marshall let me hand you Plaintiff's Exhibit Number
10 11 Do you recognize that?
11 A Yes, sir, I do
12 Q Okay, on the second page that appears to be an e-mail
13 from the seller's realtor, Mr Rakes to your realtor?
14 A Yes, sir, it is
15 Q What is the date of that?
16 A July the 13th of 2006
17 Q Would I be correct in this that he's e-mailing to
18 confirm a conversation that he had with her saying the seller
19 is willing to allow you all, the buyers, to buy an extension
20 for 30 days for \$50,000?
21 A Yes, sir, it says the seller is willing to allow the
22 purchaser to buy an extension of 30 days but they wanted
23 \$50,000 to get it
24 Q Okay, and would I also be correct that they wanted it to
25 be non-refundable?

1 A Yes, sir, they wanted -- it would be nonrefundable and
2 non-applicable to the purchase price So, they weren't even
3 going to apply it to the purchase price or anything

4 Q So, that was just 50,000 for 30 days, not to bring down
5 what you needed to bring at closing

6 A Right

7 Q And you aren't going to get it back?

8 A And we weren't going to get it back

9 Q All right, did you all ever accept this?

10 A The exact words we told Georgia is we still planned on
11 closing on time We were going to get all of our partners
12 back together, try and get the balance of the money so we may
13 close on time, but we told them it was only acceptable to us
14 if we needed it because we planned on closing on time We
15 never thought we wouldn't close on time We just had to do
16 some other arranging getting the rest of the money together

17 Q Okay, well, these arrangements, the back and forth
18 regarding 30 days for \$50,000, it never materialized, right?

19 A It never it never materialized

20 MR ALTMAN No objection

21 (Whereupon, Plaintiff's Exhibit Number 12 admitted into
22 evidence and appropriately marked)

23 Q Let me hand you Plaintiff's Exhibit Number 12 Now,
24 this is more e-mails between your realtor, the buyer's realtor
25 and the seller's realtor, correct?

1 A Yes, sir, this looks like the, this looks like the
2 second e-mail they sent us on -- it's dated or says sent on
3 July 20th of 2006

4 Q And in there they're -- he's confirming a discussion
5 that he had with your realtor saying that they withdraw their
6 offer to allow you to buy a 30-day extension of time, correct?

7 A Yes, sir, they, they withdrew the same offer that they
8 had made to us

9 Q All right you make some mention in here that you are
10 several months past the due diligence time frame Do you see
11 that? The second, third full paragraph in his e-mail

12 A Yes, sir, I see it

13 Q Okay, now, if I recall in your contract you didn't set
14 any of these time periods The sellers did, right?

15 A We didn't do anything The sellers did everything

16 Q Okay, now, did you ever get a copy of this e-mail?

17 A We didn't at that time we didn't have a e-mail or our
18 computer or I didn't know how to work it I am kind of
19 computer illiterate, but Georgia Richard did bring this over
20 to us

21 Q All right and in the fifth paragraph down it says
22 "Please inform the buyer that the seller is ready, willing
23 and able to close per the contract and will grant no extension
24 of time " Do you see that?

25 A That's right Yes, sir it says he will grant no

1 extension of time

2 Q Okay, so, presumably this is what 11 days before you're
3 supposed to close am I right?

4 A Right, exactly

5 Q Were you informed that the seller is now taking the
6 position that you get no extension of time?

7 MR ALTMAN Your Honor, he's leading the witness

8 THE COURT I sustain the objection to that question

9 MR FUTERAL Okay

10 BY MR FUTERAL

11 Q What if any discussions did you have with Georgia
12 Richard regarding this e-mail?

13 A I tried to call Georgia when they sent this back because
14 one of the reasons when that contract came in the first time
15 there is some wording in the back of our contract about e-
16 mails being part of a contract, but I didn't really understand
17 the familiarity on what that meant, and I was trying to get a
18 hold of her

19 Q Were you at any point in time ever aware of what was
20 being said in these e-mails?

21 A No, sir, not, just back and forth between them but they
22 told us as they came in

23 Q Who told you what as they came in?

24 A I, I never talked to Mickey Rakes until the ---

25 Q I don't mean to confuse

1 A I'm sorry Yeah, you are confusing me
2 Q Your realtor, Georgia Richard, did she talk to you about
3 this e-mail?
4 A She -- when she brought it in she told us that this
5 particular e-mail is what they sent her They sent it to her
6 and Benji Lafond
7 Q Okay, so the answer is yes
8 A Yes
9 Q You talked to your realtor Okay, I'm sorry
10 A You are confusing me
11 Q Between July 20th and July 31st what if any discussions
12 did you have with anybody about any extensions of time
13 whatsoever and take us through it chronologically if you did
14 have such discussions
15 A Through July 1st through July 31st?
16 Q No, from July 20th, from the date of that e-mail where it
17 says no extensions to July 31st
18 A Okay, when this contract came back in and it said there
19 would be -- they were withdrawing the same offer that they
20 gave us, which I always felt was very vague and didn't have
21 any timeframes to do anything, I got on the phone, tried to
22 call Georgia because she wasn't there, after talking to our
23 partners and I made a telephone call to a Mickey Rakes and
24 when I called Mr Rakes he was very rude to me His -- he
25 said, ``Why are you calling me? You shouldn't be talking to

1 me You should be talking to your agent," and I, I just
2 asked him I said, "Why did you all turn this contract down
3 because we thought that you know the way it was worded we
4 thought we had till the last day of the contract to get a 30
5 day extension "

6 Q I'm not talking about the 30 days and \$50 000 Let me
7 make sure I'm -- we're clear on this

8 A Yeah, you're -- I am lost

9 Q What if any conversations did you have with anybody
10 about getting any extension of time whatsoever between July
11 20th and July 31st?

12 A That we called them for an extension?

13 Q Any extension

14 A Okay at the every end of the contract around July the
15 31st I mean, I'm going to go back to Mickey Rakes again, we
16 had talked with him and he said we said, "Why, why did you
17 withdraw the contract? I don't really understand it There
18 was no timeframe in it " He said that he was going to call
19 Skipper Wooddy and talk to him about the timeframe to give ---

20 MR ALTMAN Objection as to hearsay

21 MR FUTERAL Your Honor ---

22 THE COURT I'm not sure it's for the truth of the
23 matter asserted I don't know

24 MR FUTERAL It's not for the truth

25 THE COURT Go ahead

1 A That he was going to get in touch -- Mickey Rakes was
2 going to get in touch with Skipper Wooddy

3 THE COURT Tell us who -- we've got to try to figure
4 out Who is Mickey Rakes?

5 A Mickey Rakes is the agent for the sellers

6 THE COURT All right and who is Wooddy?

7 A Skipper Wooddy is an attorney who is a partner also in
8 Bar-Pen, LLC

9 THE COURT Representing who? Who does he represent
10 in this transaction?

11 A He's just a partner in Bar-Pen, LLC

12 THE COURT What's he doing?

13 A He is the point man to everybody you talk to with Bar-
14 Pen LLC

15 MR FUTERAL Your Honor, if I may ---

16 THE COURT You talking about Mickey Rakes is the ---

17 A He's the agent

18 THE COURT --- realtor for the seller and Wooddy
19 somebody is the seller's attorney?

20 MR FUTERAL Well, he's also the seller

21 A He's the seller and an attorney

22 THE COURT Okay

23 MR FUTERAL He's, he's both He's doing the seller's
24 documents

25 THE COURT Go ahead

1 MR FUTERAL And he's a member of the Defendant
2 organization

3 BY MR FUTERAL

4 Q All right

5 A Okay, I called Mickey Rakes, like I said, and he said he
6 was going to call Skipper and talk to him about the
7 possibility of getting us an extension and we told him what
8 was going on with the sewer and water and he said he would
9 call Skipper and he would return a call to me and let me know
10 what he said

11 I personally never got a return call from Mickey
12 Rakes

13 Q Okay

14 THE COURT So, you never got an extension?

15 A No, sir

16 THE COURT All right

17 ~~A. on the 27th They never told us anymore.~~

18 THE COURT Go ahead Go ahead

19 A Okay, on July the 31st I'm going to go back a little bit,
20 on July the 27th, when pretty much we thought everything was
21 ready to go as far as the loan, I was getting ready to go out
22 of town The last time I talked to Mark Knight was around the
23 27th of July We had talked about everything We had talked
24 about the change of the money, the partners going to have to
25 put up \$885,000 instead of the \$632,000 that they originally

1 | thought we were going to have to put up When I, when I got
2 | through talking with Mark he pretty much told me what the
3 | terms of the contracts were going to be and which really
4 | wasn't much change as far as we were going to have to put down
5 | a one percent origination fee We were going to have to put
6 | in, pay for the appraisal, pay for the closing costs, and like
7 | I said, there was an origination fee with them, and we knew,
8 | we knew that everything was set to close, and I had already
9 | called our real estate attorney that was going to do the
10 | closing, and I told him to go ahead and set up closing I had
11 | previously told him to go ahead and set up closing on July the
12 | 31st, and on the 27th I was going to be leaving to go out of
13 | town So, I had talked to Mark Knight We confirmed
14 | everything Everything was set as far as we know, and we had
15 | already brought Steve Hill into the project with us So, I'm
16 | going backwards here again, and Mr Hill had agreed to take on
17 | 50% of the entire project, whatever whatever we needed to
18 | close he would help us out and he would close, but he wanted
19 | to buy in the 50% of the whole entire project That was going
20 | to reduce the ownership of David Hilleshiem, Jeremy and Bruce
21 | Marshall and Walker Funk to 50% Each one of our partners
22 | were going to be one-third of a half, basically, you know,
23 | one-third of a half and then I was only going to own one
24 | percent which was included in Jeremy's ownership of a third
25 | of that half, and I know this is getting confusing, but as we

1 got down to closing we knew we had to have the \$885,000 When
2 I left talking to Mark on the 27th he said this is the way
3 ---

4 Q Mark being the lender?

5 A Mark Knight, the lender at South Coast, and he told me
6 everything is -- this is what I'm going to submit for the
7 commitment letter I'm going to send it off This is the way
8 it's going to be and I left to go out of town assuming
9 everything was fine and ready to go

10 Q All right, this is the Friday before Monday
11 closing?

12 A That's correct Well, actually I talked to him on the
13 27th I left to go out of town the 28th, was the July the
14 28th, which was the Friday before closing

15 MR ALTMAN No objection, Your Honor

16 (Whereupon Plaintiff's Exhibit Number 13 admitted into
17 evidence and appropriately marked)

18 Q So, July 28th was the Friday before Monday closing on
19 July 31st I handed you Plaintiff's Exhibit Number I believe
20 it's 12 or 13 Can you see which one?

21 A Yes this is 13

22 Q Okay, Plaintiff's Exhibit Number 13 what is this?

23 A This is, I guess this is the commitment letter from the
24 bank

25 Q All right so on the 20 -- well, what is the date on

1 that?

2 A It's dated July the 28th 2006

3 Q Okay, so, it's dated the Friday before Monday morning
4 closing or Monday day closing rather This is from South
5 Coast Community Bank to various different persons including
6 what, David Hilleshiem, Sheep Island Plantation, Mr Funk,
7 your son and others, correct?

8 A That's correct

9 Q All right, your name is not listed on here Do you know
10 why?

11 A No, sir, I wasn't going to be part of the loan I was
12 just helping Jeremy establish his own credit

13 Q Okay in other words that's where it says the borrower
14 being Sheep Island, but then it listed various different
15 individuals as being the guarantors, the people who are going
16 to sign the loan, correct?

17 A Correct the people that were going to sign the
18 loan

19 Q All right, now, you had testified earlier that you were
20 going to get a 65% loan What is the amount that this letter
21 from the bank says that they're about to lend you? Is it 65%?

22 A No, sir, the loan amount says \$2,530,000

23 Q All right, did you ever ask the bank to lend you 100% of
24 the purchase price of this property?

25 A We never asked them or the other bank to ever lend us

1 more than a 75% loan We never made application for more than
2 a 75% loan

3 Q Do you have -- well, by the way, when did you see this
4 letter from the bank dated July 28th?

5 A We didn't see this letter till July the 31st

6 Q The day of closing?

7 A I personally didn't see it until then I think David
8 Hilleshiem and some of the people that went in and signed it
9 saw it at about five o'clock on the 28th

10 Q Do you know how you all got a copy or anybody got a copy
11 of this?

12 A I have no idea how we got a copy of it

13 Q All right, so, you were out of town for the weekend when
14 this came out

15 A When it came out I got it on Monday

16 Q All right so here you have a hundred percent instead
17 of 65 Do you have any understanding why they're now going to
18 lend you a hundred percent?

19 A In all actuality they were never actually going to lend
20 us a hundred percent of the loan What Mark had told me on
21 the 27th he wanted us to take the \$885,000 that I had told
22 every partner that -- what their share would have to have been
23 and he wanted us to put it in a CD account that he established
24 with some number

25 Q All right I'm going to stop you for one second The

1 \$885,000 that was the money that all of you all had to bring
2 to closing, correct?

3 A That was the 35% that we had to bring to closing

4 Q Which would have been 35% leaving a 65% loan

5 A A 65% loan

6 Q Okay, so, I'm sorry I interrupted you Explain to me
7 what you were explaining about?

8 A Okay, the \$885,000 that they were now requiring us to put
9 in the bank instead of the 632 which was the 75% brought the
10 loan down to a 65% loan They were telling us that we had to
11 take this money and put it into a CD account that Mark was
12 going to establish and that money had to be in that account
13 one hour prior to closing

14 Q The 885 would go into an account there at their
15 bank?

16 A Right

17 Q Okay

18 A Okay, he was going to lend us our own money So, the
19 35% that we were going to have to come up with we were going
20 to have to put it in an account, into a CD account They were
21 going to lend us that 35% back to us, the other 65% was what
22 they were lending us on the land, but if you put the two of
23 those together the amount totaled \$2 530,000

24 Q All right, they have something down here collateral three
25 requirements Do you see that at the bottom of the first

1 page?

2 A Yes I do

3 Q One obviously they wanted a mortgage, they wanted to
4 protect their interest, right?

5 A Yes, sir

6 Q Mortgage being -- well, explain to the jurors what a
7 mortgage against the property means

8 A A mortgage is basically putting a lien on the property
9 that somebody else has financing on You don't have a
10 mortgage if it's paid off

11 Q So, that means if you don't make the payments the bank
12 gets to take the property back, right?

13 A The bank will take the property if you don't make the
14 payments

15 Q All right, then you have this 885 into a CD, a
16 certificate of deposit at the bank, right?

17 A That's what we were going to be required to put in there
18 prior to that one hour closing period on the 31st

19 Q Now, here I see a third requirement that you were going
20 to pay \$211,625 into some money market account and that they
21 would debit you for the monthly payments Now, the monthly
22 payments this was an interest only loan, right?

23 A Yes, sir

24 Q For 12 months you're basically just going to pay interest
25 on the money and then try and pay the whole thing off at the

1 end of the year, right?

2 A The terms of the condition was ---

3 Q Is that ---

4 A Yes, that's correct

5 Q Okay but now they've got 211,625

6 A Yes, sir, \$211,625 in interest they now were requiring us
7 -- that I found out on July the 31st they wanted that money in
8 the bank prior to closing on 7-31, 2006

9 Q So, all your payments up front essentially?

10 A Every bit of the money up front, the 885 that was going
11 to be into the CD and now they also had thrown us a loop for
12 another \$211,625

13 Q All right

14 A Because we assumed that we were making monthly payments
15 because that's what Mark had told me prior to getting this
16 letter

17 Q Okay so, in other words before this, you didn't know
18 about this \$211,000?

19 A There was never any discussion about the \$211 625 except
20 for that would be the interest and that we would be able to
21 make monthly payments on it

22 Q Okay, now, what if any effect did this have on your
23 ability to close on July 31st, that Monday?

24 A I'm going to -- you're going to have to let me tell this,
25 on the, on the 28th when I went out of town, Mark Knight was

1 calling individuals ---

2 Q The lender, right?

3 A Mark Knight of South Coast Bank, the lender, started
4 calling all the people that were in the partnership or the
5 corporation telling them to come in and sign this commitment
6 letter Most of them -- he was calling at five o'clock and he
7 said he had to have this letter sent back to their ---

8 MR ALTMAN Your Honor, I object There's no basis for
9 him saying when the calls were made and what time they were

10 THE COURT I'm going to allow it Go ahead

11 A He, he was calling David Hilleshiem and my son at five
12 o'clock telling them to come in and sign this paperwork or
13 we're not going to be able to close this loan on 7-31 of 2006,
14 and that's -- and then as far as I know everybody went and
15 signed it and there was one individual by the name of Cecil
16 Curtis that was going to be one of the guys that we had talked
17 to about joining the partnership had already previously given
18 Mark all his financial statements, all of his lending
19 information that the bank might need or require and being that
20 he is a lender himself and saw the change in the contract he
21 wouldn't sign the contract on that day because some of the
22 terms had changed He tried to get a hold of me and I arrived
23 back in town on Monday about one o'clock I was at a funeral
24 in Conway One of my friend's sons had passed away over the
25 weekend and we were really close and he was very young, and I

1 went to his funeral, and I got back from Conway about one
2 o'clock, receiving these calls from Cecil Curtis

3 So, I got on the phone, I got on the phone and I called
4 Mark Knight and I said, "Mark what in the heck we got the
5 \$885,000 as we agreed to put in the bank into the CD," I
6 said "But where in the heck did this \$211,625 come from?"
7 He said when he sent the package back to the bank they changed
8 the terms and now they were demanding that we put this
9 \$211,625 in the bank prior to us closing, and when I called
10 him, I said, "Mark " I said, "I will personally guarantee
11 you, you had told me we had monthly payments I will
12 personally guarantee you if I have to go into my savings, my
13 IRA's, anything I got, I will guarantee you this \$211,625 will
14 be in the bank before the first payment was due, but we
15 really, really needed to and wanted to close this loan and we
16 had to do it today because that was part of the contract,"
17 and he told me in no way whatsoever would the bank change
18 that It was now part of the loan commitment and if we didn't
19 have it in the bank that day we would not be able to close and
20 he would not issue us a check

21 Q At this point in time what if anything are you all trying
22 to do to get any extensions to close this transaction?

23 A Like I said, I did call Mark and I know it didn't have
24 anything to do with that I immediately got on the phone I
25 called Georgia Richard who is our agent, told her exactly

1 what was going on I told her to get a hold of the sellers to
2 tell them what was going on We were set to close at four
3 o'clock on Monday afternoon, and I told them, I said "You
4 know, there's no way I can get all these partners back
5 together in a two-hour period and tell them now that they've
6 got to have \$211,625 " I tried to get a hold of Steve Hill
7 He had already been to the bank getting his money the
8 \$885,000, his half of that 885 000 he had to put up Our
9 partnership had to put up the rest Everybody knew that they
10 had to come up with 885 I got a hold of David Hilleshiem and
11 I got a hold of Jeremy but they didn't have \$211,000 that
12 they could get a hold of that day, and I couldn't a hold of
13 Walker Funk, who was the other partner in the partnership,
14 because he works on Hilton Head, and he was on his way back
15 from Hilton Head and I could not get a hold of him So, I
16 called Georgia and I pleaded with her and I told her the
17 situation what I had talked to Mark about and because I knew
18 that they would expect us to close on that day I said
19 "Man, we got to close this thing today," and she said that
20 she would call the seller's realtor and talk to him and tell
21 him about the situation and what was going on and hopefully
22 they would say that we could -- we just asked them for one or
23 two days I said, I said, "If the other partners can't put
24 it together I'll put the money in myself and just give us one
25 or two days We will get this thing closed " And ---

1 Q Did she ever report back to you about any conversation
2 she might have had?

3 A She said that she talked to Mickey several times that day
4 ---

5 MR ALTMAN Your Honor, I'm going to object to this as
6 being hearsay

7 THE COURT I sustain that objection

8 A Georgia ---

9 THE COURT I sustain the objection Ask another
10 question

11 Q All right, who else did you talk to about trying to get
12 any extensions?

13 A I also called our attorney and asked him to talk to the
14 sellers, whoever it be through, and told him the situation and
15 he already knew the situation and he talked to the sellers
16 from what he told me and they ---

17 MR ALTMAN All right, hold on, ask another question

18 Q You can't -- so you talked to Benji Lafond your closing
19 attorney

20 A I talked to my closing attorney

21 Q And you asked him to get you an extension

22 A To try and get us an extension

23 Q All right, don't tell us what he told you in reply okay

24 A Okay

25 Q That's hearsay All right, did you ever get any

1 extension?
2 A They told us they would not give us one more day, not one
3 more day
4 MR ALTMAN Objection
5 THE COURT Who are you talking about told you that?
6 A In the letter that's ---
7 THE COURT Who are you talking about told you that?
8 A Aubrey Wooddy
9 THE COURT Who?
10 MR FUTERAL The Defendant, Your Honor
11 A The Defendant, Aubrey Wooddy
12 THE COURT Told you that?
13 A In -- he wrote it on a paper
14 MR FUTERAL Well, I tell you what I can help the
15 witness and the Court Let me find these exhibits, Your Honor
16 THE COURT Let me make sure I understand So, at
17 this point you're asking for an extension from the seller
18 right?
19 A We, we asked them ---
20 THE COURT Is that, is that right?
21 A Yes, sir
22 THE COURT And the answer was no?
23 A No
24 BY MR FUTERAL
25 Q I'm sorry the answer, you weren't asking for an

1 extension or you were?

2 A We were, we were asking for an extension

3 THE COURT You were asking for an extension and they
4 told you, "No, we're not going to give you an extension"
5 right?

6 A No

7 THE COURT Correct?

8 A Yes, sir

9 MR ALTMAN No objection to these

10 THE COURT All right

11 MR FUTERAL Thank you

12 (Whereupon, Plaintiff's Exhibit Number 14 admitted into
13 evidence and appropriately marked)

14 BY MR FUTERAL

15 Q All right, I am showing you what has been marked as
16 Plaintiff's Exhibit Number 14 I believe?

17 A Yes, sir, it's Number 14

18 Q All right, it's a letter from July 31st, the day of the
19 closing, and who is it from?

20 A This is from Skipper I guess nickname, but it says
21 Aubrey J Wooddy, Jr

22 Q Okay, so, this is one of the members of the selling
23 corporation, the Defendant in this case?

24 A Yes, it is

25 Q Okay, and he's writing to your closing attorney as the

1 buyers of the property correct?

2 A That is correct

3 Q And correct me if I'm wrong, he says, "It is our
4 opinion that your client has defaulted under the terms of the
5 agreement between the parties and we are hereby terminating
6 the agreement"?

7 A Yes, sir, he says he is terminating the agreement

8 Q Okay

9 MR ALTMAN No objection, Your Honor
10 (Whereupon, Plaintiff's Exhibit Number 15 admitted into
11 evidence and appropriately marked)

12 Q And this is Plaintiff's Exhibit Number 15 This is also
13 a letter from the Defendant or one member of it, Mr Woody
14 correct?

15 A Yes, sir, it's Plaintiff's Exhibit Number 15

16 Q Yes and this one is dated the following date one day
17 after the closing Do you see that?

18 A Yes, sir, August the 1st, 2006

19 Q And here it says, "Please enclosed find a check for
20 \$50,000 you delivered from Sheep Island"?

21 A Yes, it is

22 Q All right, did you all try and give them \$50,000 to
23 extend the time?

24 A We tried to ---

25 Q First just ---

- 1 A Yes, yes
- 2 Q Okay
- 3 A We sent a check over for \$50 000 just so we could still
- 4 close
- 5 Q All right, was this part of the other \$50,000 in 30 days
- 6 or ---
- 7 A No, it was not
- 8 Q Why did you do this? Why did you send \$50,000 to the
- 9 Defendant, the sellers?
- 10 A We were desperate We just wanted to close We always
- 11 wanted to close and we were just trying to show good faith
- 12 that we just wanted to close
- 13 Q All right, and he's sending it back right, the 50,000?
- 14 A Yes sir
- 15 Q And in here he writes "The seller has terminated the
- 16 agreement between the parties because of Sheep Island
- 17 Plantation's failure to close in a timely manner"
- 18 A That's correct
- 19 Q That's the reason for why they're terminating it, that
- 20 you did not close by the 31st?
- 21 A That's correct
- 22 Q But would I -- at no time you got 15 extra days out of
- 23 the sellers?
- 24 A No, sir, not even one day
- 25 Q All right so, then Sheep Island filed this lawsuit?

1 A Yes, sir, we filed the lawsuit or started lis pendens
2 the next day because the sellers would not close

3 Q Your contract does it not provide for attorney's fees
4 and costs if you have to file a lawsuit?

5 A Yes, it does

6 Q Okay, let's talk about what losses if any you have
7 sustained and I mean as buyers

8 THE COURT All right, we're stopping

9 MR FUTERAL Okay

10 THE COURT That's a good point to stop

11 MR FUTERAL Thank you, sir

12 THE COURT We'll stop for lunch now Members of the
13 jury panel, I will let you go to lunch Leave your notepads
14 in your jury room, bring them back after lunch Let me tell
15 you something I forgot to tell you earlier You cannot
16 discuss the case even among yourselves during the course of
17 the trial, certainly not to discuss it with anyone else and
18 you're not to discuss it really even amongst yourselves The
19 only time you're to discuss it is at the conclusion of the
20 case when you've heard all the testimony, have a seat when
21 you've heard all the testimony and evidence and you've seen
22 and heard everything, that's when you'll discuss it That's
23 when you'll make a decision about this case So, don't talk
24 about it over the evening recess Don't talk about it during
25 breaks, anything like that I meant to tell you that earlier

1 but I'm telling it to you now Do not discuss the case even
2 among yourselves and certainly not with anyone else while
3 you're on this trial while you're on this jury The only
4 time you're to discuss it again is at the conclusion of the
5 case when you're considering your verdict You can talk about
6 the nice weather, what you did last weekend, what you're going
7 to do next weekend, whatever but don't talk about the case
8 So, with that instruction to you I'll let you go to lunch and
9 I ask you to be back at 2 15 We'll get started just as soon
10 as we can after that 2 15, have a nice lunch

11 A Thank you sir

12 THE COURT Everybody else stay seated

13 (Whereupon the following takes place outside the
14 presence of the jury)

15 THE COURT All right, let's stay in here Everybody
16 stay and keep the door closed for about five minutes and let
17 the jury have the opportunity to get out of the courthouse
18 before you let anybody out that's in here Let them get out
19 of the courthouse We'll be back at 2 15

20 *****OFF THE RECORD*****

21 (On the record)

22 (Whereupon, the following takes place outside the
23 presence of the jury)

24 THE BAILIFF They're all here Your Honor

25 THE COURT All right bring them on in

1 THE BAILIFF Judge it's going to take a few minutes
2 THE COURT All right
3 (Whereupon the following takes place in the presence of
4 the jury)
5 THE COURT All right, we have the jury back with us
6 You may continue to examine the witness
7 BY MR FUTERAL
8 Q Mr Marshall, how long has this lawsuit been going on?
9 A Almost -- since we didn't close, it's getting about a
10 year and a half, getting close to two years
11 Q Okay so, as buyers you all have been dealing with this
12 problem for a year and a half?
13 A A year and a half, yes, sir
14 Q Okay, and you have brought on behalf of the buyer a
15 lawsuit seeking damages in this case?
16 A Yes, we did
17 Q Okay do you know what kind of damages you are seeking?
18 A It's quite a bit We ---
19 THE COURT Money, right?
20 MR FUTERAL Pardon me?
21 THE COURT Money, right?
22 MR FUTERAL Yes, sir
23 A It's money, between seven and \$800,000
24 Q Okay what is that based upon?
25 A Based on the loss of purchase of the property where we

1 had some offers to buy it

2 Q Okay, you have also incurred some attorney's fees and
3 costs in this case?

4 A Yes sir, yes, sir, we've got attorney's fees, the
5 original \$50 000 we put down, the about \$50,000 we spent in
6 engineering fees, the attorney's fees, appraisals and the loss
7 of the valuation of the land that, you know, we never were
8 able to purchase it to sell it or do anything with it that we
9 thought we were going to

10 Q Okay, can you look at Plaintiff's Exhibit Number One,
11 paragraph 22 for me

12 A Number what?

13 Q Paragraph number 22, Plaintiff's Exhibit One which is
14 your ---

15 A Contract?

16 Q --- contract correct

17 A Yes sir

18 Q And your contract provides that if buyer or seller fails
19 to perform you may elect certain remedies including the
20 recovery of your attorney's fees and costs?

21 A Yes, sir

22 MR FUTERAL If I may approach, Your Honor

23 THE COURT Yes

24 MR FUTERAL This is the original copy of this for
25 filing with the court, an affidavit of attorney's fees and

1 costs Your Honor, the copies that I have of what I've
2 provided to the Court I don't have photocopies with the
3 signatures Your Honor has the original

4 (Whereupon, Plaintiff's Exhibit Number 16 marked for
5 identification)

6 BY MR FUTERAL

7 Q Mr Marshall, I just handed you Plaintiff's Exhibit
8 Number 16 I'm going to ask you to ---

9 MR ALTMAN Excuse me, Your Honor I did not realize
10 he was asking him ---

11 THE COURT I can't hear you

12 MR ALTMAN I did not realize he was asking that would
13 be an exhibit I object to it

14 THE COURT Members of the jury panel, I need you to
15 go to the jury room for a few minutes, please, while I discuss
16 this with the lawyers If you would, go to the jury room

17 (Whereupon, the following takes place outside the
18 presence of the jury)

19 THE COURT Well, what is it, so, what is it you're
20 wanting to do Mr Futeral? What are you doing?

21 MR FUTERAL Your Honor, I'll do it any way the Court
22 would like This is the affidavit of attorney's fees

23 THE COURT I'm not going to tell you how to do it

24 MR FUTERAL Yes, sir

25 THE COURT You've got, you've got to do that, but

1 this is an affidavit from you You want to admit this into
2 evidence?

3 MR FUTERAL If possible, Your Honor

4 THE COURT I'm not going to allow that

5 MR FUTERAL Okay, rather than admit it into evidence
6 then if I would be permitted to show it to the witness to see
7 the amount stated of their attorney's fees and costs to date,
8 which I ---

9 THE COURT Well, have you paid your lawyer anything?

10 A Yes, sir

11 THE COURT How much?

12 A About that amount

13 THE COURT Beg your pardon?

14 A About right about that amount

15 THE COURT What amount is that?

16 A I think we're about in the \$30,000 range already I
17 don't think we've paid everything that's still coming
18 We've paid as we went Your Honor

19 THE COURT Do you know how much you've paid?

20 A Close to \$30,000

21 THE COURT Okay

22 MR FUTERAL Your Honor, I guess ---

23 THE COURT Bring the jury back in

24 MR FUTERAL Your Honor, may we approach?

25 THE COURT Yes

1 (Whereupon, the following takes place in the presence of
2 the jury)

3 (Whereupon, be bench conference was held in the presence
4 but out of the hearing of the jury)

5 BY MR FUTERAL

6 Q Mr Marshall, have you incurred attorney's fees and
7 costs for the last year and a half in pursuing this lawsuit or
8 has the buyer?

9 A Yes, we, yes, we have

10 Q Okay, can you tell the jury approximately to date how
11 much you have paid in attorney's fees and costs?

12 A It's right at \$30 000 we've already paid and we still
13 have more

14 Q Okay so, as we speak you're still incurring attorney's
15 fees and costs?

16 A Yes, we are

17 Q Okay you all are paying by the hour for this
18 presentation, correct?

19 A Yes sir

20 Q Okay

21 MR FUTERAL One moment, please, Your Honor

22 Thank you That's all the questions that we have

23 THE COURT Cross examination

24 MR ALTMAN Thank you, Your Honor

25 CROSS EXAMINATION

1 BY MR ALTMAN

2 Q Mr Marshall?

3 A Yes, sir

4 Q I ask you to look at Plaintiff's Exhibit Number One the
5 contract?

6 A Yes, sir

7 Q You signed that contract did you not?

8 A Yes, I did

9 Q Your son signed that contract correct?

10 A Yes, he did

11 Q Did you read it before you signed it?

12 A Yes, we did

13 Q Did you understand what you were signing?

14 A Yes, we did

15 Q Okay you understood the purchase price?

16 A Yes, we did

17 Q You understood what your obligations were correct?

18 A Yes, we did

19 Q Okay, you understood in December of 2005 that you had
20 until the end of July or between July 15th and July 31st to
21 close?

22 A That's correct

23 Q That's about seven months, right, correct?

24 A Yes, sir, that's correct

25 Q So you had seven months to get everything in shape,

1 everything together to close, correct?
2 A That's correct
3 Q That's plenty that should be plenty of time shouldn't
4 it?
5 A It wasn't
6 Q But it should've been, shouldn't it?
7 A I couldn't tell you that It wasn't
8 Q It wasn't?
9 A It was not
10 Q But had plenty of time to do it?
11 A No, we didn't close So, it must not have been enough
12 time
13 Q Must not have been?
14 A Must not have been
15 Q Now, I believe you testified that you did everything the
16 bank asked you to do to get the loan together correct?
17 A Yes we did
18 Q You also testified that you applied to BB&T to give you
19 a loan, correct?
20 A Yes, we did Yes, yes, we did
21 Q And they turned you down initially?
22 A Yes, sir, they did
23 Q Did they tell you why they turned you down?
24 A They didn't turn us down because of our financial money
25 that we had because we had equity and we had money to put

1 down The problem was his concern to make the monthly
2 payments past the time of the -- he had a concern with monthly
3 payments, you know, after the loan took place, if they did an
4 interest only loan, would we be able after we ran out of money
5 to keep being able to make the payments

6 Q That was Mr Byce, correct?

7 A That's correct

8 Q How much of a loan did he say he would consider making
9 you?

10 A We talked about a 75% loan He told us pretty much the
11 same thing Mark ended up telling us at the end, he wouldn't do
12 much more than a 65% loan

13 Q Okay, so, that was in December of 2005 January 2006

14 A It was around January 2006

15 Q 65% loan is the most he would do

16 A He said between 75% and 65 He'd see if he could get
17 more

18 Q He'd see if he could get more

19 A Yes, sir

20 Q And he said that -- who applied for the loan with BB&T?
21 Who was going to BB&T?

22 A Jeremy and I went in there but Jeremy wrote the -- did
23 the application

24 Q And did Jeremy have enough assets to do this loan?

25 A He had enough assets to put the deposits down if we got

1 some equity lines in some of the properties and stuff that he
2 had owned

3 Q That he owned?

4 A That's correct

5 Q And he had 25% of the purchase price to put down?

6 A Yes, he did Yes, he did

7 Q In cash?

8 A If we -- he had cash and he also had equity lines in
9 different pieces of property that he could have gotten the
10 money to do it

11 Q Do you know how much income Jeremy had?

12 A Jeremy himself -- we had sold the business in 2006, 2005
13 and he didn't take a lot of income that year because he offset
14 taking some money Hilleshiem purchasing Mag and Tire we were
15 still waiting on \$200,000 in cash coming in, but they could
16 have paid it to us at any time. He was just waiting on them
17 to pay us whenever he wanted it

18 Q And how much income did your son have in 2005?

19 A In 2005 as an individual he showed \$10,000

20 Q \$10,000?

21 A Right

22 Q And you and your son went in to apply for the loan with
23 BB&T?

24 A We went in together The application was done by him
25 because I didn't go on the loan because I had sold the

1 business and wasn't showing a whole lot of income

2 Q Now, let's look at the contract The contract said you
3 were supposed to apply for a maximum of an 80 percent loan,
4 correct?

5 A That's correct

6 Q And you had 30 days to apply for it and 45 days to get
7 approval

8 A That's correct

9 Q Did you have the approval in 45 days?

10 A No we did not

11 Q Did you notify the seller that you didn't have the
12 approval?

13 A I told our buyer, I mean our agent

14 Q You told your agent that you did not have the approval

15 A Right

16 Q Okay, do you know if any communication was sent to the
17 seller that you did not have your approval?

18 A I would say yes but I can't guarantee it

19 Q Okay, you can't -- you aren't sure that it was
20 communicated?

21 A I don't know what was communicated between the two of
22 them except what she told us

23 Q Then you had 90 days from the date the contract was
24 signed to do your due diligence, correct?

25 A To do -- it was actually 45 days was the end of the due

1 diligence period as far as getting the loan 45 days later we
2 had to write to get due diligence on the property to make sure
3 that it passed and that was 45 days past the other 45 days

4 Q Mr Marshall, I'm going to ask you to look at paragraph 8
5 on page two of the contract It says option to terminate
6 after due diligence Do you see that?

7 A Yes, I do

8 Q And it says, "A, seller grants to buyer a 90-day right,"
9 and in parentheses in quotes, "termination right from the
10 date of this agreement during which buyer may do all, any or
11 all of the following", do you see that?

12 A Yes, I do

13 Q So, it says 90 days from the date of the contract you
14 have to do your due diligence, correct?

15 A It's -- it says, "option to terminate after -- seller
16 grants the buyer termination right," to check out the
17 property and then if we didn't want to buy it at that time to
18 terminate it

19 Q But that was a 90-day period, not a 45

20 A For us to do due diligence as far as checking out the
21 property

22 Q Correct

23 A Correct

24 Q What happened at the end of the 90-day period? Did you
25 terminate the contract?

1 A No, we didn't terminate the contract

2 Q Did you pay -- there was some deposit money, extra
3 deposit money you were to pay Did you pay that over to the
4 seller?

5 A Yes, sir it was paid after the 90-day due diligence
6 period

7 Q And you released the \$10 000 you had already paid,
8 correct?

9 A It was released

10 Q Then when you did that did you say everything was okay
11 with the property? Is that what you were telling us?

12 A Yeah everything seemed to be fine as far as what we
13 checked out on the property, everything looked good

14 Q Okay, did you have your financing committed at that time?

15 A No, we did not

16 Q You did not Did you tell the seller that?

17 A I told my agent who was supposed to tell the seller

18 Q Do you know if she did?

19 A Only what she told me sir

20 Q Do you have any proof, anything in writing that shows
21 whether she told the seller that you did not have your
22 financing?

23 A No, sir, I do not

24 Q Let me ask you to look at paragraph 34 of the contract
25 That's where it says that you have between July 15th and July

1 31st 2006, to close, correct?

2 A Say that again I'm sorry

3 Q You have between July 15th and July 31st, 2006 to close

4 A That's what it says in the contract

5 Q And it says time being of the essence

6 A That's correct

7 Q What did you understand that phrase to mean?

8 A To do it as quickly and as close to that time as you can

9 Q Just as close to that time or does it say you have to do

10 it by that time?

11 A In here it says time is of the essence, whatever that

12 means, that's what it says to me

13 Q That's what it says to you

14 A That's right

15 Q Did you have an attorney look at this contract?

16 A I had Dale E Van Slambrook of the Steinberg Law Firm

17 kind of glance it over before we signed off on it

18 Q You had an attorney look at it Did he tell you there

19 were any problems with the contract?

20 A Didn't see any problems with the contract

21 Q And you signed it, correct?

22 A We signed it

23 Q Nobody forced you to sign, is that correct?

24 A No sir, no, sir

25 Q At any time during -- prior to July 31st or prior to

1 August 1 2006, did you write a letter to the sellers or to
2 anybody saying there was a problem with the financing?

3 A No, I did not

4 Q Did you put anything in writing saying there was a
5 problem with financing?

6 A I thought that's what you just asked me

7 Q Did you say it to anybody? Did you write a letter, put
8 in writing to anybody?

9 A There was nothing in writing that I wrote

10 Q Nothing that you wrote

11 A No, sir

12 Q Did you write a letter to anybody, do you know of anybody
13 that wrote a letter to anybody telling the seller that there
14 was a problem with financing?

15 A To the seller?

16 Q Yes, sir

17 A Not that I know of

18 Q Not that you know of

19 A No sir

20 Q It wasn't conveyed in writing to them that there was a
21 problem with financing, correct?

22 A It was supposed to be conveyed Whether it got conveyed,
23 I don't know

24 Q It wasn't done in writing You've never seen it

25 A No, not in writing that I know of

1 Q Let's talk -- you talked a little bit about 30, request
2 for a 30-day extension Do you remember that?

3 A Yes, I do

4 Q Okay, around July 30th, excuse me, July 10th, 13th of
5 2006, you asked your agent to get a 30-day extension

6 A We asked them would they consider giving us a 30-day
7 extension

8 Q And their response was what?

9 A The -- an e-mail came back of saying that they would give
10 us a 30-day extension for \$50,000 That's it, no dates, no
11 times, no nothing, that's when it started, didn't know when it
12 ended

13 Q How did you respond to that? Did you send a note saying
14 "Here's the \$50,000?"

15 A No, no, we did not

16 Q Did you respond to it at all?

17 A Told our agent that we intended to close on July the
18 31st, but if we needed it then we, we would take it if we
19 needed it

20 Q Did you tell the seller that?

21 A I told my agent

22 Q Okay, I'm going to ask you to look at Exhibit 12

23 A Yes, sir

24 Q Okay, and that's the e-mail where you were notified that
25 the seller was withdrawing the ---

1 A Am I -- 12 under survey?
2 Q No sir Exhibit 12
3 A Oh, Exhibit 12, okay I'm looking at 12 under the ---
4 Q That's fine
5 A You changed on me there Yes, sir
6 Q That's the e-mail you've testified that you were given by
7 your agent, Ms Richard, telling you that the offer for the
8 30-day extension was withdrawn Do you remember that?
9 A Yes, sir
10 Q Okay and I'm going to ask you to look and this is the
11 bottom part of that document which is the e-mail from Mr
12 Rakes to Ms Richard, starts off by saying, "Hi, Georgia "
13 Do you see that?
14 A Yes, sir
15 Q Okay
16 A Yeah, yeah, I've got it right here yeah
17 Q Okay, the third paragraph down starts off, it says
18 "The buyer has not responded in any way to said offer which
19 was made several days ago and we are several months past
20 the," quote, "due diligence", close quote "time frame "
21 Do you see that?
22 A Yes, I do
23 Q Did that raise any questions in your mind that the
24 seller is saying they had not received any response about the
25 offer?

1 A We figured it is in the contract and if they wanted
2 information they could get it from us but the agents knew

3 Q No, sir, listen to my question We're talking here
4 about the offer regarding the 30-day extension

5 A Oh, the offer, okay

6 Q They made an offer, the seller made an offer at your
7 request to allow you to buy a 30-day extension Do you
8 remember that?

9 A Yeah

10 Q Okay, and this is the e-mail withdrawing the offer?

11 A This is correct

12 Q Okay, and you testified that you told your agent to tell
13 the seller that you weren't going to exercise it now, that you
14 wanted, might want to exercise it later, is that correct?

15 A What we told her was and if you'll let me finish talking
16 on this, the contract was very vague It had no time frame on
17 it whatsoever It didn't say you've got to respond by this
18 time It didn't say you've got to respond by that time We
19 didn't know if it started on the last day of the contract if
20 we didn't, but we told her it was acceptable to us if we
21 needed it but we expected to close on time

22 Q Now, this e-mail that we're talking about, Plaintiff's
23 Exhibit Number 12, says, "Hi, Georgia, this e-mail is to
24 confirm our conversation at approximately 2 30 p m this
25 afternoon " it's dated July 20th, do you see that?

1 A Yes sir

2 Q Okay, the next paragraph reads, "As I informed you
3 during our discussion the seller has instructed me to contact
4 and inform you that they immediately withdraw their offer" to
5 your purchaser allowing them to buy an extension of time to
6 close on the subject property" do you see that?

7 A Yes, I do

8 Q The next paragraph reads, "The buyer has not responded
9 in any way " Did you not respond to the offer for the
10 extension?

11 A I told George exactly what I just told you

12 Q You told Georgia that you might want to take it at the
13 end?

14 A We told her that, that at the end of the -- we didn't --
15 it was so vague in the contract we told her -- we were
16 assuming that when they waited, they put it at the end of the
17 31 days I mean at the end of 7-31 that that would give us an
18 extra 30 days, and we told her if we needed it we'd accept it
19 but we did not think we were going to need it

20 Q Well when you saw, you saw this e-mail, Ms Richard
21 gave you this e-mail, did she not?

22 A That's correct

23 Q And it said there had been no response, do you see that?

24 A That's what it's saying

25 Q What was your reaction?

1 A I was kind of -- I didn't understand why they said that
2 So, I made a call to Mickey Rakes

3 Q You made a call to Mickey Rakes

4 A Right, asked him what was going on with the contract
5 because I -- we were under the assumption that this is what
6 was told to them

7 Q Had you ever accepted, sent a note, an e-mail, anything
8 to the seller saying you accepted his offer or their offer for
9 the 30-day extension?

10 A I haven't, I haven't done anything, anything we were to
11 do was through the agent because Mickey Rakes flat out told me
12 do not talk to him talk through my agent

13 Q You didn't send anything in writing or your agent didn't
14 send anything in writing to the seller saying that you wanted
15 to accept the offer, did you?

16 A Not that, not, not that I know of

17 Q Not that you know of What was the reason you asked for
18 the 30-day extension?

19 A The change in the water, the direction water was going
20 to flow

21 Q That was a problem for you, right?

22 A Well, it was going change how much money we had to put
23 down at closing between the 65 and the 75% loan

24 Q So, you knew that was an issue by July 20th or actually
25 by July 10th, the 13th, you knew that you might have to come

1 up with 35% rather than 25% right?

2 A It was certainly we were still talking with Mark about
3 It wasn't a firm decision yet, but we were still trying to
4 figure out what are we going to do it as a raw land or do it
5 that way, but it didn't look like we were going to -- we were
6 going to probably have to go 65%

7 Q So, you needed another \$250,000, another ten percent?

8 A \$253,000, yes, sir

9 Q Did you make arrangements to get that \$250 000?

10 A Yes, sir, we were making arrangements to get the
11 \$253,000

12 Q Who was going to come up with the 250?

13 A Steve Hill and all the -- well, after we got Steve Hill
14 involved, Steve Hill, Walker, Jeremy, Dave

15 Q When did you get Mr Hill involved?

16 A It was somewhere between June -- we talked to him in
17 June He came in between June and July somewhere around
18 there

19 Q Somewhere between June and July

20 A Yeah

21 Q Was it, in fact, the Wednesday before that he took his
22 information to the bank?

23 A We talked -- me and Mr Hill talked in June

24 Q But was it, in fact, it was July 26th when he took his
25 information to the bank?

1 A Sir, I have no idea because I didn't go with him
2 Q You didn't go with him
3 A No, I did not
4 Q Did you ask him if he had taken his information to the
5 bank before that?
6 A He told me he took the information to the bank
7 Q When did he tell you that? -
8 A He -- I don't know the exact date, but I know that he
9 told me he took the information to the bank
10 Q But you don't know when
11 A No, I do not know when, sir
12 Q When you spoke to Mr Knight, the bank loan officer ---
13 A Yes, sir
14 Q --- on July 27th ---
15 A Yes, sir
16 Q --- he told you the loan would be 65%, didn't he?
17 A He told me to expect, he didn't think any different but
18 he was, we were both expecting to have to come up with
19 \$885,000
20 Q \$885,000?
21 A Yes, sir
22 Q Whose idea was it to come up with the interest carry for
23 a year, the interest payments for a year, to put the deposit?
24 A Well, I knew you were going to ask me this Originally
25 when we applied for the loan and we were expecting to get a

1 75% loan it's something we mentioned to Mark, but no more was
2 ever said about it whatsoever because he said he didn't think
3 we were going to have to do it that way He just, you know,
4 thought that the process was going to go through, but I mean,
5 at that time, the 75% loan we could have come up with the
6 difference for the interest carry We just -- when it changed
7 to a million dollars we weren't going to be able to

8 Q So, it was your idea to come up with the interest carry?

9 A It was something we discussed early in January of 2006

10 Q When you were talking to BB&T they were talking about a
11 65% loan if they could have made it, correct?

12 A Correct

13 Q When did Mr Knight tell you for the first that it might
14 only be a 65% loan?

15 A It really started to factor in sometime about that water
16 and sewer time when we started talking about how we were going
17 to use the property

18 Q He didn't tell you in the beginning when you first
19 started talking to them that if it was raw land it would only
20 be a 65% loan?

21 A No, sir, the application was filled out as a 75% loan
22 That's what we talked about

23 Q I understand that's what you asked for That's not my
24 question to you My question is did Mr Knight tell you that
25 it might only be a 65% loan if it was raw land?

1 A Yeah, yes, he did

2 Q In the very beginning?

3 A He said it -- there's two ways you can go If it's a raw
4 land it could be 65% If it -- if you go the other way it
5 could be 75% It's just a matter of how we ended up doing the
6 land

7 Q But that was from the very beginning So, you knew that
8 back in January, February?

9 A No, because we didn't -- well, we knew that that was a
10 possibility, but it wasn't something that he said was firm
11 because we didn't know which way we were going with the land
12 He would have did 75% if we ended up making lots

13 Q So, you knew it might be 75 and it might be 65

14 A Correct

15 Q And you suggested the possibility coming up with the
16 interest carry, the interest payments for the year be
17 deposited

18 A When we very first talked about doing a loan I told him
19 what had happened with BB&T and I told him that they said 75
20 to 65, pretty much the same thing, how they did raw land, but
21 he said ``Your financial strength makes a difference in what
22 they actually will do for you If you're financially stronger
23 they'll lend you a little more If you're not financially
24 strong, they're going to lend you a little less ''

25 Q There's no question on the 27th when you were leaving

1 town, July 27th, you knew it was 65%?

2 A I knew I was -- yes sir, I knew it was 65%, that we were
3 going to have put in \$885,000 into an account that he was
4 going to open up

5 Q And you -- did you tell him at that time, "If you're
6 going to make me come up with 885, \$885,000 I'm not going to
7 be able to come up with the interest carry?"

8 A There was never no discussion after the first time about
9 interest carry ever We were assuming we were going to make
10 monthly payments and that's what we had talked about doing

11 Q When you were in his office, his being Mark Knight's
12 office on July 27th, did you ask him where the commitment
13 letter was?

14 A I didn't go into the office I called him on the phone

15 Q You called him on the phone

16 A Yeah

17 Q Did you ask him where the commitment letter was?

18 A Mark had always told us that he was going to be able to
19 get this loan done He just had to push it a little faster
20 than other ones He was doing everything he could do to get
21 this thing closed and we were trying to supply him everything
22 he needed to get the loan closed

23 Q My question to you, sir, again ---

24 A No sir, I did not see it

25 Q Did you ask him for the commitment letter?

1 A No, sir

2 Q Okay, you were on the 27th of July, 2006, which was a
3 Thursday, correct?

4 A Yes, sir, that was a Thursday

5 Q Okay, closing, the last day to close this loan, this
6 purchase was Monday the 31st, correct?

7 A Yes, sir, that's correct

8 Q And you did not have a commitment for the loan, did you?

9 A I have verbal commitment that he was going to get the
10 loan closed, nothing in writing

11 Q You didn't have anything in writing, you didn't know what
12 the exact terms were going to be, did you?

13 A The terms he said were going to be the same that we'd
14 always talked about, a one percent origination fee, he was
15 going to do interest, interest for 12 months with an option of
16 an additional six months, we'd have to pay them some extra
17 money to get that optional six months There was never no
18 discussion whether it was going to be interest up front,
19 after, after the initial talk We were, we were talking about
20 doing monthly payments and with the \$50,000 we put down we
21 figured we already had all the closing costs carried, covered

22 Q And after you had got off the phone with Mr Knight on
23 the 27th of July ---

24 A Yes, sir

25 Q --- when you got off the phone with Mr Knight, what time

1 of day was that phone call?

2 A It was probably about 3 30, four o'clock in the
3 afternoon

4 Q What did you do after you got off the phone with Mr
5 Knight?

6 A I contacted all the partners, told them to expect to have
7 to come up with their equal share of what they were going to
8 have to use to close \$885,000

9 Q Did you talk to everybody?

10 A I talked to everybody that was in the room

11 Q Okay, who did you talk to?

12 A I talked to Steve Hill, talked to David Hilleshiem and
13 Jeremy knew and Walker Funk

14 Q Okay, did you talk to John Bordine?

15 A I talked to John Bordine, who was supposed to already be
16 putting money into the account and he was going to be a
17 partner prior to us talking to Steve Hill but they never put
18 any money in the account So, we started talking to Steve
19 Hill who we actually brought on as a partner and once we
20 brought Steve Hill into the partnership Mark Knight said we
21 didn't need anybody else He said Steve Hill was all we
22 needed He had -- he was financially strong enough to do it
23 with even out us We -- he didn't even need us

24 Q Did you call Mr Bordine and tell him to get his money
25 together?

1 A Yeah

2 Q You did?

3 A Yeah

4 Q Did you call Mr Curtis? Did you call Mr Curtis, Cecil

5 Curtis?

6 A This -- on the 27th?

7 Q Yes, sir

8 A Oh, this was prior to the 27th I didn't talk to them on

9 the 27th, but they knew they were supposed to be putting money

10 in the account They told us they were going to come up with

11 3, \$400,000 originally and that never happened

12 Q Did you call Mr Curtis and Mr Bordine and tell them

13 that they needed to come up with their share of \$885,000 on

14 July 27th?

15 A On the 27th?

16 Q Yes, sir

17 A Yeah, they already knew what they had to come up

18 Q How did they know they had to come up with their share of

19 \$885,000 before the 27th?

20 A Because we had talked about it before what they were

21 going to have to come up They were going to put \$400,000 in

22 the account to start off with That would have been plenty

23 enough to cover

24 Q You called Mr Hill on the 27th, correct?

25 A I'm pretty sure I talked to Mr Hill on the 27th

- 1 Q You talked to Mr Funk on the 27th?
- 2 A Yes, I talked to Walker Funk on the 27th
- 3 Q You talked to Jeremy Marshall on the 27th?
- 4 A Yes, sir I talked to him every day
- 5 Q Talk to him every day Talk to Mr Hilleshiem on the
- 6 27th?
- 7 A Yes, I did
- 8 Q You told them what share they were going to have to come
- 9 up with?
- 10 A Yes, I did
- 11 Q Why were you going to let Mr Curtis and Mr Bordine come
- 12 up with more money than their share?
- 13 A They were, they were originally supposed to put that much
- 14 money in an account prior to us even talking to Mr Hill
- 15 They never came up with any money So, we were already
- 16 looking at not using them That's when we talked to Steve
- 17 Hill because somebody told me that we needed to go talk to
- 18 Steve Hill, he'd probably be a good guy to talk to to bring
- 19 into the partnership and if he wanted to
- 20 Q And when was that that you talked to Mr Hill?
- 21 A That was between June and July
- 22 Q Between June and July
- 23 A Right
- 24 Q When did you tell Mr Bordine and Mr Curtis that they
- 25 needed to come up with the 3 to \$400,000?

1 A That was in -- well, they were saying that they were
2 going to put some money in the account and they said, "How
3 much would -- should we expect to put in here?" I said,
4 "Between" -- they were talking about \$200,000 a piece
5 Q \$200,000 a piece?
6 A Right
7 Q And when did you tell them that? When did you talk about
8 that?
9 A That was probably around June
10 Q Probably around June
11 A Yeah uh-huh
12 Q Did you call them back at any time and say "You don't
13 need \$200,000 a piece?"
14 A They never put any money in the account
15 Q No, sir, did you call Mr Bordine or Mr Curtis back and
16 say, "You don't need to come up with the \$200,000 a piece
17 because we have Mr Hill coming in and you need less money?"
18 A No, I didn't tell them that
19 Q You ever told them that
20 A Huh-uh, we were expecting them to put their money in
21 Q You were expecting them to put their money in but you ---
22 A And brought in Steve Hill, yeah
23 Q Mr Hilleshiem knew how much money he was going to have
24 to put in Why did you tell him how much money -- he didn't
25 have to put, come up with that much money because Mr Hill was

1 a partner?

2 A Okay, you're going to have to say that again real slow

3 You're losing me

4 Q Okay, you called Mr Hill and told him how much money

5 based on your conversation with Mr Knight correct?

6 A Yes, sir

7 Q And you called Mr Hilleshiem and told ---

8 A Mr Hilleshiem we work in the same place I didn't have

9 to call

10 Q Fine, you got to talk to him

11 A Yeah, we talked

12 Q You talked and you told your son

13 A Yes sir

14 Q And you got a hold of Mr Funk

15 A Yes, sir we did

16 Q Because they needed less money because Mr Hill was

17 coming into the picture right?

18 A No, Mr Hill was already in the picture

19 Q But that was after you had talked to Mr Curtis and Mr

20 Bordine

21 A Correct We first talked to Mr Bordine and Mr Curtis

22 through a friend of ours that came into the shop and what he

23 wanted to do was he wanted to become a partner because they

24 wanted to do development on the property because they were in

25 the modular home business and they wanted to get in and then

1 they also did financing He said they did financing up to a
2 hundred percent on lots That's why they wanted to get in,
3 but when it came time to put money up we didn't see anything

4 Q When did you call Mr Bordine and Mr Curtis to tell them
5 exactly how much money they needed?

6 A All I'm telling you is they were supposed to put that
7 money in It never came in So, I mean, I told -- I asked
8 them where their money was and they said it was coming but it
9 never came

10 Q Did there come a time when you told Mr Curtis and Mr
11 Bordine or when you decided that the two of them would not be
12 partners or members of the limited liability?

13 A On July the 31st

14 Q July 31st, did you get on the phone and call them and
15 say, "You're not here anymore?"

16 A When I got back on July the 31st after I had been out of
17 town to Conway on the death, when I got back one of the
18 persons that wasn't -- went in to talk to them about the
19 contract, putting money in there to start off with, he came in
20 and he had a copy of actually the commitment letter He
21 didn't like the terms of the commitment letter and he stopped
22 He said, "I'm carrying this to my attorney because something
23 has changed in what they told us originally "

24 Q And that was -- who was that?

25 A Cecil Curtis

1 Q Cecil Curtis Did Mr Bordine or Mr Bordine ---
2 A I never saw Mr Bordine but one time He was a friend of
3 Mr Cecil Curtis
4 Q Did he sign the commitment letter?
5 A He did
6 Q Did he call you and say that there had been any changes?
7 A Just Cecil Curtis
8 Q Okay, how about Mr Hill, did he sign the commitment
9 letter?
10 A I know that they said he did I mean, I don't know if
11 this is the original but I thought he did
12 Q Okay, you're looking at Exhibit 13 and I'm going to ask
13 you to look at the fifth page
14 A Yeah, I'm looking at something different Hold on a
15 second
16 Q No, sir, I think you're looking at the contract
17 A I think I'm looking at something wrong here
18 Q We're looking at Exhibit 12 sir
19 A Okay, that's one That's why I'm in the wrong one
20 Exhibit 12?
21 Q Yes, sir
22 A Exhibit 12 is --
23 Q No, excuse me, Exhibit 13, I'm sorry
24 A Okay, Exhibit 12 was Georgia Richard s e-mail
25 Q Exhibit 13 is the commitment letter

- 1 A On this piece it's not signed
- 2 Q If you'll look on page five, the fifth page of the
3 exhibit
- 4 A One, two, three four -- there's something signed by
5 Steve Hill
- 6 Q Okay, do you see his signature twice once on behalf of
7 ---
- 8 A Yeah, guarantor and on the Sheep Island Plantation
- 9 Q Okay
- 10 A Yes sir
- 11 Q And do you see where Mr Jeremy Marshall signed?
- 12 A Yes, sir, as a guarantor
- 13 Q And as a member of the limited liability company?
- 14 A Yes, I do
- 15 Q Okay, and you see where Mr Hilleshiem signed?
- 16 A Yes, I do
- 17 Q Well, two times?
- 18 A Yes, sir
- 19 Q And do you see -- if you'll go backwards a page to the
20 fourth page do you see where Mr Funk signed?
- 21 A Yes, sir I do
- 22 Q Okay, on that same page do you see where Mr Bordine or
23 Mr Bordine signed?
- 24 A On the same page?
- 25 Q Yes, sir

1 A I saw where Mr Bordine did

2 Q Okay, did any of them call you and say, "There's been a
3 change in the terms? We've got a problem?"

4 A Cecil Curtis did on the 31st

5 Q Anybody other than Mr Curtis?

6 A No, nobody else called and told me anything

7 Q Did your son know how to get hold of you in Conway on the
8 28th or 29th?

9 A Did he know how to get a hold of me?

10 Q Yes, sir

11 A Yes sir, he would have known how to get hold of me

12 Q You have a mobile phone?

13 A I got a mobile phone, yes, sir

14 Q Did your son call you and say "Dad, we've got this
15 commitment letter and it doesn't say what you told us?"

16 A What, what Jeremy told me if I'm allowed to say that,
17 okay what Jeremy told me that if ---

18 Q Listen to my question Did your son call you and tell
19 you that the commitment letter was different than what you
20 told him it was going to be?

21 A No, sir, he just called and told me they signed the
22 commitment letter

23 Q Didn't say there was anything wrong with it

24 A He said he never saw it but the page that Mark told him
25 to sign

1 Q Never read it?

2 A He just -- Mark said he had to have it at -- back at the
3 office that day or we weren't going to close on Monday So,
4 he called and I'm going by what they told me, Dave Hilleshiem
5 and Jeremy had told them to come in and sign it and whoever
6 else he called and they all came in and signed it but he
7 didn't even give any of them a copy from what I understand

8 Q Do you know if they read it?

9 A Sir, I wasn't there So, I don't know

10 Q But they signed it and they agreed to it

11 A From what I, from what I understand those are their
12 signatures

13 Q And you were going to be the manager of the limited
14 liability company, is that correct?

15 A Dave was the president I was just helping with it

16 Q You were helping them with it

17 A Right, uh-huh

18 Q And you were going to be a one percent member, is that
19 correct?

20 A That's correct

21 Q Okay, do you know what an operating agreement is?

22 A Yes, I do

23 Q What is an operating agreement?

24 A It's what, what you use to go with -- basically what
25 your, what your jobs and duties are going to be with that

1 corporation

2 Q Is it the agreement between the members of the limited
3 liability company?

4 A Yes, I guess it is

5 Q Was there ever an operating agreement executed?

6 A As far as I know there was

7 Q As far as you know there was

8 A Yeah

9 Q Everybody signed it?

10 A I think the ones that were -- the final ones in the
11 partnership did sign it

12 Q Did you -- you signed it?

13 A I think -- I'm pretty sure I signed it, but I'm not
14 positive I'm not sure

15 Q Mr Marshall, I've handed you a document Have you ever
16 seen that before?

17 A I don't remember seeing it

18 Q You don't remember seeing it It's called an operating
19 agreement, Sheep Island Plantation, LLC

20 A That's correct

21 Q Isn't that something you gave the bank?

22 A I didn't give it to the bank

23 Q You didn't give it to the bank

24 A I personally didn't give it to the bank

25 MR ALTMAN Then, Your Honor, I won't -- not ask it be

1 entered at this time ---
2 THE COURT All right
3 MR ALTMAN --- because I need to get it identified by
4 someone else
5 THE COURT Do you want to get it back so it won't get
6 mixed up?
7 MR ALTMAN Yes sir
8 BY MR ALTMAN
9 Q Mr Marshall, did you ever write a letter to Mr Knight
10 the bank loan officer, around August 2nd 2006?
11 A Yeah, that's correct
12 Q You remember writing that letter?
13 A Yes, sir
14 Q Why did you write him a letter?
15 A Mark had been calling me from -- after, right after the
16 time we were supposed to close wanting to know what was going
17 on, were we still going to close you know, just basic
18 questions That I wrote it to him to tell him what, what was
19 all involved
20 Q Let me ask if you recognize that letter
21 A Yes, sir, I've already seen this
22 Q You've seen that letter?
23 A Yes, sir
24 Q That's the letter you wrote to Mr Knight?
25 A That's correct

1 Q It starts off by saying, "Hello Mark, here's what we --
2 here's what we're going -- here is what is going on so you
3 know As you know, we were awaiting for the funds to be
4 transferred from Tex (Cecil O Curtis) and John Bordine on
5 July 31st, 2006 Everyone, everybody else's money was here
6 and available "

7 A That's correct

8 Q So, you had all the money except for that money

9 A That's correct

10 Q On the 31st

11 A That's correct

12 Q So, you're going forward on the 31st if it wasn't for
13 two of your partners

14 A The \$211,625 we didn't have

15 Q You said Mr Curtis and Mr Bordine were supposed to
16 come up with \$200,000 a piece

17 A They were

18 Q They didn't come up with it?

19 A That's right

20 Q You also testified that on the 31st you decided those
21 two would not be members, correct?

22 A When they didn't put their money in we weren't going to
23 use them anymore

24 Q If they didn't put their money they weren't going to use
25 them

1 A That's right Would you?

2 Q But you're saying that's the reason you couldn't close
3 right?

4 A That's not the reason we couldn't close The reason we
5 couldn't close was they -- nobody told us about the \$211 625
6 being interest only that was going to be due that day

7 Q Mr Marshall, your letter was August 2nd to Mark Knight

8 A That's correct

9 Q The first sentence, second sentence, ``As you know, we
10 were awaiting on the funds to be transferred from Tex (Cecil
11 O Curtis) and John Bordine on July -- on 7-31-2006
12 Everybody else's money was here and available ''

13 A Right

14 Q So, if you would have had Mr Curtis and Mr Bordine or
15 Mr Bordine's money you could have closed, correct?

16 A If we could -- had it but we didn't have it

17 MR FUTERAL Your Honor, pardon me, Your Honor, I
18 object Counsel is reading from the letter I would ask the
19 Court, please, to allow the witness to read the entire letter

20 ---

21 THE COURT He can do that He can do that But he's
22 asked a question I think he's entitled to ask the question
23 that he was asking Go ahead

24 A If they had put the money in there we could have closed
25 They did not put the money in

1 Q So, you couldn't close because they didn't come up with
2 their money

3 A That's correct

4 Q That's the problem

5 A That's part of the problem because we would have had the
6 \$211,625 to pay the interest

7 Q Did you get on the phone on the 31st and call Mr Curtis
8 or Mr Bordine and say, "Where is your money?"

9 A I talked to Mr Curtis on the 31st and he's the one that
10 brought up the subject that the contract had changed and he
11 said they were awaiting their money, it never happened

12 Q They being he and Mr Bordine?

13 A Yeah, I only met Mr Bordine one time He was a friend
14 of Cecil Curtis's

15 Q Okay, it says, "We knew without their money we would
16 not have the funds to close " Do you see where it says that?

17 A All right let me go back and read this We would not
18 have their money -- let me see, "We knew without their money
19 we would not have the funds to close on that day "

20 Q So, people you had been relying on didn't come up with
21 their share of the money and that's why you couldn't close,
22 isn't it?

23 A No, sir, the reason we couldn't close we did not know
24 about the \$211,625 We already anted up the difference

25 Q We being who?

1 A The partners that were in there Steve Hill -- well
2 they were going to, Steve Hill, Jeremy Marshall, David
3 Hilleshiem and Walker Funk

4 Q But until -- as of the 31st Mr Curtis and Mr Bordine
5 were still supposed to be your partners, correct?

6 A They were going to be partners

7 Q If they had come up with their money you could have
8 closed

9 A If they had come up with their money we probably could
10 have closed

11 Q Probably or absolutely?

12 A If it got there in time we probably could have closed

13 Q They were supposed to come up with \$200,000 a piece?

14 A Yeah that's correct

15 Q That's \$400,000?

16 A Yes, sir

17 Q You had the \$885,000 from the others?

18 A We would have had the \$855,000

19 Q Would have?

20 A We didn't -- well, it would have been deposited in the
21 account

22 Q You would have had but you didn't have?

23 A Every partner had their money that said they would have
24 it to deposit in the account

25 Q Did you see it?

- 1 A I know Jeremy had his money
- 2 Q Did you see the others having their money?
- 3 A I know that Walker Funk had his money in the account
- 4 Q Did you see them?
- 5 A The money?
- 6 Q The money or cashier's ---
- 7 A I saw the bank, I saw where he deposited it in the bank
- 8 Q You saw where he -- how much did he ---
- 9 A Walker Funk
- 10 Q How much did he deposit?
- 11 A I think it was about 115, \$120,000, but he was bringing
- 12 the rest of the money
- 13 Q Did you see it?
- 14 A I didn't personally see it
- 15 Q Did you see Mr Hill's money?
- 16 A No, sir, but if Mr Hill's -- no, sir, I did not see the
- 17 money
- 18 Q Didn't see the money I'm going to ask you to go down
- 19 toward the bottom of that letter where it says, "When we saw
- 20 the funds would not be there we carried a check to the
- 21 property owner in the amount of \$50,000 hopefully so they
- 22 would honor their e-mail granting us a 30-day extension for
- 23 the additional \$50,000 " Do you see that?
- 24 A Yes, sir
- 25 Q That's the 30-day extension offer that had been

1 withdrawn?

2 A Yes, sir

3 Q You knew it was withdrawn?

4 A Yes, sir

5 Q You were making an offer to buy another 30-day

6 extension?

7 A No sir, we were just making a desperate move to say,

8 ``Hey we still want to close and this is what we're doing to

9 show you we want to close ''

10 Q Did you explain to the seller why you were sending the

11 \$50,000?

12 A I told, I told Benji Lafond

13 Q Did you see a letter going to the seller saying ``We

14 need more time because, '' and give you a -- give a reason?

15 A I never saw a letter

16 Q You never saw a letter?

17 A Huh-uh

18 Q The check that you sent with it, did you write it?

19 A The check was written originally when, when they first

20 made the offer, and we never took it out of the checkbook

21 because after we talked to Steve Hill and some other guys like

22 that, we thought that \$50 000 to get a 30-day extension was a

23 little bit crazy because we always planned on closing on time

24 Q So, you didn't accept the offer? So, there's no offer

25 on the table It's been withdrawn

1 A That's correct

2 Q And you're making a new offer, correct?

3 A We're just trying to show them that we want to close,
4 which is the last thing said in this thing, too

5 Q Did you explain to the seller what the problem was?

6 A I explained to Benji Lafond and he's supposed to transmit
7 that to the seller

8 Q Did you see any letter, anything going to the seller
9 saying we need extra time and give an explanation as to why?

10 A Personally I did not see it

11 Q Has anybody ever showed you such a letter since this
12 case began?

13 A A letter?

14 Q Any written document giving an explanation to the
15 seller?

16 A I haven't actually seen anything in writing, no, sir

17 Q When you sent -- when you wrote the \$50 000 check ---

18 A Yes, sir

19 Q --- was the money was there \$50,000 in your bank
20 account?

21 A Yes, sir

22 Q You're sure about that?

23 A Pretty sure there was

24 Q Pretty sure?

25 A I wouldn't have wrote a check if it wasn't

1 Q Was there \$50 000 in the checking account on July 30th,
2 2006?

3 A Yes, there was

4 Q You're sure about that?

5 A Yes, unless we withdrew it out I mean, we withdrew it
6 out after one person wanted to withdraw their money out,
7 Walker Funk

8 Q I'm asking you if on July 30th, the date the check is
9 dated, if there was \$30,000 in the account

10 A 30 or 50?

11 Q 50, excuse me

12 A As far as I knew there was, but the money was in there
13 that day it may have got withdrawn that day when we found out
14 we were not going to close

15 Q Do you know what day of the week July 30th was?

16 A Oh, July the 30th I'm thinking the 31st No, it
17 wasn't in there on July the 31st You are right I'm wrong
18 I'm sorry I'm still thinking the 31st

19 Q Is that a bank statement from your -- from Sheep Island
20 Plantation, LLC's, bank account at South Coast Community Bank?

21 A Yes, sir it looks like it is

22 Q Okay, it shows that you opened the account on April 10th
23 2006, is that correct?

24 A On April 10, yes, sir

25 Q Is there a date, anything showing a date of July 30th,

1 2006?

2 A No, sir, there's not the 30th, no, sir, you're right

3 Q Okay, on July 10th, there's a balance of \$1,785 25,
4 correct?

5 A That's correct

6 Q The next entry is July 31st

7 A Yes, sir

8 Q And that was a deposit of \$115,000?

9 A That's correct

10 Q And that was Mr Funk's deposit for the closing, right?

11 A Yeah, that was part of his deposit for the closing

12 Q And that was not money that was supposed to be paid to
13 buy an extension, was it?

14 A No but I mean, if we needed to send it I would have put
15 it back in there that day if they accepted it

16 Q You had cash, you had cash available?

17 A Yeah I have cash available

18 Q You had cash, is that what you testified to in your
19 deposition, sir?

20 A I said I got cash available in different places, but
21 I've got to move it around, but I could put it in there

22 Q That day, you just needed that one -- you could pull it
23 out the 31st

24 A It might have -- I could have had it in there within a
25 day or two That's what I told you

- 1 Q You could have had it in there within a day or two
- 2 A Right
- 3 Q And you had the check delivered to \$50 000 check
- 4 delivered to the seller on August 1st correct?
- 5 A We gave it -- Dave Hilleshiem had it on 7-31 He took
- 6 it to Benji on 7-31 On 7-31 there was \$116 000 in this
- 7 account
- 8 Q And that was money that was for the closing, not for
- 9 not to buy an extension of time, correct?
- 10 A It was in there for whatever we needed it for I would
- 11 have replaced it as soon as we got -- if they took the check
- 12 Q At any time between, starting with July 31st, at anytime
- 13 July 31st did you convey a message to the sellers saying
- 14 you're entitled to a 15-day extension of time?
- 15 A I told, I told the people, Benji and me and Dave had
- 16 talked about it and we, we went right over to the Futeral Law
- 17 Firm and we started legal process when they refused to close
- 18 Q I'm sorry, the legal process on the 31st?
- 19 A I talked to them on the 1st
- 20 Q You talked to them on the 1st?
- 21 A Right, when they refused to close
- 22 Q Did you send a message to the seller saying what the
- 23 problem was and you were entitled to a 15-day extension
- 24 pursuant to paragraph 33 of the contract?
- 25 A All I told was the attorney

1 Q Have you seen anything in writing where that message was
2 conveyed to the seller?

3 A I think you've asked me this before and said I haven't
4 seen anything in writing other than what they say they said

5 Q Between August 1st, 2006 and August 15th, 2006, did you
6 notify the seller or anybody on your behalf notify the seller
7 that you were ready to close within that 15-day time period
8 that you say you had in paragraph 33?

9 A All I know is they wouldn't close

10 Q Did you notify the seller that you were ready to close
11 between August 1st and August 15th?

12 A We -- Benji Lafond relayed that message What he says
13 I mean I don't know if I'm supposed to be saying that or
14 not, but it was relayed to the seller, to the sellers

15 Q Show me the writing where it was relayed

16 A It wasn't in writing

17 Q Did you hear Mr Lafond tell the sellers?

18 A That's what I just said I, I can't -- no I did not
19 hear it

20 Q Were you involved in the conversation?

21 A I told Mr Lafond and I told Georgia Richard

22 Q But you didn't hear anybody convey that to the seller,
23 did you?

24 A I wasn't there when they talked to them, sir I don't
25 know

1 Q You don't know

2 A I mean, I don't -- I can't tell you if I'm not there

3 Q You don't know that anybody told the seller that it was
4 financing problems?

5 MR FUTERAL Your Honor ---

6 A You're asking me ---

7 MR FUTERAL --- pardon, Mr Marshall Your Honor, I
8 object I think this has been asked and answered many, many
9 times

10 THE COURT Ask another question

11 MR ALTMAN Yes, sir

12 Actually, Your Honor I have nothing further at this
13 point

14 THE COURT All right, anything on redirect?

15 MR FUTERAL Yes sir, please

16 REDIRECT EXAMINATION

17 BY MR FUTERAL

18 Q Mr Marshall you were asked some questions by
19 Mr Altman, counsel for the seller, questions regarding
20 whether you notified anybody that you did not obtain I
21 guess a loan approved within the 45 days from the contract
22 date and you did not Sheep Island did not tell the sellers
23 that, correct?

24 A No we did not

25 Q And would you look at Plaintiff's Exhibit Number One,

1 paragraph 6, if you will look Do you see what it says
2 there?

3 A Under what part of it?

4 Q Paragraph 6, if you will look up on the screen?

5 A Okay

6 Q And in your document, did you have an understanding
7 whether the sellers themselves could simply go to the bank
8 and ask the bank any question about this loan process that
9 they wanted to at any time?

10 A I can read that to you

11 Q You don't have to read it

12 A Okay

13 Q Is that your understanding of the contract?

14 A The buyers could, I mean, the sellers could ---

15 Q Yes or no

16 A Yes yes

17 Q Yes or no

18 A Yes

19 Q I'm not trying to beat up on you I just -- we're just
20 getting to the heart of it here

21 A Yes

22 Q Okay, so, they could go to the bank anytime they wanted
23 to and ask them what's up with the loan, what's up with their
24 financing?

25 A Yes, they could have

- 1 Q Okay and you gave them that right to do so
- 2 A Yes, sir, we did
- 3 Q Okay do you know whether they ever actually bothered to
- 4 exercise that right at all?
- 5 A As far as I understand no
- 6 Q Okay, and if I understand correctly the agreement
- 7 required -- no, wrong one The agreement itself required you
- 8 all to deliver, you the buyers, deliver to the sellers this
- 9 loan approval You had to actually give it to them, right?
- 10 A Yes, sir
- 11 Q Okay, but as we all know, you all didn't do that
- 12 A Yes, sir
- 13 Q Okay and I just want to make sure that I understand
- 14 To your knowledge did they ever exercise the option to
- 15 terminate the agreement when you didn't give them the loan
- 16 approval within 45 days? Did they ever give you written
- 17 notice that they were terminating for this reason?
- 18 A No, sir, they never gave us any kind of notice, written
- 19 or verbal or anything
- 20 Q Okay, not even after you gave them the \$50,000 and all
- 21 of that?
- 22 A Not even after ---
- 23 Q Okay
- 24 A --- we gave them the \$50,000
- 25 Q So, the first time, I guess, you knew that you weren't

1 going to go past the 31st would have been what, the 31st?
2 A Yeah
3 Q Never mind
4 A Did you ask a question?
5 Q No, never mind
6 Okay, and you were talking about a gentleman named Mr
7 Curtis who was going to be part of this deal was supposed to
8 bring money into the deal, correct?
9 A Yes, sir We started talking early in June when we were
10 going to need some more financial partners
11 Q Okay, and Mr Curtis he did not sign the commitment
12 A He would not sign it
13 Q Okay did you have any indication as to whether
14 Mr Curtis would then bring money to put into Sheep Island if
15 he wouldn't sign a commitment from the lender?
16 A No, we did not
17 Q All right, so, do you know why Mr Curtis never brought
18 you his money?
19 A Apparently it never came in
20 Q You were ---
21 THE COURT What did you say? What was your answer?
22 Q He said apparently it never came in, Your Honor
23 A I'm sorry, sir
24 Q All right, you were asked some questions about a letter
25 that you wrote to the lender

1 A Yes, sir

2 Q I think that's Exhibit -- it'll have a blue sticker on

3 it

4 A I know I've just got to find it There's so much stuff

5 up here I've got to find it I'll find it though

6 Q That's all right

7 A It's got a blue sticker on it? Oh, well, let me see if

8 that's -- I'm trying to -- this has got a blue sticker on it,

9 too Let me go through these It might be something that's

10 flipped over or something Oh, there it is I'm sorry

11 Q They're all right, there we go

12 A I am sorry

13 Q That's all right, all right, okay Okay, now Mr

14 Altman read to you just some portions of this letter earlier

15 A Yeah, he didn't read the whole thing

16 Q All right, I'm going to ask you a question here, but I

17 want to make sure that I understand a few things So, you're

18 looking at this letter with me?

19 A Yes, I am

20 Q All right, it says, "Hello Mark, here's what's going on

21 so you know As you know we are waiting on the funds to be

22 transferred from Tex (Cecil Curtis) and John Bordine

23 Everybody else's money was here and available " Now do you

24 remember Mr Altman asked you about this sentence "We knew

25 without their money we would not have all the funds to

1 close ''

2 A Did he ask me that?

3 Q He did, in fact ---

4 A Yeah

5 Q --- ask you a question about that sentence

6 A Yes

7 Q Now, let me read the next sentence or so to you ``When

8 we first talked we were told that we would need 25% of the

9 purchase price down We were told we would put a year's

10 worth of interest payments in the bank In the last few days

11 before we were all rushed to close, you included, you told us

12 that we would now be required to put down 35% That

13 increased our money down to 885, \$885 000 We had the

14 \$885,000 put together but not the other 211,625 ''

15 A That's correct

16 Q Now, the 211,625 is that referring to the commitment

17 letter you got the Friday before the Monday closing showing

18 this particular amount?

19 A Yes, sir

20 Q All right, and then you wrote and I quote, ``We could

21 have closed on July 31st, 2006, if we could have put off

22 paying the interest payments until before the first payment

23 was due ''

24 A That's correct

25 Q All right, so you're talking about the interest payment

1 that this entire figure represents, right?

2 A That's correct, yes, sir

3 Q Now, are you talking about here just if you could start
4 making payments a month into it? Is that what this is about?

5 A Yes, sir

6 Q All right, ``that is why'', then you left out a we or I
7 ---

8 MR ALTMAN Your Honor, I'm going to ask Mr Futeral
9 not interpret He can read the letter but certainly can't
10 give him the leeway to do that without objecting He s to
11 read verbatim

12 MR FUTERAL I think it'll become clear I'll read
13 verbatim

14 BY MR FUTERAL

15 Q ``That is called you and you told me that it was part of
16 the loan paperwork and you didn't think it could be changed
17 So we started scrambling to get the additional 211,625 ''

18 A That's correct

19 Q Now, Mr Altman had asked you a question trying to --
20 well I guess ask you whether it was because Tex and Mr
21 Bordine didn't bring money or somebody didn't bring money
22 isn't that the real reason why you didn't close? Will you
23 read the next sentence for us, please?

24 A ``If it would not have been for either the 10 percent
25 increase in the money, \$250,000 or having to pay the 211,625

1 we would have closed -- we could have closed "

2 Q All right, lastly, I forget which Defendant's Exhibit
3 this is All right, look at that right there Okay, what,
4 what Defendant's Exhibit Number is that?

5 A It says Defendant's Exhibit Number Three

6 Q Okay, this is where Mr Altman was asking you whether
7 you had sufficient monies in the account from which to
8 deliver a \$50,000 check

9 A That's correct

10 Q Okay, and that check was delivered, what, August 1st or
11 2nd?

12 A It left our office ---

13 Q Was it August 1st or 2nd?

14 A It got delivered on, I thought 7-31 but I understand 8-
15 1, I don't -- August 1st

16 Q Okay, the next day?

17 A The next day

18 Q So, when he was asking you whether you had sufficient
19 funds from which to write the check what is the answer?

20 A Yes

21 Q You had 116-785-25 in there,

22 A That's correct

23 Q Who had signatory rights, meaning who could sign checks
24 for Sheep Island?

25 A David Hilleshiem and myself

1 Q All right, the deposit that you made where did that
2 money come from?

3 A It came from Walker Funk

4 Q Did you tell him what you were going to use the money
5 for?

6 A Yes, I did

7 Q Did you have the authority as a member of Sheep Island
8 to write any checks for 50,000 for whatever reason?

9 A Yes, I did

10 Q Okay, and at the time you wrote the check, were you
11 aware that they weren't going to let the closing go forward?

12 A Yes, I was

13 Q So, why did you write the \$50,000 check at that point?

14 A It was just a desperate measure just to show that we
15 wanted to close

16 Q I want to take you back to that last Defendant's
17 Exhibit This is your letter to the bank Would you read
18 the last short paragraph for us, please?

19 A Yes, sir I'll be glad to "They have refused to give
20 us even one day extra to close Even with the e-mail
21 confirmation they have returned our check to our lawyer I
22 am meeting with a real estate attorney today to go over the
23 case I will inform you of the results We still want to
24 close "

25 Q That's all the questions that I have

1 THE COURT That was the letter to the bank?

2 A This is the letter I delivered to the banker when he was
3 wanting to know what was going on

4 THE COURT Okay, I want to make sure about who you
5 were telling that to

6 A I'm sorry, sir

7 RECROSS EXAMINATION

8 BY MR ALTMAN

9 Q Mr Marshall, talking about the letter, Defendant's
10 Exhibit Two

11 A Yes, sir, the same one

12 Q Did you deliver a copy of this to the seller to explain
13 what was going on?

14 A I delivered -- this was on 8-2 I delivered it to Mark
15 when he wanted to know what was going on

16 Q You didn't deliver it to the seller to tell them what
17 was going on

18 A I did not deliver it to the seller, no, sir

19 Q Did you ask anybody to deliver it to the seller?

20 A I did not ask anybody to deliver it to the seller It
21 was what Mark wanted to know what was going on

22 Q And I know I've asked this but I want to make sure
23 everybody is clear on it, the second sentence in the letter
24 talks about you waiting on the money from Mr Curtis and Mr
25 Bordine

1 A That's correct

2 Q Go on to say, "We knew without their money we would not
3 have the funds to close", correct?

4 A On that, on that particular day their money was supposed
5 to have been there It never came

6 Q And it's because their money never came, they were --
7 there would have been more than enough money to close if the
8 people you were relying on could come up with the money,
9 correct?

10 A If we had known that we had to close with that \$211,625
11 and the money would have been there we would have had the
12 money to close

13 Q Mr Bordine and Mr Curtis would be your partners and
14 members of the LLC with you, correct?

15 A They were they were guarantors on the loan, yet they
16 had not been added on into the corporate part of it

17 Q They were on the commitment letter weren't they?

18 A They were on the commitment letter, the loan, the loan,
19 but they were not in the corporation yet We were waiting to
20 see if they did what they said they were going to do

21 Q Was everybody else on the commitment, on the LLC and
22 member of the LLC?

23 A If they weren't on there at that time, which I'm not
24 absolutely positive, but they were going to be there at
25 closing, before closing

1 Q You believed them, but you didn't believe Mr Curtis and
2 Mr Bordine?

3 A When money doesn't show up and somebody is telling you
4 it's coming I didn't believe them

5 Q You didn't know if they weren't going to walk in with it
6 on the 31st?

7 A If they did it might have been a different situation

8 Q It might have been but you say in this letter it's
9 because their money didn't show up is why you couldn't close,
10 isn't it?

11 A I'm saying that, yes, that their money wasn't never
12 there So, it never came

13 Q Okay, thank you Nothing further

14 THE COURT Thank you very much You can step down
15 Call your next witness

16 MR FUTERAL Your Honor, we'd like to call Georgia
17 Richard to the stand please, sir

18 THE COURT All right

19 MR FUTERAL As a housekeeping matter I think we've
20 all sort of put various exhibits without going through formal
21 process and motion I had not objected to Mr Altman's
22 exhibits I just wanted to make sure the record reflects
23 though that we had moved to introduce all of our exhibits
24 with the exception of that affidavit

25 MR ALTMAN I stated, I believe, for each one

1 THE COURT Plaintiff has introduced either over
2 objection or without objection One through 15

3 MR FUTERAL Thank you, sir

4 Your Honor, we'd like call to Georgia Richard to the
5 stand, please

6 WHEREUPON, Georgia Richard was called to the stand duly
7 sworn by the clerk and testified as follows

8 THE CLERK Have a seat and give us your name and
9 spell your last name for us

10 MS RICHARD My name is Georgia Richard, last name
11 spelled just like Richard, R-I-C-H-A-R-D

12 DIRECT EXAMINATION

13 BY MR FUTERAL

14 Q Is it Ms or Mrs ?

15 A Mrs

16 Q Mrs Richard, you are a licensed realtor here in South
17 Carolina?

18 A Yes, sir

19 Q All right, and you were the realtor who was representing
20 the purchasers of the property, the 101 acres?

21 A Yes

22 Q All right, so you were the licensed realtor then for
23 Sheep Island Plantation, correct?

24 A Yes

25 Q Okay, how long have you been a licensed realtor?

1 A 14 years

2 Q In 14 years time, I'm assuming you don't have an exact
3 account but how many real estate transactions have you been
4 involved with either representing buyers or sellers?

5 A Last year 51

6 Q 51, okay The broker on the other side of this or the
7 realtor on the other side was?

8 A Mickey Rakes

9 Q Mickey Rakes, who was representing the sellers, correct?

10 A Correct

11 Q Would I be correct that that would be the person that
12 you predominantly had your communications with regarding this
13 real estate transaction?

14 A That should be the only one, yes sir

15 Q Ma'am, would I also be correct that as the realtor you
16 were acting as the agent for the buyer?

17 A That's correct

18 Q Okay, and that Mr Rakes would be acting as the agent
19 for the seller?

20 A Yes, sir

21 Q Okay, ma'am, you've been sitting in the courtroom
22 listening to some of this testimony today?

23 A Yes

24 Q All right, and you know that a lot of questions have
25 been asked as to whether the sellers were given any notice of

1 problems or any request for an extension of time You've
2 heard those?

3 A Yes

4 Q Okay, ma'am, would you tell the jury, please what if
5 any conversations you had with anyone regarding either
6 problems with the closing or any requests for an extension?

7 A After July 31st we are unable to close I talked to the
8 buyer my client, actually they called me and told me ---

9 THE COURT I'm sorry -- you did what?

10 A I spoke to my client, actually they called me and told
11 me there want me to make another attempt to try to set up a
12 closing with the seller

13 Q Mrs Richard, when you're saying you spoke to your
14 client I just want to make sure we're clear, you were talking
15 about ---

16 A Sheep Island, LLC ~~the buyer in this case~~

17 Q --- Sheep Island, the buyer in this case, okay,

18 A That's correct

19 Q Okay

20 A And they say they are prepared to file the lawsuit I
21 then called Mickey Rakes, the other agent I believe is
22 August the 2nd, and I told Mickey I say ``Mickey, please,"
23 actually I was pleading and begging that we been working on
24 this case for almost seven months and I said, ``My people are
25 getting their money They're ready to close Let's try to

1 talk to Mr Pendley," because I have done business with him
2 before, Steve Pendley, which is one of the seller

3 Q Okay, so, just so we clear, Steve Pendley, now deceased
4 as I understand it was one of the members of Bar-Pen the
5 seller of this property

6 A Yes

7 Q And you knew Mr Pendley?

8 A Yes

9 Q Okay, so, you're talking to Mr Rakes again and you were
10 talking to him about wanting to close or the buyers do So
11 tell us more about Mr Pendley

12 A I said, "Please call Mr Pendley and let him know that
13 I am involved, we are involved in this case and as a real
14 estate agent I really don't want to go to any lawsuit "

15 Q Pardon the interruption Did the buyers in this case,
16 who were you speaking with representing the buyers?

17 A Mr Marshall

18 Q Okay, did Mr Marshall say to you, "I just want to have
19 a lawsuit," or did he indicate whether he wanted to close or
20 what?

21 A He wants to close

22 Q Okay

23 A He just need couple of days

24 Q Okay

25 A And I said "Mickey, please call Mr Pendley and let

1 him know that my buyer's ready and let's set up a closing day
2 and so we can get this closed before they take the whole
3 thing to, before they file the lawsuit "

4 Q Where we are today?

5 A Right

6 Q Okay

7 A And Mickey agreed with me

8 MR ALTMAN Your Honor, I'm going to object to that
9 as being hearsay

10 MR FUTERAL Your Honor ---

11 THE COURT I'll allow it

12 MR FUTERAL Thank you

13 BY MR FUTERAL

14 Q Go ahead

15 A Mr Rakes said, "Let me call Mr Pendley " Then he

16 call me back shortly says, "Mr Pendley is out of the
17 country and told me whatever Mr Wooddy says counts "

18 Q Now, when you're speaking about Mr Wooddy that would be
19 that gentleman seated over there, one of the, well part of
20 the sellers

21 A Yes, another partner

22 MR ALTMAN Your Honor, I'm going to object to this
23 She just said that Mr Pendley told her that he was out of
24 the country and he talked to Mr Wooddy?

25 A No, Mr Rakes

1 MR ALTMAN How did he speak to Mr Pendley out of
2 the country?
3 Q Mr Rakes
4 A Mr Rakes told me We're not allowed to talk to other
5 clients, the clients ---
6 Q Excuse me, wait ma'am, one second
7 MR ALTMAN I'm sorry
8 MR FUTERAL Your Honor, I believe what her testimony
9 ---
10 THE COURT Ask a question
11 MR FUTERAL Yes, sir
12 BY MR FUTERAL
13 Q Yes, sir, I had -- I asked you ---
14 THE COURT Ask her another question
15 MR FUTERAL Yes, sir
16 BY MR FUTERAL
17 Q So, in your conversation with Mr Rakes what did he tell
18 you?
19 A He says he will call Mr Woody
20 Q I'm sorry?
21 A He will call Mr Woody to see if we can set up a
22 closing
23 Q Okay, did you ever get any calls back from Mr Rakes ---
24 A Yes
25 Q --- about whether he spoke to Mr Woody?

1 A Yes, he did

2 Q Okay and what did Mr Rakes tell you?

3 A Mr Rakes said Mr Wooddy is a lawyer himself He will
4 go to trial and he have a lot of money He don't care

5 Q He doesn't care?

6 A He doesn't care

7 Q All right, so there would be no closing?

8 A Would be no closing

9 Q Okay, and did you communicate any of this information to
10 the buyers?

11 A Yes, I told Mr Marshall and they filed a lawsuit on the
12 4th of August

13 Q Okay, that's all the questions that I have Thank you

14 CROSS EXAMINATION

15 BY MR ALTMAN

16 Q Ms Richard ---

17 A Yes, sir

18 Q --- did you tell Mr Rakes why the closing did not take
19 place on July 31st?

20 A Yes, sir

21 Q What did you tell him?

22 A That the buyer is required by the banker to come up
23 extra \$211,000

24 Q When did you tell Mr Rakes that?

25 A I told Mr Rakes on July the 31st

1 Q Did you -- did you just said you had this conversation
2 with him on August 2nd

3 A No, 31st we have numerous conversation prior closing

4 Q Did you see any proof that the bank had changed any loan
5 requirements?

6 A No

7 Q And that was strictly through conversation you had with
8 Mr Marshall?

9 A No -- yes, Mr Marshall and, and the closing lawyer,
10 which is Mr Benji

11 Q Mr Lafond?

12 A Lafond I'm sorry

13 Q Had you been told previously that the buyer had loan
14 approval?

15 A They have a commitment letter

16 Q They had one previously?

17 A The have a commitment letter coming

18 Q Did you tell ---

19 A It is ---

20 Q Did you tell anybody that you -- that they had a
21 commitment for a loan before July 31st?

22 A No

23 Q You never did that?

24 A No

25 Q You sure about that? Are you sure about that? Did you

1 tell anybody -- well, let me ask you this, did Mr Marshall
2 tell you that there was a loan approved prior to July 31st?

3 A They said they got the letter -- they have a letter from
4 the bank I never saw it, but they are having a commitment
5 letter coming

6 Q Do you remember having your deposition taken on May
7 29th, 2007?

8 A Yes

9 Q Do you remember stating that Mr Marshall told you that
10 the loan had been approved around April 26th?

11 A Yes, it's approved but there is condition attached to
12 it

13 Q But you said he told you on April 26th they had a loan
14 approved

15 A Loan approved means they have letter from the bank says
16 it's approved but it always have condition that they have to
17 met before they can close

18 Q That's true with any loan You have to meet the ---

19 A That's correct

20 Q So, it doesn't matter what day it comes in It's going
21 to have conditions

22 A Right

23 Q And if you don't meet those conditions you're not going
24 to close

25 A That's right

1 Q But you testified as of April 26th he told you he had a
2 loan approved already

3 A Yes, he have a loan commitment coming which is more
4 important than approval

5 MR ALTMAN Your Honor, do you want to open this or
6 shall I?

7 THE COURT No, you can open it

8 BY MR ALTMAN

9 Q Mrs Richard, I'm handing you the original of your
10 deposition that was taken on May 29th 2007 I'm going to
11 ask you to turn to page 18, excuse me, page 19 Are you on
12 page 19?

13 A Yes sir

14 Q Okay, I'm going to ask you to look at line 13

15 A Yes

16 Q And I say, "Okay, were you told at any time that the
17 loan had been approved?" And your answer on line 15 was
18 what?

19 A Yes

20 Q And my question "When was that?" Do you see that?

21 A Yes

22 Q And your answer on line 17 and 18 is what?

23 A April the 26th

24 Q No read the entire statement please

25 A Oh, "By Mr Marshall I believe it's around April the

1 26th "

2 Q Okay, so, you said they had a loan approved, you didn't
3 say something was coming You said a loan was approved

4 A Right

5 Q Did you convey that or tell Mr Rakes that the loan had
6 been approved?

7 A Yes

8 Q When did you tell him?

9 A As soon as I have the documents that had come in on the
10 April 26th I call him and told him

11 Q You told Mr Rakes on April, around April 26th that the
12 buyer had a loan approved?

13 A Correct

14 Q Nothing further, Your Honor

15 THE COURT Anything on redirect?

16 MR FUTERAL Yes, sir

17 REDIRECT EXAMINATION

18 BY MR FUTERAL

19 Q Mrs Richard, you're being asked a lot of questions
20 about loan approvals and such, and you're aware that the
21 contract provided that the buyers were supposed to give
22 written notice of the loan approval within 45 days, correct?

23 A That's correct

24 Q Okay, and you're also aware in this contract -- is this
25 a fairly standard real estate form?

1 A Yes

2 Q Okay, this particular form and contract there was
3 earlier testimony about one or more floating around Who
4 drafted this one, the one that's in issue today you or Mr
5 Rakes?

6 MR ALTMAN Your Honor, I'm going to object This is
7 going beyond the scope of redirect

8 THE COURT I'll allow it

9 MR FUTERAL Thank you

10 THE COURT Go ahead

11 A Mr Rakes

12 Q Mr Rakes drafted it?

13 A Yes

14 Q So you're aware that it provided that sellers could
15 have the option to terminate if your clients, the buyers did
16 not give that written notice of approval to them

17 A That's correct

18 Q After 45 days ticked by did you ever get any contact
19 from the sellers including Mr Rakes saying, "Where is our
20 written approval"?

21 A No

22 Q Did he ever ask you for it?

23 A No

24 Q Did he ever send you anything or anybody talk to you or
25 send you something saying, "We're going to terminate this

1 agreement because you didn't get us that written approval
2 within 45 days?"

3 A No

4 Q Okay

5 THE COURT They didn't do that They let it go on
6 till the 31st right?

7 A Yes

8 THE COURT And it didn't close on the 31st?

9 A Correct

10 Q So, I just want to make sure we're clear Mr Altman
11 asked you some questions as to exactly when you told Mr
12 Rakes that there was a problem with the financing and that
13 your folks wanted more time to close

14 THE COURT Did you say that? I don't remember you
15 saying that

16 MR FUTERAL Oh, I'm sorry, Your Honor

17 THE COURT What did you say you told Mr Rakes when
18 you called him after the 31st?

19 A After the 31st?

20 THE COURT Yes

21 A I told him that the buyers are ready to close they got
22 their money and I just need two days, a couple of days

23 THE COURT Did you think, did you tell him, did you
24 tell him that they had -- that you wanted to close because
25 they had a 15-day period that they could close if they had a

1 problem with their money?

2 A No

3 Q Ma'am, let me show you a copy of the contract which is
4 Plaintiff's Exhibit Number One Ma'am, please turn to the
5 fifth page of that contract, paragraph 33 Okay this is the
6 paragraph where it says that there'd be an additional 15
7 days, right?

8 A That's correct

9 Q Did the buyers ask for this number 15 days, or did the
10 sellers put this number into the contract?

11 A The buyer asked for it

12 Q Okay, and it was given to them by the seller

13 A That's correct

14 Q Is there anything in that agreement whatsoever that says
15 in order to get your 15 days you must say paragraph 33, use
16 those words?

17 A Do you want me to read it?

18 Q If you'd like to look over it

19 A Could you repeat your question again?

20 Q Ma'am, is there any provision in this paragraph that
21 says in order to have the 15-day extension you actually have
22 to use the words, "I want a 15-day extension?"

23 A No

24 Q Or is there anywhere in this contract that says, "I
25 want a 15-day extension and you have to use the word or the

1 term paragraph 33 extension agreement?"

2 A No

3 Q Is there anything even in this agreement that says that
4 in order to get the 15 days you have to tell them that in
5 writing?

6 A No

7 Q And if I understand you didn't ask for the full 15
8 days You just asked for a couple of Mr Rakes, is that
9 correct?

10 A That's correct

11 Q And you did tell him there was a problem with the
12 financing?

13 A Yes, I did

14 Q Okay, that's all the questions I have, Your Honor

15 MR FUTERAL Thank you

16 MR ALTMAN Nothing further, Your Honor

17 THE COURT Thank you very much You can step down

18 A Thank you

19 THE COURT Call your next witness

20 MR FUTERAL Yes sir

21 Your Honor, we'd like to call Benjamin Lafond to the
22 stand, please

23 WHEREUPON, Benjamin A Lafond was called to the stand,
24 duly sworn by the clerk and testified as follows

25 THE CLERK Have a seat State your name and spell

1 your last name for us

2 MR LAFOND Benjamin A Lafond L-A-F, as in flag, O-
3 N-D, as in dog

4 DIRECT EXAMINATION

5 BY MR FUTERAL

6 Q Mr Lafond, can you tell the jurors a little bit about
7 yourself, please?

8 A I'm from Summerville, born and raised, 39 years old two
9 kids a 15 year old girl and a seven year old girl I'm a
10 practicing attorney in Summerville The primary focus of my
11 practice is real estate transactions I'm also the town
12 prosecutor for the Town of Summerville

13 Q All right, before going into private practice doing real
14 estate closings what other positions have you held as a
15 lawyer?

16 A After law school I worked in Myrtle Beach for a little
17 over a year doing real estate transactions and a little bit
18 of litigation I moved back to Summerville because I got
19 sick of Myrtle Beach and wanted to come home and opened up a
20 practice with my sister and a law school classmate of mine
21 I did mostly real estate transactions and some domestic,
22 family law work, and pretty soon after moving back to
23 Summerville I was offered a position with the Solicitor's
24 Office in Dorchester County, which is the Prosecutor's Office
25 if you're not familiar with that I was part-time prosecutor

1 for about six months and then became a full-time prosecutor
2 with the Solicitor's Office over in Dorchester County and
3 held the position of Assistant Solicitor for about four years
4 until my final year there in 2004 when I became the deputy
5 solicitor, which was kind of the person in charge of
6 Dorchester County, not the whole circuit but the county I
7 was kind of the -- in charge of what happened as far as
8 prosecution in that county.

9 Q Okay, in all how long have you been practicing law?

10 A A little over ten years now

11 Q Okay, and what law school did you go to?

12 A The University of South Carolina

13 Q Okay, and your undergraduate degree?

14 A I started at the University of North Carolina in Chapel
15 Hill but my grades were so spectacular after a year and a
16 half that my dad made me transfer home to go to work for six
17 months so I would appreciate what college was about and I
18 worked at a saw blade manufacturing company for about six
19 months and I went back to college at the College of
20 Charleston where I graduated in '93, and from '93 to '94 I
21 worked two jobs as a bartender at a restaurant and I was
22 working full-time at a law firm as essentially a paralegal
23 and then I went to law school in 1994 and graduated in '97
24 Q Okay, now, you were the real estate closing attorney for
25 the buyers in this particular transaction

1 A That's correct

2 Q Okay, and who was the closing attorney for the sellers?

3 A Skipper Wooddy

4 Q Okay, and if I am correct he was not only their closing
5 attorney but he was also one of the members or owners if you
6 will of the property itself

7 A It appeared that way When I -- when we did the
8 initial, when I initially got the contract and was told by
9 Bruce and Dave that we were going to do this closing I did a
10 little background work just to kind of get an idea I knew
11 this was a very large purchase, and so, I did a little
12 background work just to find out who the owners of the
13 property were and there was an initial error as to what the
14 tax number was on the contract It was incorrect, and so,
15 when I finally got the information with the correct tax
16 number and I pulled the deed and the mortgage and I saw that
17 Mr Wooddy, I believe, had signed as one of the people on the
18 mortgage

19 Q Okay, for those of us who are not familiar and without
20 going into a great deal of detail, can you give us the
21 Reader's Digest condensed version of what a real estate
22 closing attorney does?

23 A Okay, we receive the contract Typically, it's either
24 from a lender, in this case, Bruce and Dave Hilleshiem were
25 friends and former, you know, clients of mine So, they

1 brought me the contract and said, "We're going to buy this
2 piece of property " Once you get the contract you take it
3 and you give it to your title abstractor In most cases some
4 folks have them in their office and some use a third party
5 I use a third party That abstractor goes out and basically
6 searches back the title for 40 years or 60 years to make --
7 to find out who owns it and if there are any problems in the
8 title, if there have been any lawsuits or judgments that
9 might effect somebody's ownership and that's the Reader's --
10 Q If I may interrupt, you're ---
11 A Okay
12 Q --- you're also looking at the chain like if somebody
13 were to say to their friend, "I'll sell you the property,"
14 yet they turn around and sold it to somebody else at the same
15 time and that sort of stuff
16 A I wanted to make sure that Bar-Pen, "the Defendant" in -
17 this case, owned the property so -- and that they owned it
18 free and clear except for any mortgages that we might be
19 paying off at closing for my clients That's, that's one of
20 the biggest duties is that I make sure that my clients get
21 the property free and clear of any liens except for the liens
22 that they are going to be placing on it to finance the
23 property I have to look at the contract and review the
24 contract and then from that point I review the title work
25 when it comes back from my abstractor I do some work that I

1 deal with the lenders, have to send them what's called a
2 title commitment, and that is, "Hey, this is who owns it
3 now These are the liens and any easements," things like
4 that that -- the things that might effect the ownership to
5 the property or what's being conveyed

6 Q If I may, would I be correct an easement might be like
7 if this were a piece of property and SCE&G or SCANA had a
8 right to go through and lay down power lines they might have
9 an easement through the property, that's what you're talking
10 about right?

11 A That's correct

12 Q Okay

13 A Okay, I have to do those sorts of things to let the bank
14 know what they're going to be taking a lien on, what they're
15 going to be lending money on because the bank is going to
16 want to know exactly what it is they're risking their money
17 on because the bank is taking a risk anytime they loan money
18 to somebody From that point I wait for the bank to give me
19 closing instructions and typically with most transactions I
20 get closing instructions either the day before or the day of
21 a closing and at that point in time that's when I tell my
22 client what they have to bring to closing, you know I don't
23 know if you all have bought houses, but how much money you've
24 got to bring and you kind of the way it works in this
25 business is that in most cases it's fairly last minute or it

1 seems like last minute because it's usually a decent chunk of
2 change you have to bring to closing

3 Q Mr Lafond, do you recall -- do you have a general idea
4 as a closing attorney what the real estate market was like
5 say in this period of time between December of '05 and July
6 of '06?

7 A It was, it was hot I mean, it was not like you're
8 seeing, you know, everyday in the paper It was the opposite
9 of what we're seeing nowadays, you know it's not housing
10 slump, housing slump, it's, you know, the builders couldn't
11 build fast enough

12 Q Okay, and you had mentioned that sometimes these things
13 kind of get, well, my saying would be, nothing makes a person
14 more productive than the last minute, but would it be typical
15 for everything to be at your office a week before closing,
16 the day of closing, how do these things go?

17 A In all honesty it varies from closing to closing,
18 lender to lender Even cash closings where there's no lender
19 involved it could be very last second It's just the nature
20 of the business

21 Q Okay, now, you were trying to do, I guess setting up for
22 a closing on July 31st under the contract that the parties
23 had?

24 A That's correct

25 Q Okay, and that closing did not happen that day correct?

1 A That's correct

2 Q All right, can you explain to the jurors what your
3 understanding is of why this closing didn't go forward on
4 July 31st?

5 A On Friday, I believe it was the 28th, either, it was
6 either Friday afternoon, the 28th, or Thursday afternoon, the
7 27th, my clients, I got the commitment letter My clients
8 got the commitment letter and it was requiring them to bring
9 roughly \$200,000 more than they were expecting to bring to
10 closing, and it kind of caught them off guard You know, all
11 along they had been talking about 75% that they were going to
12 have to bring to closing, I mean, a 75% loan and it caught
13 them off guard and it and so, they had to scramble and you
14 can imagine scrambling at the last minute to try and get an
15 extra \$200 000 You now they thought they were going to
16 have to bring 800 some odd thousand dollars to closing that
17 they were prepared to bring, especially after they got Steve
18 Hill involved in this, and then the next thing they know it's
19 actually a million one that they had to bring to closing and
20 it threw them for a loop and it was something that it wasn't
21 an insurmountable obstacle because they were pretty much
22 ready within a day or so to do it They just couldn't get it
23 done that Monday

24 Q Okay, there's been mention several times about Steve
25 Hill and I guess in respect to his financial abilities Do

1 you know Mr Hill?

2 A I'm, I'm, yes, I know Steve personally

3 Q Okay, do you know what he does for a living?

4 A Yeah, Steve is a builder

5 Q Okay, is he a reputable builder?

6 A He has an extremely good reputation as a builder and as

7 a person in the community

8 Q Do you know how many homes or what communities are you

9 aware of that he might have built over the years?

10 A Oh man I mean there's a bunch in Summerville I don't

11 know what he's done outside of Summerville, but he's done

12 homes in Pine Forest He's done homes in many of the

13 subdivisions on the Trolley Road area You know, he's a big

14 small builder He's not a Centex or a Ryland or a D R

15 Horton, but he's a he's a he's a -- he does -- he'll do 10

16 or 15 homes in any given time He's not a hundred or 200

17 home guy

18 Q Okay

19 A But he's got a good reputation I've, like I said, I've

20 dealt with him on many, many occasions

21 Q Okay, all right, so, tell us what if any conversations

22 Did you have with any representative or member of Bar-Pen,

23 namely the seller of this property, and when did you have

24 them if you did?

25 A I spoke with Skipper Woody and it was either Friday or

1 Monday and I think I had another big closing going on Monday
2 morning It may have been a hotel closing but it was, so,
3 it was a little crazy in the office So, it may have been
4 Friday, but I spoke with Skipper Wooddy about this and I
5 basically told him what I just told you all, "Skipper my
6 clients got thrown for a loop They weren't expecting to
7 have to bring this additional \$200,000 to closing you know,
8 they've got -- you know Steve Hill, you've been in the
9 business long enough, you know Steve's got the financial
10 wherewithal to do this but it's just going to take them a
11 little extra time, you know they're going to be ready to
12 close within a couple of days, can you give me a couple of
13 days to close, my guys really want to close," and his
14 response was he couldn't do it and I asked him I said, you
15 know you know it's kind of surprising because it's a lot of
16 money, two and a half million dollars and it was surprising
17 to me as to why he wouldn't you know say sure go ahead
18 you know, wait a couple of extra days for that kind of money
19 and his response to me, you know, I asked him, I said, "Do
20 you have a backup contract " which if you all aren't
21 familiar with real estate that means somebody else is back
22 there waiting to close, they've got the money and they're
23 going to close if you don't close, and he said no, he said,
24 there was a problem with it, I think they had heard the
25 partners in, one of the partners had heard that my client was

1 trying to do something with the property, was going to resell
2 it after they bought it and that it may have been contacted
3 one of his partners had actually been contacted by somebody
4 who was going to be involved in that, and that was why they
5 didn't want to go any further, didn't want to give my guys an
6 extension

7 Q Assuming that that was true, that somebody contacted one
8 of their partners to sell them their very own property after
9 the closing, is there anything wrong with that?

10 A No

11 Q If they bought and then resold it at a premium?

12 MR ALTMAN Your Honor, I would object to this
13 There's no basis for him answering or even the question

14 THE COURT Ask another question

15 MR FUTERAL Yes sir

16 BY MR FUTERAL

17 Q All right, Mr Lafond, so where did the conversations
18 end up?

19 A He -- Skipper told me they weren't going to close If
20 they didn't close on the 31st they weren't going to close,
21 and so, I sent him and I do not remember like I said,
22 without seeing the document I don't remember if I had the
23 \$50 000 check delivered to his office on Monday afternoon or
24 Tuesday afternoon, on the 31st or the 1st, but he either
25 called me or e-mailed me pretty early the next morning and

1 said, ``Not going to happen, we're not -- I'm sending it
2 back," and I was like, ``My guys really want to close," and
3 I'm pretty sure I explained it to him again that you know,
4 that's the only reason we didn't close on the 31st was this
5 additional money that they weren't expecting to have to bring
6 to closing and that with Steve Hill involved they were going
7 to be able to get it, it was just the mechanics of getting
8 the money It wasn't that it wasn't there, it's a large sum
9 of money and they had to move it, you know Steve had to
10 make it happen which meant he had to move it out of either
11 some CDs or ---

12 MR ALTMAN I'd object to this, Your Honor I've let
13 a lot of what I call hearsay go because ---

14 THE COURT You have an objection?

15 MR ALTMAN I have an objection

16 THE COURT What's the objection?

17 MR ALTMAN This is hearsay hearsay there's no
18 basis for the testimony

19 THE COURT You want to be heard in regard to that?

20 MR FUTERAL No Your Honor

21 THE COURT I sustain the objection

22 MR FUTERAL Thank you

23 BY MR FUTERAL

24 Q All right Mr Lafond, the -- you are aware that at some
25 point the buyers tried to, I guess, get a 30-day extension

1 and perhaps buy one for \$50,000? Are you aware of that?

2 A Well I -- if you're talking about the \$50,000 check
3 that I forwarded to them?

4 Q No, not as of the 31st or the 1st Are you aware of any
5 goings on prior to that with respect to them trying to buy
6 extra time or extend the closing?

7 A Yes, there was a -- I know there was a series of e-mails
8 or least an e-mail or two between Georgia Richard and Mickey
9 Rakes about trying to get a 30-day extension or seeing what
10 it would cost to get a 30-day extension on the contract

11 Q Do you know why the buyers in this case were trying to
12 get that 30-day extension?

13 A If -- I guess they were still trying to iron things out
14 with -- insofar as the ---

15 MR ALTMAN Your Honor, objection It's hearsay
16 There's no basis for it

17 THE COURT Well, obviously they thought they needed
18 it, is that right? Go ahead

19 MR FUTERAL Thank you

20 BY MR FUTERAL

21 Q Mr Lafond, was there any further communication with Mr
22 Woody or any other representative for the sellers after that
23 conversation you had with him that you just described?

24 A From me?

25 Q Yes, sir

1 A Not to my recollection

2 Q Now, you also had indicated that you had sent over a
3 \$50 000 check Well, let me back up, you had asked him for
4 two or three extra days to close Did that have anything to
5 do with the \$50,000 for 30 days?

6 A No, it was just, you know, like I said in these -- in
7 this business a lot of times closings get held up for any
8 number of reasons, and if, if, you know, the seller truly
9 wants to sell the property and the buyer really wants to buy
10 the property a lot of times a closing will go a few days over
11 the stipulated contract time It's just the nature of the
12 business, be it somebody's money didn't get wired on a
13 certain date, you know, "Oh, I didn't realize that this was
14 going on that date and I had to get it moved " They get
15 moved around a lot, and my clients wanted to buy the money
16 [sic] They had a lot of money invested in the property and
17 ---

18 MR ALTMAN Your Honor, I'm going to object to this
19 unless he knows specifically ---

20 THE COURT Ask him another question, ask another
21 question

22 MR FUTERAL Yes, sir

23 BY MR FUTERAL

24 Q All right, Mr Lafond, let me show you what has been
25 previously introduced as Plaintiff's Exhibits Number 14 and

1 15 Have you seen these before?
2 A Yes
3 Q Okay, what are they?
4 A They're the check that Mr Wooddy faxed to me on the
5 31st stating that, that my clients defaulted and that they're
6 terminating the contract and then that's 14
7 Q Are you aware, all right and that's sent on July 31st?
8 A That's correct
9 Q Are you aware as the closing attorney -- now, you got a
10 copy of the contract in this case, correct?
11 A That's correct
12 Q Are you aware of whether your clients had defaulted on
13 any of the terms of that contract?
14 A I don't believe they had
15 Q Okay, and now, this other one, Plaintiff's Exhibit
16 Number 15, this is another -- well, it says by hand hand-
17 delivered letter to you in Summerville from Mr Skipper
18 Wooddy from Mt Pleasant, is that correct?
19 A That's correct
20 Q Is that when he returned the \$50,000 check to you?
21 A That's correct
22 Q So, looking at the return of the check of \$50,000 do you
23 have any idea whether that \$50,000 was tendered to him on the
24 31st or the 1st as you look at these?
25 A And I'm going to be to the best of my recollection I

1 want to say it was sent to his office but it was probably
2 after hours on the 31st

3 Q Okay

4 A After five o'clock So, it would technically be the
5 1st

6 Q Okay and looking one last time at Plaintiff's Exhibit
7 Number Fifteen can you tell the jurors, please, what the
8 sellers stated reason was for terminating this agreement?

9 A The seller has terminated the agreement between the
10 parties because of Sheep Island Plantation, LLC's, failure to
11 close in a timely manner

12 Q One moment, please, Your Honor That's all the
13 questions that I have, thank you

14 THE COURT Any cross examination?

15 MR ALTMAN Yes, sir

16 CROSS EXAMINATION

17 BY MR ALTMAN

18 Q Mr Lafond, did you prepare the documents necessary to
19 form Sheep Island Plantation, LLC?

20 A I filed the operating agreement I mean, I filed the
21 Articles of Organization I believe I got a federal employee
22 ID number on behalf of the LLC, and I prepared my boilerplate
23 operating agreement that I think I forwarded to Dave
24 Hilleshiem and then I think we were going to sign it at the
25 closing

1 Q Let me show you a document and ask if that's the
2 operating agreement you prepared

3 MR FUTERAL Your Honor, I'd like to see Is that the
4 same one?

5 MR ALTMAN The same one I handed you previously

6 MR FUTERAL Okay, never mind Thank you

7 THE COURT Let's take a break right at this point
8 before you get into that We'll take a short recess, and
9 members of the jury panel, let you have a short recess about
10 five, ten minutes

11 *****OFF THE RECORD*****

12 (On the record)

13 (Whereupon, the following takes place outside the
14 presence of the jury)

15 THE COURT Bring the jury in

16 (Whereupon, the following takes place in the presence of
17 the jury)

18 MR ALTMAN Your Honor, Mr Futeral is not in the
19 courtroom

20 THE COURT Go ahead He's got his co-counsel there

21 BY MR ALTMAN

22 Q Mr Lafond, prior to the break I handed you a document
23 that's been handed, identified as Defendant's Exhibit One
24 Have you seen that before? Did you prepare it?

25 A Yes, sir, I did

1 Q What is that document?

2 A That's a -- it's the operating agreement I think it's
3 the initial operating agreement that I prepared on behalf of
4 the LLC

5 Q When would you have prepared that?

6 A Probably when I initially organized the LLC, I think in
7 either March or April of 2006

8 Q Is it signed?

9 A This, no sir

10 Q Do you know if it was ever signed?

11 A No, sir I don't know I can't say yes or no

12 Q Have you ever seen a signed copy of an operating
13 agreement?

14 A I don't believe so no, sir

15 Q When you prepared this who gave you the information to
16 use to prepare it?

17 A I can't remember if it was Dave Hilleshiem or Bruce
18 Marshall

19 Q I'm going to ask you to look at the very last page

20 A Okay

21 Q Who does this document show would be the members of the
22 limited liability company?

23 A Well I mean you've got -- this was a draft, but it was
24 ---

25 Q I understand

1 A --- Dave Hilleshiem and Bruce Marshall

2 Q Okay, were you ever told there would be any other
3 members of the LLC?

4 A Throughout the process, you know, through the -- when
5 all this was going on with them trying to deal with the piece
6 of property, either Dave or Bruce would tell me that they
7 thought this person may be coming in as a member of the LLC

8 Q In order to carry out the closing would it have been
9 necessary for you to have an executed operating agreement?

10 A I fully intended once I knew who all the members of the
11 LLC were going to be to have them have -- change the last
12 page of this document to reflect who the members were and
13 what their membership interests I mean, it's a fairly
14 simple process for doing that

15 Q Were you ever given the names of the people who were
16 going to be the members?

17 A When I found out that they were not going to be able to
18 close that day I think I was given the names on the
19 commitment letter was, you know, and then I was just going to
20 get the percentages from them when they came to closing

21 Q So, as of July 31st ---

22 A The 28th, I ---

23 Q --- you didn't have an operating agreement prepared for
24 execution did you?

25 A Well, I had it prepared I was just going to have to

1 add several names to the last page and signature, and
2 signature lines on the second to the last page

3 Q So, even the day of closing you had not been given the
4 names to add or their percentages?

5 A I had them I just hadn't done it yet

6 Q Had you been given the percentages? _ _ _

7 A No, I was going to ask -- I was going to put those in
8 probably at the closing table I have a computer in my
9 office and I mean, it's a fairly simple process

10 Q Let me show you a document and ask if you've ever seen
11 -- well, let's get this marked first, and ask if you've ever
12 seen this two-page document

13 A Yes

14 Q What is that document?

15 A That's the letter and I did, guess I had it hand
16 delivered to Skipper on August 1st, 2006, with the \$50,000
17 check for the extension

18 Q Okay, the letter says, "Dear Skipper, enclosed is my
19 client's check for \$50 000 for the extension on this
20 purchase If you have any questions please call or e-mail,
21 with kindest regards I am," that's what it says correct?

22 A That's correct

23 Q Okay and attached there's a copy of a check?

24 A Yes

25 Q Okay, do you know if the check was any good when you had

1 it delivered to Mr Woody?

2 A I was acting on my instructions So, I have no -- I
3 have no access to their bank account, so

4 Q Did you tell them it would be, telling them being your
5 clients, it would be a good idea to get a bank check or a
6 cashier's check?

7 A They dropped this by my office at some point late in the
8 afternoon on the 31st to the best of my recollection ---

9 Q Okay, and if we look at the check it's Sheep Island
10 Plantation, LLC's, check number 1005, correct?

11 A Yes

12 Q And in the explanation it says for extension through 8-
13 30-2006, correct?

14 A Yes

15 Q In fact says that twice, correct?

16 A Yes

17 Q Doesn't ask for two or three or four or a one day
18 extension, it talks about a 30-day extension, correct?

19 A That's what it says in the line, yes

20 Q And I believe you've testified that you reviewed the
21 contract, correct?

22 A Yes

23 Q At anytime on or before August 15th, 2006, did you have
24 any discussions with anyone regarding the provisions of
25 paragraph 33 of the contract, that's the one that talks about

1 the 15-day extension?

2 A I honestly do not remember having any discussions with
3 anyone

4 Q As of August 15th, 2006, were you yourself, did you have
5 any memory of that provision being in the contract?

6 A To the best of my recollection, no

7 Q No is your answer

8 A That's correct

9 Q At any time prior to August 15th, 2006, did you
10 recommend to your clients to say, to tell the sellers that
11 they were ready to close, that you had the money, you were
12 ready to close?

13 A I told my clients -- I told Mr Woody, because he was
14 acting as both the seller's attorney and a member of the
15 seller, that we would probably be ready to close by the end
16 of the week, I believe was the language I used and I
17 explained to him why and he said they weren't going to close
18 after the 31st, period, and that's when I told him that they
19 needed to go see an attorney because Bar-Pen was not going to
20 close

21 Q Defendant's Exhibit I believe, Number Four, your letter
22 August 1st do you see that?

23 A Yes

24 Q Where in there does it say that there's a need for a one
25 or two or three day extension of time to close?

1 A It's doesn't
2 Q Why not?
3 A I conveyed it verbally to ---
4 Q Is there anything in writing that says ---
5 A No
6 Q --- we need one or two extra days?
7 A No, I had spoken with Mr Wooddy Now, don't -- and I'm
8 sorry, don't shake your head I had conveyed it in orally to
9 Mr Wooddy and told him, ``Skipper, you know,'' like I said
10 earlier, ``Skipper, my clients will be ready to close this in
11 a couple of days They kind of got caught off guard by this
12 additional money,'' and that's when I explained, and that's
13 what I explained to him and my clients asked me to deliver
14 the \$50,000 check and I followed what my clients asked me to
15 do
16 Q- How do you know that your clients would have been
17 prepared to close in one or two days?
18 A Steve Hill, whom I spoke with on the 31st, I know as I
19 stated earlier I know Steve's reputation I've dealt with
20 him a bunch, told me he would be able to come up with the
21 additional money but it was a matter of mechanics, that is
22 pulling the money from someplace else, be it a CD or a stocks
23 or investments, but it was going to take him a couple of days
24 to come up with that additional \$211,000 and that was the
25 money that they needed to close I had been informed by my

1 clients and Steve, you know, in fact, I think Steve told me
2 that he could do the whole thing by himself, but it was Steve
3 told me he could come up with the additional money and based
4 on my past dealings with Steve and his reputation I was
5 comfortable that he would do what he said he was going to do

6 Q Now, have you seen Mr Hill's financial statement?

7 A No, I don't believe I've been shown it, no

8 Q Have you seen any of his bank accounts and saw how much
9 money he has in the bank?

10 A No

11 Q Okay were you given the \$885,000 to put into your trust
12 account?

13 A No

14 Q Did you ever see a bank loan commitment that was fully
15 executed?

16 A No, I believe and it's fairly typical in these closings
17 that if it's not fully executed on many occasions I've
18 executed loan commitment letters at the closing table

19 Q Did you ever get the closing package from the bank?

20 A I'm trying to remember if I actually got it from the
21 bank or if they held off because I told them that we didn't
22 have the 211 or Bruce or Dave told them that we didn't the
23 additional 211

24 Q Did they send you, send you a closing package later
25 within a day or two when you were supposed to have the money?

1 A No because Skipper told me they weren't going to close

2 Q You never set the closing date or tried to close within
3 any period of time after the 31st did you?

4 A The seller told me they weren't going to close There
5 wasn't a whole lot of purpose in setting up a closing,
6 getting everybody to the table when one party's not, has

7 informed me and that the contract is terminated and they're

8 not coming, you know, essentially they're not coming to

9 closing

10 Q Even though it would show that you're ready to perform,
11 you're not showing that you're ready to perform when the
12 contract said July 31st was the final day, correct?

13 A I told them we'd be ready to close in a couple of days
14 I guess telling someone isn't good enough nowadays

15 Q This contract was time is of essence contract, correct?

16 A Yeah, says it several different places, including the 15
17 days

18 Q But had a seven-month period between the contract date
19 and the final closing date?

20 A Yes

21 Q Correct?

22 A Yes, I mean, yes

23 Q And when we got to July 31st they couldn't -- nobody
24 could close, the buyers could not close

25 A Correct

1 Q The seller sent you the closing documents, did they not?

2 A Yeah, I think he e-mailed them to me either on Friday or
3 he may have e-mailed them to me Monday morning I'm not
4 exactly ---

5 Q You had the closing documents Was there any problem
6 with the seller closing documents?

7 A No I mean, they're fairly simple So, I mean, that's
8 ---

9 Q Everything was ready You talk about everything being
10 done at the last minute I just want to cover this one last
11 area, is the same true in commercial closings as in
12 residential closings? Are they a little bit tighter in
13 commercial closings than they are in residential closings
14 getting documents together and getting them to you?

15 A When you say a little tighter, do you mind?

16 Q A little bit, a little bit more formal, have it to you a
17 little bit earlier than residential closings?

18 A Not, not in my commercial closing practice I do
19 probably eight or nine hotel purchases a year, and they're
20 Small Business Administration loans typically and who knows
21 when they're going to close We'll set a closing date and
22 it'll get moved 10 or 15 times and I'll always get the
23 closing packages and they're this thick and I'll get them the
24 day of closing by fed-ex every time

25 Q And you review those totally, is that right?

1 A Yeah well, I -- after I've reviewed the first one, I
2 mean the SBA closing documents all are the same except for
3 the number They're the same notes, the same guarantees,
4 the same tri-party agreements, the same agreements with --
5 between the -- because the SBA requires the borrower to sign
6 all the same things in their documents They require the
7 franchise because typically if you're dealing with these
8 hotel closings they require the franchise to sign the same
9 agreements So, to some extent probably 99 percent of the
10 documents are alike except for the numbers and the names

11 Q Isn't it true that you were involved in a hotel closing
12 on July 31st?

13 A I think I was scheduled to close one on July 31st I'm
14 not sure if it actually closed that day or it may have been
15 moved because of this

16 Q Weren't you pretty well tied up with that closing all
17 day?

18 A They typically take about two hours because of the
19 volume of documents I would have probably tied my -- taken
20 my whole morning and blocked it off for that one closing,
21 yes

22 Q Were you also tied up in the afternoon?

23 A This, this particular closing was what I had blocked out
24 for the afternoon because it was going to be a commercial

25 Q And did you work on it the entire afternoon, this

1 closing?

2 A I was dealing with probably with Bruce and Dave trying
3 to figure out if we were actually closing this thing, if they
4 were going to come up with the money and I know I was on the
5 phone with Mr Woody some, too

6 Q You were Why did you wait until -- why did you send
7 him an e-mail at five o'clock, why did you wait till five
8 o'clock to send him an e-mail with a \$50,000 check?

9 A I think we were trying to figure out exactly what was
10 going on I think I had been on the phone with him

11 Q I have nothing further Your Honor

12 THE COURT All right, anything on redirect?

13 MR FUTERAL Nothing further, Your Honor

14 THE COURT Thank you very much You can step down

15 MR FUTERAL Your Honor, may the witness be excused

16 ---

17 THE COURT Any problem with that, Mr Altman?

18 MR ALTMAN I have no problem

19 THE COURT All right, thank you very much for
20 coming You're free to go

21 MR FUTERAL Thank you, Your Honor

22 A Thank you Your Honor

23 THE COURT Call your next witness

24 MR FUTERAL Your Honor, we'd like to call Mark Knight
25 to the stand, please

17475

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Thomas L. Hughston, Circuit Court Judge

Case No 06-CP-08-1650

Sheep Island Plantation, LLC

Appellant,

v

Bar Pen Investments, LLC,

Respondent

RECORD ON APPEAL
VOLUME II

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1 WHEREUPON, Mark Knight was called to the stand, duly
2 sworn by the clerk and testified as follows

3 THE CLERK Have a seat and state your name and spell
4 your last name for us

5 MR KNIGHT Mark Knight K-N-I-G-H-T

6 DIRECT EXAMINATION

7 BY MR FUTERAL

8 Q Mr Knight, you work for South Coast Bank?

9 A South Coast Community Bank

10 Q Yes, sir, and you worked for South Coast Community Bank
11 back when this transaction was taking place?

12 A Yes sir

13 Q Would you kindly tell the jurors what it is you do for
14 South Coast Bank?

15 A I -- at that time I was a commercial loan officer,
16 which is in charge of generating loans, also business
17 development

18 Q How did you meet Mr Marshall?

19 A Originally I had met him through the branch manager at
20 the time calling on his local business there in Goose Creek

21 Q Okay, and at some point in time you all had a
22 conversation about the transaction that we're in court for
23 today?

24 A Yes

25 Q All right, go ahead I'm sorry

1 A Sometime in January of '06, I joined the bank in
2 September of '05 in January of '06 sometime came in and
3 wanted to talk to me and sit down about applying for a land
4 purchase

5 Q Okay, did anybody else come with him, sit down and talk
6 to you about it?

7 A I believe it was Mr Marshall and Jeremy

8 Q Okay, and at that point in time explain to us what it is
9 that you're doing or going to do or how does this process
10 work after they come and meet with you?

11 A Traditionally, you sit down and talk about the
12 parameters of the deal, what they're, what they're looking
13 for, the terms, what the bank can provide but usually they
14 come to the meeting, the first meeting with, you know, a
15 contract

16 Q Okay, did they provide you at any point in time with a
17 copy of the contract in this particular situation for this
18 land?

19 A Yes

20 Q Okay you've been sitting in the courtroom throughout
21 the afternoon You've heard some testimony regarding 65
22 versus 75%?

23 A Yes, sir

24 Q Loan to value, would I be correct that whether it's
25 going to be 65 or 75 would depend on whether this property

1 was able to be subdivided into a neighborhood or whether it
2 was just going to be raw land?

3 A Well, raw land is straight 65, but the difference
4 between 75 and 65 is determined by whether or not the land
5 has access to water, which if it has access to water it
6 usually can be involved in a development loan, which will be
7 split into lots and sold for homes

8 Q Okay, so when you're talking about access to water
9 you're talking about water and sewer not boat landings?

10 A Yes, yes

11 Q Okay, in this case was there some question when you
12 first started talking to Mr Marshall and his son as to
13 whether there would be water and sewer or not?

14 A There was that question for, for quite a few months

15 Q Okay, would I be right in assuming that when Mr
16 Marshall and Jeremy met with you they really in terms of
17 whether there was going to be raw land that they were going
18 to resell or they were going to develop it all of these
19 things hadn't been finalized on their end?

20 A No, and in my mind especially when they applied for the
21 loan it's like anybody else that's shopping just to see what
22 kind of deal we can offer them

23 Q Okay, how many loans similar to this one, and when I
24 mean similar where you're lending a bunch of money for many
25 acres possibly for development and so on, how many loans like

1 that have you been involved with?

2 A Of this this many acres, not, not many However as
3 far as development loans, say two to three

4 Q Okay, so, now, for 101 acres, in fact that would be sort
5 of a large development for this particular, for your bank at
6 that time correct?

7 A Yes, sir, even two and a half million is a large loan
8 for a community bank

9 Q And obviously you're trying to make money off of the
10 deal but meanwhile you want to make sure that you don't take
11 the risk of lending money and not getting repaid, would I be
12 correct in that?

13 A Yes, sir, I mean, it's my job to represent the bank but
14 at the same time I'm trying to get the loan approved

15 Q Sure You -- have you represented or worked with
16 different kinds of buyers, in other words, like do you know
17 Mr Hill?

18 A I knew of Mr Hill I didn't know him personally I
19 just knew his name and his signs, commercials

20 Q Okay, I guess what I mean is are some people seasoned in
21 what they're doing in terms of commercial transactions and
22 buying property or do you also deal with some people who are
23 not so familiar with these types of transactions?

24 A Certainly

25 Q Okay

1 A I mean, there's -- it takes all kinds

2 Q Does everybody that comes into your office or do they
3 have all their ducks in a row, they know exactly what they're
4 going to do with the property, when the water and sewer is
5 coming in and what the terms of the loan are going to be and
6 so on?

7 A No sir

8 Q Okay, would it be fair to say that it's sort of a work
9 in progress?

10 A Yes, sir, any type of land purchase is usually a work in
11 progress

12 Q Okay, okay, now, after you've had your initial meeting
13 with Mr Marshall, at that meeting did you tell him you
14 needed any particular information, paperwork what sorts of
15 things might you have needed?

16 A Well when you apply for any loan your minimum two years
17 tax returns, personal financial statements, and the contract
18 is pretty much what I ask for at the initial meeting saying
19 this is what I will need to go forward

20 Q At any point in time were you aware of whether Mr
21 Marshall and his son were going to transfer or sign that
22 property to like a corporation or a limited liability
23 company?

24 A Yes, sir The-- at some point later in '06 and it was
25 sometime in the spring It wasn't May June or July, but

1 Sheep Island was formed and they opened an account at the
2 bank

3 Q Okay, is there a set time frame within which when a
4 person walks into your office and says "I'd like to borrow,
5 well, in this case a lot of money," I'm assuming, between
6 that time and when you author the bank authors rather a loan
7 commitment letter is there, is there -- I mean, is this time
8 period etched in stone on you all's end?

9 A No, sir

10 Q And you understand my question If I walked into your
11 bank and I said, "I want to borrow a couple of million
12 dollars or whatever it may be to buy this 101 acres " do you
13 have like 30 days to give me that commitment or 10 days or
14 ---

15 A We, you know, they didn't know what they wanted to do
16 with the land So, until -- I was just trying to gather
17 information to determine, one, really if they, if they
18 qualified, or two, I was just trying to collect all the
19 information I could because obviously in a contract, you
20 know I knew in January that we had a little while to work
21 with

22 Q Okay, seven months

23 THE COURT You actually knew in January what?

24 A That the contract didn't expire until much later

25 THE COURT So, you knew -- you were working on this

1 from when January till July the 28th when you finally sent
2 out this commitment letter?

3 A No, sir I mean, I accepted their application in
4 January but by no means did I start working in January I'm
5 not the quickest but ---

6 THE COURT Well, when did you start working on it?

7 A Well, when they determined, one, that water wasn't going
8 to be connected to the, to the property At that point I had
9 a parameter to work around and also ---

10 THE COURT When was that?

11 A Not until maybe the beginning of July

12 Q Okay

13 THE COURT But you knew that they had to close on
14 July the 31st

15 A Yes, sir

16 Q During the time that you dealt with Mr Marshall, well
17 let me ask you this, did you deal with any other folks from
18 Sheep Island? Did others come into your office?

19 A What time period are you referring to?

20 Q Any time period whatsoever

21 A Yes, sir

22 Q Okay, who else came to see you from Sheep Island?

23 A Well, I obviously got to know Dave fairly early into the
24 transaction Bruce, after they determined that water wasn't
25 coming around at that time, Bruce, you know, would come in my

1 office and keep me up to date as to, ``Hey, we're going to be
2 bringing some new investors into the deal They're going to
3 come see you, '' such as the two gentlemen, Tex and the other
4 guy

5 Q Okay, did you ever meet with Tex and the other fellow?

6 A Yes, sir, they came in and they were -- they provided
7 all the information I needed However, they were pretty up
8 front in saying that it was going to -- their money was going
9 to come from somebody else So, they didn't tell me who

10 Q Okay

11 A But I think they were just acting as a middle man

12 Q So, then they're indicating they're going to borrow from
13 somebody else to come up with their money to get into the
14 deal, is that right?

15 A Yes, sir

16 Q Okay

17 A Sounded like a pretty good deal

18 Q Of the -- I'm sorry

19 A Nothing

20 Q It was a good deal?

21 A I -- at just -- if if I was in their shoes and I could
22 get access to that money I would like to get in on that, too

23 Q Okay, well, maybe not, but ---

24 A Right

25 Q All right, sorry So of the members that you dealt

1 with did you have any problems getting any information out of
2 them? In other words, did they dilly dally around and not
3 give you what you asked for?

4 A No, sir

5 Q All right, have any -- no problems with Mr Marshall or
6 with his partner, Dave, or anything of that nature?

7 A No, I had their financials for quite some time

8 Q In your experience as a lender anything unusual about
9 the fact that it appears that this LLC is reshaping itself,
10 one member's in one member may be out, new ones are being
11 added? Is this unusual in your trade?

12 A No, sir, not in when you're talking about a -- well,
13 this deal changed from a development loan to a -- just a
14 strictly land purchase

15 Q Okay, and I would be correct then that it changed
16 because or of whatever happened in June or July the water and
17 sewer going in a different direction so to speak

18 A Right I mean, they had brought engineering maps, you
19 know, detailing how the lots were going to look if, if the
20 water came into play

21 Q Who brought you engineering maps?

22 A Bruce

23 Q Okay how often did Bruce contact you about the loan
24 throughout this process?

25 A I wouldn't say, you know, once a week, but at least once

1 every other week

2 Q Okay

3 A Fairly often

4 Q As you got down to June and into July how often did he
5 contact you then?

6 A Several times a week

7 Q Okay

8 A If not daily

9 Q Did he keep you updated as to what was going on with
10 water and sewer and partners and so on?

11 A Well, once the water was -- we -- it was determined it
12 wasn't going to occur then he was said, "Look, we need to
13 focus on who's going to be in this," because it was
14 obviously in the beginning of July and we had -- we needed to
15 meet the closing date

16 Q And when you told him that, well did he respond with
17 action, I mean other than just telling you "Sure, we
18 will " did he do anything?

19 A Informed me who, who was going to be coming to see me,
20 provided me with phone numbers or had them contact me I
21 advised them what I would need from them and they came into
22 my office and dropped it off ---

23 Q Okay

24 A --- or met with me

25 Q Now, is Mr Marshall correct in that up until this point

1 there wasn't anything concrete about this I call it prepaid
2 interest Maybe I'm misstating what it is, but this interest
3 payment of \$211,000 is that something you all had been
4 discussing throughout the course of this and I understand you
5 hadn't authored a commitment letter I think we've all heard
6 that a bunch

7 A Uh-huh

8 Q But were you talking about, hey, you know you guys are
9 going to have to come up with a years worth of interest?

10 A No

11 Q Okay, so, this is something then that developed what
12 late June, early July or?

13 A The interest -- I was underwriting the loan from the
14 standpoint that it wouldn't require that Upper management,
15 namely the president of the bank, said that in order to get
16 his signature we needed that as another additional
17 requirement

18 Q And just so I understand we're clear on this, while
19 you're working on them to obtain the loan you're not the
20 final decision maker on whether they get it, right?

21 A It's outside my lending authority, yes

22 Q Okay, and not to belittle your position but if the bank
23 president says, "This is the way we're going to do it,"
24 then that's how the loan's going to be done or not at all

25 A He had to sign off on the loan So it was it was in

1 his hands

2 Q Okay, do you recall at what point you put all of the
3 information together to put it into the hands of the bank
4 president or whomever else was going to make that final
5 decision and bearing in mind that that commitment letter was
6 what, January 28th, as we've seen?

7 A I met ---

8 THE COURT July 28th

9 Q I'm sorry, thank you, Your Honor, July 28th

10 A I met with a Mr Hill, who was the final person I had
11 not met with

12 Q Steve Hill you're talking about

13 A Steve Hill

14 Q Okay

15 A On Wednesday, I believe right around lunchtime if not
16 just after lunch He brought me what I asked him to bring
17 me At that point ---

18 Q Well, may I stop you for one minute? What did you ask
19 him to bring you?

20 A Personal financial statement and ---

21 Q Do you recall how strong Mr Hill's financial statement
22 is?

23 A Yes, sir

24 Q On a scale of one to ten, one being he's panhandling on
25 the corner with a tin cup and ten being he can handle this

1 whole transaction himself, where would you rate him based on
2 his financials?

3 A A ten

4 Q Okay, so, he's strong financially?

5 A Yes, sir

6 Q Meets with you Wednesday, he's part of this deal now?

7 A Yes, sir

8 Q Okay, please take us forward

9 A Well, I knew he -- Bruce had informed me that he was
10 going to be part of this deal but until I had the required
11 documentation from the bank I couldn't do my job and present
12 the bank, present the loan for approval.

13 Q Was Mr Hill avoiding you or anything that you're aware
14 of or --

15 A No, I mean it was -- I know he -- I know he's busy

16 Q Okay, all right, was he brought in late or brought in
17 early or do you know?

18 A I don't know

19 Q Okay, fair enough So, once Mr Hill comes in on that
20 Wednesday you then put it together and give it to the powers
21 that be there at South Coast?

22 A I finished up doing the underwriting, presented it to my
23 senior credit officer who said, "Well, this loan of this
24 size is going to -- the president, Wayne Pearson, is going to
25 have to sign off on it " and he essentially said you know

1 you've got to hustle and track him down I finally tracked
2 Mr Pearson down on the 28th the day of the commitment
3 letter, and he wanted the interest put in or the 12 months
4 interest carry put into a money market, assigned to this
5 deal, as well as the other parameters that I had written out
6 as far as the first mortgage and the 65%

7 Q Okay, just so the jurors understand, when you're talking
8 about you're doing the underwriting can you explain to them
9 very, very briefly what it is you mean when you say you're
10 underwriting the loan?

11 A I'm collecting financial information to justify the
12 bank's risk of getting involved in the transaction

13 Q Okay, so, as we know the commitment letter then -- well,
14 defines the term that they would have to pay the interest and
15 please correct me if I'm wrong, but I want to make sure I
16 understand this, the loan is for one year

17 A Yes, sir

18 Q For that entire amount, correct?

19 A Yes, sir

20 Q Or would have been?

21 A It's 12 months interest only

22 Q Okay, and all they have to do is make interest payments
23 on that which obviously it's a large sum, so, lots of
24 interest, right?

25 A Yes, sir

1 Q And the bank wanted them instead of to make monthly
2 payments on their interest like say somebody does on their
3 house they wanted all that money up front in an account, I
4 think a ---

5 A In a money market account which is an interest-bearing
6 account

7 Q Okay, at the bank

8 A Yes, sir

9 Q To cover your risk, of course

10 A Yes, sir

11 Q Okay, and so, you authored the commitment letter on the
12 28th Do you know how that got to the buyers? Did somebody
13 come in and pick it up or ---

14 A It got to the buyers in a variety of ways I believe I
15 faxed it to Mr Funk I think he was in Myrtle Beach I
16 believe I e-mailed it to Mr Hill and I believe the other
17 ones were delivered up to Low -- to their office in Goose
18 Creek

19 Q Okay, and to just sort of speed this up, at some point
20 Mr Marshall had testified he communicated with you that he
21 was sort of taken by surprise by this particular number and
22 that it was going to, well, basically, hinder the buyers from
23 closing Did he have those conversations with you as you
24 heard?

25 A Yes, sir

1 Q Okay, he was probably kind of upset or not?

2 A Yes, sir, surprised

3 Q Okay not that you all did anything wrong but he was
4 surprised?

5 A Yes, sir

6 Q Okay, all right, now, you didn't have any dealings with
7 Skipper Wooddy, the sellers', their real estate agent You
8 didn't have anything to do with any of that, correct?

9 A No, sir

10 Q Okay, all right

11 Sir, I'm showing you Plaintiff's Exhibit Number Two and
12 13 These are, Two is the letter that you authored on
13 February 14th, 2006, is that correct?

14 A Yes, sir

15 Q And the one from July 28, 2008, that is the loan
16 commitment letter that was transmitted, correct?

17 A Yes sir

18 Q All right and it was never signed by all of the people
19 that it was intended to be signed by, is that correct?

20 A That's correct

21 Q Okay and as we know the closing didn't go forward on
22 the 31st This letter, though, on February 14th 2006, now,
23 this is not a loan commitment letter of any sort, right?

24 A Correct

25 Q And just briefly this is the one that says you've been

1 in discussions with Bruce Marshall about making a loan and
2 that you welcome the opportunity to assist them with that

3 A Yes

4 Q It's addressed to whom it may concern, in other words,
5 somebody perhaps other than Mr Marshall Can you tell us
6 why you authored this letter?

7 A Bruce came into my office and said that they needed a
8 letter showing that they've applied for this loan

9 Q Okay

10 A And that I was looking at information and hoping to move
11 forward

12 Q Okay, so, this was to demonstrate that they're making a
13 loan application, not that they had loan approval but just
14 an application

15 A That's correct

16 Q Okay One moment, Your Honor That's all the questions
17 that I have Thank you

18 THE COURT All right we'll stop here for this

19 evening You can have your cross examination tomorrow

20 morning Members of the jury panel we'll take our evening

21 recess Leave your pads with the balliff as you leave

22 Again, I tell you not to discuss the case with family,

23 friends or anyone else They're not the 12 people that will

24 make a decision in this case You are So, with that I'll

25 let you go and ask you to be back with us in the jury room by

1 9 30 tomorrow morning We'll get started just as soon as we
2 can after that Have a nice evening 9 30 tomorrow morning
3 Wait just a second

4 A Sorry

5 (Whereupon, the following takes place outside the
6 presence of the jury)

7 THE COURT You can step down

8 *****OFF THE RECORD*****

9 (On the record, Wednesday, March 12, 2008)

10 (Whereupon, the following takes place outside the
11 presence of the jury)

12 THE COURT Come on back up Mr Knight
13 Bring the jury in

14 (Whereupon, the following takes place in the presence of
15 the jury)

16 THE COURT All right we have the jury back with us
17 The parties are present along with their attorneys All
18 right, appreciate you being on time We'll continue now with
19 the trial Mr Altman I believe you were about to cross
20 examine Mr Knight

21 MR ALTMAN Thank you, Your Honor

22 CROSS EXAMINATION

23 BY MR ALTMAN

24 Q Mr Knight, I believe you testified yesterday that you
25 had been with South Coast Community Bank for a fairly short

1 period of time when Mr Marshall came to see you?
2 A Yes, sir I joined South Coast in September of '05
3 Q And so this was in January of '06 that they came to see
4 you, correct?
5 A Yes, sir
6 Q When they came to see you did they have a copy of the
7 contract with them?
8 A I honestly can't say for sure, however I know they did
9 fill out an application
10 Q Who filled out that application?
11 A I believe Jeremy was the one who actually signed it
12 Q Let me show you a copy of a document and get this
13 marked, first, and I believe it would be Defendant's Exhibit
14 Number Four, Five, excuse me Have you seen that document
15 before?
16 A Yes, sir
17 Q Is that the application that Jeremy Marshall filled out?
18 A Yes, sir
19 Q When Jeremy Marshall came to see you who was with him?
20 A I believe it was Bruce and Jeremy
21 Q Okay you understood they were father and son?
22 A At that time yes sir
23 Q What were they asking you to do?
24 A They were inquiring about -- they were inquiring about a
25 loan for a land purchase

1 Q How much were they seeking to borrow from you?

2 A They were inquiring about it, what the bank would lend,
3 what our lending authority would be

4 Q Did they tell you how much the purchase price of the
5 property they were trying to buy was?

6 A Yes, sir

7 Q What did they tell you?

8 A Around two and a half million dollars We got into the
9 specifics on the fact that it was a land Asked them,
10 basically explained to them that South Coast policy is 75% for
11 development land, 65 for raw land

12 Q And what -- tell me the difference again if you would
13 between raw land and development land?

14 A Development land has access to water and sewer

15 Q Public water and sewer?

16 A Yes, sir

17 Q And raw land does not have access?

18 A Yes, sir

19 Q What do you mean by not having access? It's within a --
20 is it has to be right in front of the property or can be down
21 the road a bit?

22 A Being able to tap into the city water, having that
23 capability where the city would have to designate where
24 they're, where they're going to take water to next

25 Q So it has to be known there's going to be water

1 available, water and sewer available fairly near the property,
2 correct?

3 A Yes, sir

4 Q And you told them if it was not, if the water and sewer
5 was not available you would loan 65% ---

6 A On on that

7 Q --- on the value?

8 A On the purchase price

9 Q Okay, and what has been identified as Defendant's
10 Exhibit Number Five ---

11 MR ALTMAN And Mr Futeral, do you have any
12 objections to that exhibit?

13 MR FUTERAL No

14 MR ALTMAN Thank you

15 (Whereupon, Defendant's Exhibit Number Five admitted into
16 evidence and appropriately marked)

17 Q It shows on here, I believe that the applicant is
18 Jeremy Marshall and a to be incorporated, to be incorporated
19 under the name Sheep Island Plantation, LLC is that correct?

20 A Yes, sir

21 Q And if you look at the second page, the top of the
22 second page what does Mr Marshall tell you his income is from
23 the previous year?

24 A \$10,000

25 Q \$10,000 Does he tell you what his assets were?

1 A They're listed there, yes, sir

2 Q About how much?

3 A What he has listed is 1,172,000

4 Q Did he provide you with a list of what those assets
5 were?

6 A At this time, I don't -- no, sir I don't believe so

7 Q Okay, did he tell you who else would be involved as
8 investors in the property with him?

9 A At that time it was still unknown I knew at that time
10 you know, Bruce, and then they list a couple of other, other
11 gentlemen here

12 Q Does it list Mr Hilleshiem?

13 A His name is there

14 Q And Mr Funk?

15 A Yes, sir

16 Q Okay, anybody else listed at that time?

17 A No, sir

18 Q Okay, you mentioned Bruce Marshall His name does not
19 appear on the application, correct?

20 A That's correct

21 Q Okay, based on what you had in this application would
22 the bank have lent 65 or 75% of the purchase price to Mr
23 Marshall?

24 A No, sir

25 Q What else did you need in order to determine if you were

1 going to loan him money?

2 A We needed to collect personal financial statements, tax
3 returns indicating that, one, that they could have repaid us
4 the loan

5 Q Did you eventually receive the information you needed
6 for Mr Jeremy Marshall, Mr Hilleshiem and Mr. Funk?

7 A Yes, sir

8 Q When did you receive that information?

9 A I honestly don't know the exact date, however it was
10 it was not too long after this It was that spring

11 Q That's during the spring so, March, April of 2006?

12 A I don't recall if it was February 1st or March 1st

13 Q When you received the information on Mr Jeremy
14 Marshall, Mr Hilleshiem, Mr Funk did that show enough
15 financial strength for the bank to make a loan of the type
16 that was being requested?

17 A At that time no

18 Q It did not Did you tell anyone that they needed more
19 financial strength in order to get their loan?

20 A Yes sir

21 Q Who did you tell?

22 A I believe I told Bruce at that -- more specifically,
23 when they provide the financials, that's when I was more than
24 willing to write the letter that we'd, or I guess it was
25 presented yesterday showing that they had applied for the

1 loan, but I also said they would, at that time we wouldn't be
2 able to approve the loan at that time

3 Q At that time, they needed more -- somebody else with
4 more financial strength?

5 A Yes, sir

6 Q Both income-wise and asset-wise or one or the other?

7 A I would say both

8 Q Okay, when was next time you had contact with anyone
9 regarding this loan after you got the information from Mr
10 Funk, Mr Hilleshiem and Jeremy Marshall?

11 A We were in contact quite a bit Obviously a loan of
12 this size I was -- wanted to see this through as well and I
13 stayed in contact with them and they did the same with me
14 going back and forth on what exactly they wanted to do with
15 the property

16 Q Did there come a time when they brought more investors
17 into the project?

18 A Yes, sir

19 Q When was that?

20 A When the -- when it was determined that water wasn't
21 going to be in -- available for the property is when I
22 originally knew that there was going to be other investors,
23 that I had heard names

24 Q When was that?

25 A At the beginning of July

1 Q The beginning of July 2006

2 A Yes, sir

3 Q That's when you became aware the water and sewer was not
4 available for the property?

5 A About that time yes sir

6 Q And that was about the time also they started talking
7 about other investors?

8 A Yes, sir

9 Q Did they give you any names?

10 A The gentleman that we discussed, Mr Curtis, and the
11 other gentleman

12 Q Mr Bordine

13 A Bordine

14 Q Bordine When did they provide you with information?

15 A Either the, not the -- it was -- not the -- the 28th was
16 that Friday I think I finally sat down with them the that
17 Monday

18 Q The Monday before the 28th So, it may have been the
19 24th?

20 A Yes, sir, right around then

21 Q Did there come a time when you met with a Mr Hill?

22 A Yes, sir

23 Q When was that?

24 A Met Mr Hill and got his financials I believe on that
25 Wednesday

1 Q The 26th?

2 A Yes, sir

3 Q When did you first see a copy of the contract?

4 A It was before I issued that letter, I believe, on the
5 14th of February

6 Q Okay, I'm going to show you what has been marked as
7 Plaintiff's Exhibit Number One, which is the contract

8 A Yes, sir

9 Q Did you review the contract?

10 A Yes sir

11 Q Did you notice any provisions about when the contract
12 was to close?

13 A Yes, sir

14 Q Okay and I'm going to ask you to look, I believe,
15 paragraph 34 Does that have a statement in there of when the
16 closing dates, the closing has to take place?

17 A With reference to paragraph nine closing shall take
18 place no sooner than July 15th, 2006, and no later than July
19 31, 2006

20 Q So, prior to February 14th you were aware we had --
21 there was a good bit of time before closing but there were
22 definite closing dates?

23 A Yes, sir

24 Q They had to close by the 31st of July?

25 A That's correct

1 Q And you're telling me, telling us that on July 24th and
2 July 26th you're finally getting financial information on the
3 investors, is that correct?
4 A Yes, sir
5 Q Okay, when -- in the process, the normal process of the
6 bank, how long or how long before the closing do you like to
7 have the commitment letter done?
8 A Certainly as soon as possible
9 Q What timeframe do you feel comfortable? You feel
10 comfortable with the day before closing?
11 A Do I feel comfortable, no
12 Q How long beforehand do you want to have that prepared?
13 A On a commercial or any closing I'd say at least -- well,
14 it varies whether or not the appraisal has been completed
15 if, you know, because usually the commitment letter is issued,
16 at that point they knew the terms, then we go forward with,
17 with an appraisal
18 Q So, you normally get the appraisal, the commitment
19 letter done, then do the appraisal?
20 A Yes sir
21 Q And then you're ready to close ---
22 A Yes, sir
23 Q --- assuming the appraisal meets, provides an adequate
24 value?
25 A Correct

1 Q Okay, how long before closing do you need to order the
2 appraisal?

3 A That varies as well, certainly want to provide time for
4 the appraisal

5 Q A week, two weeks three weeks?

6 A On a commercial appraisal it usually takes a week,
7 usually at least a week

8 Q At least a week?

9 A Yes, sir

10 Q So, that means that you would have wanted to order this
11 one at least by the 24th of July correct?

12 A Yes, sir

13 Q But you prefer a longer period of time than that?

14 A Certainly

15 Q So, you would have liked to have had the commitment
16 letter done prior to the 24th?

17 A Yes, sir

18 Q Why do you want to have the commitment letter before you
19 order the appraisal?

20 A Well, the, the -- if the bank is going to order the
21 appraisal they're responsible for the appraisal Therefore,
22 want to make sure we're going to -- make sure we're going to
23 be closing on the deal or we're going to go forward with the
24 deal

25 Q Normally is one of the terms of the commitment that the

1 borrower is going to pay for the appraisal?

2 A Yes, sir

3 Q And that's going to happen whether the closing takes
4 place or not, correct?

5 A Well, not necessarily, but yes, sir

6 Q If you're going to order the -- if the bank is going to
7 order the appraisal you want the borrower to be responsible
8 for it

9 A Okay, yes, sir

10 Q Did you -- why did it take so long to get the commitment
11 out in this case?

12 A I met with the final investor on Wednesday

13 THE COURT I'm sorry I didn't understand you

14 A I met with the final investor on the Wednesday,
15 therefore I couldn't, I couldn't do my due diligence in
16 presenting the entire loan request to the bank until I had all
17 the information

18 Q You say submit it to the bank Who do you have to
19 submit it to?

20 A The loan committee which is upper management

21 Q What was the reason for the delay in getting the
22 information from the investors? Was that something you did or
23 something the borrower did?

24 A It's not anything I did

25 Q The borrower delayed getting it to you, didn't he?

1 Getting the names to you and the people to you?

2 A Yes, sir

3 Q And after that you were running as hard as you could to
4 get a commitment out?

5 A Yes, sir

6 Q And you got the commitment out on the 28th?

7 A That's correct

8 Q And that was approved by the senior management "by the
9 loan committee?"

10 A Yes, sir

11 Q And then what did you -- once you had the loan approved
12 and you had prepared the commitment letter, what did you do?

13 A Notified the borrowers

14 Q How did you notify them?

15 A By phone, in person, by fax I was trying to do
16 everything I could possibly do

17 Q Did some of them come in to sign?

18 A Yes, sir

19 Q And did you hand, whoever came in to sign, did you
20 present them with the entire commitment letter?

21 A Yes, sir

22 Q Okay and you handed it to them and they signed it?

23 A Yes, sir

24 Q Okay, I'm going to show you what has been marked as
25 Plaintiff's Exhibit 13 and ask if you can identify that Have

1 you seen that before?

2 A That's the commitment letter, yes, sir

3 Q And I'm going to ask you to look at the last four pages
4 which are the signature page, where signatures appear?

5 A Yes, sir

6 Q Did everybody -- well, let me back up a second The
7 letter is addressed to a number of people is it not?

8 A Yes, sir

9 Q It's addressed to M Stephen Hill, John Bordine, Cecil
10 Curtis, Jeremy S Marshall, Walter M Funk David A
11 Hilleshiem and Sheep Island Plantation, LLC correct?

12 A Yes, sir

13 Q How did you get those names?

14 A Those were the -- whose financials I had collected who
15 were applying for this loan

16 Q Who told you that those people were going to be the
17 investors?

18 A Sheep Island Plantation

19 Q Bruce Marshall?

20 A Yes, sir

21 Q Mr Marshall testified that he talked to you on the
22 27th Do you remember that conversation?

23 A At this point we were talking just about everyday

24 Q Okay, you were in the courtroom yesterday when Mr
25 Marshall testified I believe?

1 A Not for the entire time, but yes, sir

2 Q Okay, let's look at the last four pages and there are

3 signatures on each of the pages, all the signatures are not on

4 all the pages

5 A That's correct

6 Q Okay, when the -- do you remember who came in to sign?

7 A Excuse me I don't recall specifically

8 Q Okay, when the people came in to sign or when you --

9 yeah, I think you said you sent it to them by fax?

10 A Yes, sir

11 Q Or e-mail?

12 A Uh-huh, yes, sir

13 Q Did anybody say, "Mr Knight, this commitment letter is

14 not right?" Did anybody comment on it?

15 A Yes, sir

16 Q Who did?

17 A Bruce Marshall

18 Q Well, Bruce Marshall didn't sign it, did he? I'm

19 talking about when you presented the commitment letter to the

20 people who signed, did anybody raise any questions?

21 A I believe Mr Hilleshiem did as well

22 Q Well, he signed, didn't he?

23 A Yes sir

24 Q Mr Hilleshiem signed both as a member of Sheep Island

25 Plantation, LLC, and as a guarantor, did he not?

1 A Yes sir

2 Q Okay, Jeremy Marshall signed did he not?

3 A Yes, sir

4 Q In both capacities? Mr Hill signed in both capacities,

5 did he not?

6 A Yes, sir

7 Q Mr Funk signed, did he not?

8 A Not in both capacities

9 Q Well, if you'll on the first of the signature pages it

10 does have him there in both capacities I believe

11 A Oh, excuse me yes, sir

12 Q So, everybody signed the letter as you prepared it with

13 the exception I believe of Mr Curtis?

14 A That's correct

15 Q Mr Bordine also signed, correct?

16 A Yes, sir

17 Q They accepted the terms as you presented it, presented

18 those terms to them, correct?

19 A By signing yes

20 Q Did there come a time when anyone informed you that some

21 of these people were not going to be members of the LLC?

22 A Did there come a -- repeat the question

23 Q Did there come a time when someone told you that some of

24 the people who you had addressed this letter to would not be

25 members of Sheep Island Plantation, LLC?

1 A Yes, but that was, I believe not until after the 31st

2 Q After the 31st?

3 A Yes, Sir

4 Q Do you remember receiving a letter from Mr Bruce

5 Marshall on or about August 2nd, 2006?

6 A Yes, sir

7 Q I'm going to show you what has been marked as

8 Defendant's Exhibit Number Two Did you read the letter when

9 you received it?

10 A Yes sir

11 Q Did you contact Mr Marshall after you received this

12 letter?

13 A I imagine I did

14 Q You don't remember specifically talking to him?

15 A I remember specifically talking to him, you know, from

16 the 31st, the 1st, just trying to find out because obviously

17 my loan processors or the banks loan processors had been

18 working very hard to make this close and they wanted to know

19 can they put this aside and start working on something else

20 or you know, if they wanted to know what was going on and

21 obviously I needed to find that out

22 Q Did Mr Marshall ever tell you or did anyone on behalf of

23 Sheep Island Plantation, LLC, tell you that they needed to be

24 prepared to close the loan, they needed to tell the sellers

25 they were ready to close, and they needed a loan package from

1 you?

2 A Could you repeat that again?

3 Q Did anyone on behalf of Sheep Island Plantation, LLC,
4 after -- on July 31st or before July, August 15th tell you
5 that they needed a closing package, they needed to be able to
6 tell the sellers that they were ready to close?

7 A Well, on the, you know on the 31st the bank is preparing
8 the loan package fully expecting the commitment letter to be
9 signed

10 Q I understand that but the commitment letter is never
11 completely signed, correct?

12 A Correct

13 Q Did anyone on behalf of Sheep Island, LLC, did anybody
14 come in to complete the signing of the commitment letter on or
15 after July 31st?

16 A No, sir

17 Q Okay did anyone on behalf of Sheep Island Plantation,
18 LLC, tell you that they needed to tell the sellers that they
19 were ready to close and they needed the loan approved so that
20 they could close between August 1st and August 15th?

21 A I was under the impression that they were delivering,
22 going to try to deliver this as, as Exhibit Number Two states,
23 that they were going to pay 50 000 to get an extension, and
24 after that I was, I mean, to answer your question no, but I
25 was expecting to find out that they were given an extension

1 and then we would close and then I would be given a date that
2 we were going to close

3 Q Did anybody tell you that they had a two-week extension
4 automatically?

5 A At this time?

6 Q At any time

7 A At any time?

8 Q At anytime prior to August 15th?

9 A I'm not sure I was told that by paying 50,000 they
10 were going to be granted an extension

11 Q A 30-day extension?

12 A I'm not sure if it was 15 or 30

13 Q Isn't that what the letter next to the last paragraph
14 sir?

15 A 30-day extension, yes

16 Q They were buying a 30-day extension for \$50,000?

17 A Correct

18 Q I have nothing further, Your Honor

19 THE COURT Anything on redirect?

20 MR FUTERAL Yes, sir, thank you

21 REDIRECT EXAMINATION

22 BY MR FUTERAL

23 Q Good morning Mr Knight

24 A Good morning

25 Q Mr Knight, if I -- if you invite me over to your house

1 for dinner say seven o'clock and I'm at my house, I'm doing
2 laundry, I'm watching TV, and I don't get ready and show up
3 into your house until say eight o'clock have I delayed
4 getting to your house?

5 A Yes, sir

6 Q Okay, now, if I'm supposed to be at your house for
7 dinner at seven o'clock and on the way driving to your house I
8 find out that there there's the one road into your
9 neighborhood they're ripping it up and doing stuff with water
10 and sewer and it delays me, well, I don't show up for another
11 hour, have I delayed getting to your house or has something
12 else delayed me from getting there?

13 A I guess both

14 Q Okay, well, you were asked some questions by Mr Altman
15 as to whether the borrowers in this case delayed getting
16 investors and I just want to make sure I understand what he
17 was asking you and what you were answering him Is there
18 anything that you know of that the borrowers did purposely not
19 to get investors?

20 A No, sir

21 Q Do you know whether the borrowers took their own sweet
22 time trying to find investors?

23 A I don't know that

24 MR ALTMAN Your Honor, I'm going to that It's pure
25 speculation That would be pure speculation

1 THE COURT Sustain the objection to that question

2 Q All right, Mr Knight, I handed you Plaintiff's Exhibit
3 Number 17 Do you recognize that?

4 A Yes sir

5 Q All right, and Plaintiffs Exhibit Number 17 is an
6 affidavit that you gave in this case regarding the transaction
7 itself?

8 A Yes

9 Q Okay, would you, would you read for the jury ---

10 THE COURT You want to impeach him by using his
11 affidavit? Is that what you're doing?

12 MR FUTERAL No, sir, I'm ---

13 THE COURT That's the only purpose you can use
14 something like that for

15 MR FUTERAL Okay, well then with the Court's
16 permission I'd like to treat Mr Knight as a hostile witness
17 then, please Your Honor, may I be heard on this?

18 THE COURT Sure

19 MR FUTERAL Thank you

20 THE COURT Members of the jury panel let you go to
21 the jury room for a few minutes please

22 (Whereupon, the following takes place outside the
23 presence of the jury)

24 THE COURT Yes, sir

25 MR FUTERAL Sir, the reason why I am asking to treat

1 this witness as a hostile witness and for Mr Knight's benefit
 2 it sounds like I want to wrestle him on the stand, and
 3 technically speaking, I guess that would be He was asked a
 4 series of questions by Mr Altman where he elicited a response
 5 from Mr Knight that the borrower essentially delayed getting
 6 investors and that's why this didn't go through His
 7 affidavit that he's given in this case, if you look at
 8 paragraph number six of it Your Honor, towards the end it
 9 talks about the buyers had informed him they were ready,
 10 including the down payment, etcetera, goes on to provide about
 11 the change in closing a year's worth of interest and says,
 12 "This change in closing condition was of no fault of the
 13 buyers Actually, the buyers did everything they could to
 14 come up with the extra 211," etcetera

15 THE COURT Well, I asked you if you wanted to impeach
 16 and you said no

17 MR FUTERAL Actually, I'm sorry, Your Honor, if I
 18 misspoke I thought I said, yes, I'd like to You know, when
 19 you asked to impeach him and I said hostile witness I'm
 20 thinking the same thing I'm sorry, Your Honor

21 THE COURT That's correct I will let you -- you
 22 can use an out-of-court statement to impeach him

23 MR FUTERAL Thank you sir

24 THE COURT Bring them back in

25 MR ALTMAN Your Honor, may I make one statement?

1 THE COURT Yes, sir

2 MR ALTMAN This affidavit is dated April 11th, 2006
3 Mr Knight's deposition was taken on May 29th, 2006, a month
4 and a half later The questions that I asked Mr Knight were
5 based on his answers in the deposition

6 THE COURT You can bring that out, too, if he's
7 already testified He's testified both ways apparently
8 Bring the jury in

9 MR ALTMAN Yes, sir

10 MR FUTERAL Thank you Your Honor, and I'm sorry if I
11 mischaracterized it, but I ---

12 THE COURT I think you said no

13 MR FUTERAL Yeah, I did say -- I may have said no and
14 then I was thinking hostile and impeachment the same thing
15 Okay

16 THE COURT All right It's rather unusual to impeach
17 your own witness You used to not be able to do that

18 MR FUTERAL Sometimes

19 (Whereupon, the following takes place in the presence of
20 the jury)

21 THE COURT All right members of the jury are back
22 with us You may continue

23 MR FUTERAL Thank you sir

24 BY MR FUTERAL

25 Q Mr Knight, if you would kindly read to the jurors

1 paragraph six of your affidavit You gave this affidavit in
2 -- what is the date of your affidavit?

3 THE COURT It's on the last page, April 11th, 2007

4 MR FUTERAL Thank you, sir

5 BY MR FUTERAL

6 Q All right if you'd read paragraph 6 to the jury, please

7 A "It is my understanding that according to the contract"
8 the closing was supposed to occur on or before Monday, July
9 31st, 2006 Having had worked with the buyers for several
10 months on this loan we believe we had come to terms on a loan
11 which required the buyers to pay \$885,500 down at closing
12 The buyers informed me that they had everything ready,
13 including the down payment, and were ready to close
14 Unfortunately, at approximately two o'clock on July 28th
15 2006, South Coast Community Bank decided or required from the
16 buyers a year's worth of interest, which amounted to an
17 additional \$211,625 from the buyers at closing This change,
18 this change in closing conditions was of no fault by the
19 buyers Actually the buyers did everything they could to
20 come up with the extra \$211 625, but they could not do so by
21 the end of the day The buyers notified me that they could
22 come up with the extra money at any time In August of 2006 I
23 could have issued them the loan immediately "

24 Q So, Mr Knight, having ready that when Mr Altman was
25 asking you questions about delays and that sort of thing, are

1 you trying to suggest that the reason why this didn't close is
2 somehow the buyers' fault?

3 A No

4 Q Okay That's all the questions that I have Thank you

5 THE COURT Mr Altman?

6 MR ALTMAN Yes, sir

7 RECROSS EXAMINATION

8 BY MR ALTMAN

9 Q Mr Altman, do you remember your deposition being taken
10 on May 29th, 2007?

11 A Yes, sir

12 Q Do you remember when I asked you questions about when the
13 investors came in to see you during that deposition?

14 A Yes, sir

15 Q Okay, do you remember me asking you if the delays were
16 caused by the fact that the investors came in very late?

17 A Well yes.

18 Q Okay did you give me the same answers today that you
19 gave me then?

20 A I'm not sure

21 Q Okay I'm going to show you the original of your
22 deposition and ask you to look at first at page 40

23 A Yes, sir

24 Q Well, let's go back a little bit further first Let's go
25 back to page 33, at line 20

1 A Yes, sir

2 Q I asked you a -- I've asked you a series of questions
3 about how long it took you to get the commitment letter and
4 then I asked you a question on line 20 why did this take so
5 long Would you read your answer, please?

6 A ``Well, I never had -- I never was given the information
7 I needed to get a normal approval until the last minute or the
8 13th hour ''

9 Q And I asked you, ``The information from the borrower, ''
10 and your answer was?

11 A ``The final, as you mentioned earlier, I met with Mr
12 Hill on Wednesday afternoon ''

13 Q Now, on page 37, at line 24 I asked you, ``You did not
14 receive the other information on the others until the week the
15 loan was approved, '' and your answer on page 38 was?

16 A Correct

17 Q And then on page 40 I asked you, page 40 line 8 And
18 any delays that were caused were caused by the borrower, is
19 that a fair statement, '' and your answer on line 12 is?

20 A Yes, yes, yeah

21 Q Yeah, would be the correct answer, correct?

22 A Yes, yes

23 Q And you were asked a series of questions and you make
24 some statements about the interest carry, the \$211 000 I'm
25 going to ask if you still have in front of you Defendant's

1 Exhibit Number Two which is the August 2nd letter

2 A Yes

3 Q I'm going to ask you to look at that letter and about the
4 fourth sentence which is on the 7th line, the sentence reads,
5 "We told you that we would put a year's worth of interest in
6 payments in the bank," and that was Mr Marshall telling you
7 that, correct?

8 A Yes

9 Q So, it was Mr Marshall who suggested putting the year's
10 worth of interest in the bank, wasn't it?

11 A That was, that was early in the process

12 Q Okay, but he suggested it early in the process that they
13 would do that

14 A Yes

15 Q And you knew by the beginning of July that the loan was
16 only going to be 65%

17 A Yes

18 Q Because you knew there was no water and sewer
19 availability, correct?

20 A Yes sir

21 Q So, we know that they need \$885,000 down payment and
22 early on the borrower suggests the interest carry, the year's
23 worth of interest being deposited So this wasn't something
24 new that came up at the last minute, was it?

25 A I mean that's -- when he talked about that was at the

1 beginning of the process when they didn't know if they were
2 looking at developing the lots or I don't understand here

3 Q They didn't know a lot of things They were -- they took
4 their time They didn't respond as quickly as they should and
5 we ended up where we were, correct?

6 A I finally got all the information on Wednesday

7 Q On Wednesday the 26th and the loan was supposed to close
8 five days later with the weekend in between correct?

9 A Yes, sir

10 Q That's pretty hard to do, isn't it?

11 A Yes, sir

12 Q If not impossible, two and a half million dollar loan,
13 correct?

14 A Well, the bank was ready to close if we were ready to go
15 forward

16 Q One last point, the second sentence of Mr Marshall's
17 letter says, "As you know we were awaiting on funds to be
18 transferred from Tex, Cecil O Curtis and John Bordine on July
19 31st, everybody else's money was here and available " So, if
20 they would have had Mr Curtis's and Mr Bordine's money we
21 could have closed, correct?

22 A I mean I can't answer that

23 Q That's what he said

24 A Yes, that's what he said

25 Q In the letter to you

1 A Yes

2 Q So it was they didn't get their investors, their
3 partners didn't come forward is what the problem was that's
4 what he told you in this letter, correct?

5 A That's what the first part of this letter says

6 Q Thank you

7 THE COURT Thank you very much You can step down
8 You want to excuse Mr Knight?

9 MR FUTERAL Yes, Your Honor, please

10 THE COURT Any objection?

11 MR ALTMAN No, sir

12 THE COURT Thank you for coming You're free to
13 go

14 MR ALTMAN No, no sir I I -- he needs to
15 stay

16 THE COURT Oh, you need him to stay?

17 MR ALTMAN Yes, sir

18 THE COURT Okay, stay Mr Knight I'm sorry

19 MR ALTMAN We had subpoenaed him also and may use him
20 at a later time

21 THE COURT All right

22 Call your next witness

23 MR FUTERAL Yes, Your Honor

24 Your Honor, we'd like to call David Hilleshiem to the
25 stand, please

1 WHEREUPON, David Legrand Hilleshiem was called to the
2 stand, duly sworn by the Clerk and testified as follows

3 THE CLERK State your name and spell your last name
4 for us

5 MR HILLESHIEM Yes, ma'am My name is David Legrand
6 Hilleshiem, last name H-I-L-L-E-S-H-I-E-M

7 DIRECT EXAMINATION

8 BY MR FUTERAL

9 Q Mr Hilleshiem, could you kindly tell the jurors a little
10 bit about yourself, for example, how old are you?

11 A I'm 41

12 Q Okay, are you married?

13 A I'm married with two children, a girl that's ten,
14 [REDACTED] and boy that's eight, [REDACTED]

15 Q Okay, can you give us the short version of your
16 background, where you're from and that sort of thing?

17 A Sure I'm originally from Wisconsin I moved to
18 Summerville, South Carolina, in '92 originally worked for the
19 military I joined the military right out of high school and
20 wanted them to pay for my college, went through college in the
21 military, was an army flight nurse and worked many years with
22 the Army doing nursing duties for them with the 44th General
23 Hospital After Desert Storm I resigned my commission and
24 became a private business owner in the local area Recently,
25 the most recent thing I've done is I purchased Low Country Mag

1 and Tire in Goose Creek, a local automotive business I
2 purchased it from Bruce Marshall and have been working that
3 industry for the last two and a half, almost three years

4 Q Are you familiar with the transaction that you've been
5 hearing about the testimony in court the last couple of days?

6 A Yes, sir

7 Q All right, you were, in fact, one of the members or
8 would be one of the members of Sheep Island LLC?

9 A Yes, sir

10 Q Do you have an understanding of what an LLC is generally
11 speaking?

12 A Yes, sir

13 Q What is it?

14 A It's a limited liability corporation, protects the
15 investors basically for a number of different reasons to
16 short taxes and kind of liabilities that you might, and
17 lawsuits and those kind of things

18 Q Okay, so, you -- were you one of the members when Sheep
19 Island, LLC, was formed?

20 A Yes, I was

21 Q At that time did you know who the members were going to
22 be, how many and in what percentages?

23 A Not exactly, no, we didn't -- we, we formed the LLC
24 originally with myself, Bruce Marshall, not Bruce Marshall,
25 well, actually, yeah Bruce Marshall was part of the LLC and

1 Walker Funk and Jeremy Marshall

2 Q Okay, and did those members change over time?

3 A Yes we talked to many people during this whole process
4 about adding and subtracting people to the partnership We
5 were looking for investors, you know, from, almost from day
6 one when the, when the LLC was formed

7 Q Okay, we've heard a lot of names that have been tossed
8 out there I think Cecil Curtis being one of them Was he
9 ever actually a member of Sheep Island, LLC?

10 A No, sir

11 Q Why not?

12 A We started looking into some backgrounds, we looked in
13 the background of all the members that we were thinking about
14 bringing on and some questionable information came up on the
15 background of both those two and Cecil and Bordine and we
16 decided at that time that they were not going to be members of
17 our LLC and that was, I guess, sometime in June

18 Q Were you involved in any way in the process of, for
19 example dealing with water and sewers issues?

20 A Yeah, I was very -- I took the lead on a lot of that,
21 those issues

22 Q All right, you know, the suggestion has been that
23 somehow you all delayed as far as water and sewer issues Can
24 you tell us what if anything do you know about the water and
25 sewer issues?

1 A Water and sewer was a very important piece of what we
2 were looking at when trying to develop this property
3 Originally we thought we'd want to come in and maybe build,
4 separate it do lots, engineering drawings, bring, you know
5 water and sewer to the property So, we started meeting with
6 the authorities in Berkeley County about that issue and
7 Roshire was in charge of those things initially and we had
8 been in many conversations with his office and with the
9 engineers over at the water and sewer facilities The
10 original plans were that we would have water and sewer at the
11 facility in time that would be, in a reasonable amount of time
12 that we could consider it property that we could develop If
13 not we could pay a little bit of extra money and we could tap
14 into it real easily

15 After Roshire was voted out of office, everything changed
16 and it really threw the whole, the whole, that whole area in
17 turmoil because nobody knew exactly what was going to be going
18 on with the water and sewer and after as many meetings as we
19 could possibly schedule we finally got an answer that things,
20 because everything had gone back to the engineers and the
21 engineers had told us that the plan that Roshire had
22 originally done was more politically based than what they were
23 doing was more based on good, good or good practices for the
24 water and sewer in the area they were going to switch
25 directions

1 Eventually water and sewer would be to that property,
2 well, it would be to the corner of Sheep Island Road and 176
3 There would be a regional pump station They guaranteed us
4 that However, it would not be there in time for us to close
5 on that property So, at that time we had to make a decision
6 to develop the property or to buy the property as raw or
7 undeveloped land or undevelopable land at that point.

8 Q So, the sellers had given seven months to close this
9 transaction, in fact, you couldn't close sooner than that
10 correct?

11 A Correct

12 Q What sense, if any, would it have made for you to go
13 ahead and get a loan commitment and do the loan without
14 knowing about this issue of water and sewer, in other words
15 raw land versus residential development?

16 A As far as I understood from Mr Knight that we couldn't
17 get a loan until we resolved this issue I mean, you had to
18 resolve it whether it was going to be a raw land We could
19 have gone and just said it was going to be raw land right off
20 the bat, but we were really trying to do it as a development,
21 what are they called a PUD or planned urban development and we
22 were meeting with engineers and, you know, architects and all
23 sorts of builders and, I mean everybody you can possibly
24 think of that could give us input on this piece of property
25 and we had to come up with which way we were going to do it

1 Once, as soon as we found out that the water and sewer was not
2 going to be there, we contacted Mark Knight, let him know that
3 the water and sewer wasn't going to be there in time and that
4 we would have to, we would have to make this property raw land
5 purchase and that was sometime early, I guess July of 2006

6 Q Now, as I understand it you were involved perhaps as much
7 as Mr Marshall was throughout this process?

8 A Correct

9 Q All right, rather than testify to everything he's already
10 testified, I wanted to ask you a few specific questions about
11 the transaction Are you aware of whether the sellers were
12 given any notice of your intention of seeking additional time
13 to close, and I'm not talking about the water and sewer,
14 \$50,000 and giving you 30 days I'm talking about an
15 extension under the contract?

16 A Yes they were well aware

17 Q Okay, and how do you know that?

18 A I talked to Benji Lafond and Benji Lafond relayed the ---

19 MR ALTMAN Your Honor, I object to hearsay

20 THE COURT Lafond is your lawyer, right?

21 A Correct

22 THE COURT You want to say anything else about that?

23 I sustain the objection otherwise

24 MR FUTERAL No, Your Honor Mr Lafond has already
25 testified That's fine

1 BY MR FUTERAL

2 Q Anything that you know of first-hand aside from say what
3 your realtor had done or testified to or what Mr Lafond had
4 done or testified to?

5 A No, nothing more than that

6 Q Okay

7 A "We had to work through those people, that's, I mean,
8 that's the normal protocol for that

9 Q Okay, the, the loan itself, when you got down to needing
10 another \$211,000, there's been some discussion about
11 investors, I think they've sometimes been called partners, but
12 anyway, people bringing additional money to the table, and I
13 think there was talk about a Mr Curtis and Mr Bordine
14 What, if anything, did they have to do with whether you could
15 close on that day?

16 A They had nothing to do with the closing We had the
17 money in place We were -- already talked to Mark Knight
18 about that I'm surprised that he doesn't remember the
19 conversation, but we talked to Mark Knight and told him those
20 two would not be partners in that in that group He told us
21 at the time it would be no big deal

22 MR ALTMAN I'm going to object to hearsay

23 A No he told me

24 THE COURT Hold on just a second now Ask the
25 question again

1 MR FUTERAL Your Honor, I, I ---

2 THE COURT Ask a question

3 MR FUTERAL All right, yes, sir

4 BY MR FUTERAL

5 Q My question was -- I lost my train of thought derailed
6 My question was what if anything did Mr Bordine's
7 involvement, is it Bordine, am I saying it right?

8 A Bordine, yeah, I think that's, I think that's correct

9 Q Bordine and Mr Curtis's involvement, did that have
10 anything to with you being able to close that day or not?

11 A No, we would have closed without them if it hadn't been
12 for the \$211,000

13 Q All right, so, the decision not to make them investors in
14 Sheep Island is that what you were testifying to earlier?

15 A Correct

16 Q Okay, when was that made?

17 A That was made in June

18 Q All right, was that information ever relayed to the bank
19 that they were not going to be investors in this project?

20 A Yes, yes

21 Q Okay, do you have any idea why their, I believe their
22 names show up on the loan commitment?

23 A I mean, it was one of those things that just didn't,
24 apparently didn't come across, that he didn't understand what
25 we were talking about We told him He said at the time of

1 closing it would have been no big deal "We'll just cross
2 them out "

3 Q Okay, so, did you all have sufficient capital aside from
4 the \$211,000, did you have the money and so on to close?

5 A Yes

6 Q All right, where was that money? How did you have it?

7 A We had it in -- everybody had their checks that they
8 were bringing to put a deposit in the bank at closing

9 Q All right, just so we all understand, who would those
10 individuals have been and how much money would they bring?

11 A That would have been Jeremy Marshall and Bruce Marshall,
12 those two, which would have been -- well, Steve Hill, of
13 course he would have had 50% of the 800 and some odd thousand
14 dollars that we had to bring

15 Q Bruce and Jeremy, how much were they bringing?

16 A They were bringing a third of the other half

17 Q - All right, who else?

18 A Myself

19 Q How much were you bringing?

20 A The exact dollar amount, I mean, I ---

21 Q Approximately

22 A \$150,000, somewhere around there

23 Q Where were you getting that money from?

24 A From personal accounts

25 Q Okay, so, you had it in your accounts ready to go?

1 A Yes sir

2 Q All right, and who else was there?

3 A And there was Walker Funk

4 Q Okay, and how much was he bringing?

5 A The same amount as the Bruce Marshall's group, myself
6 the three of us would have made up the other 50%

7 Q All right, as an LLC had you all determined from these
8 particular members, yourself included, Mr Funk and so on,
9 that they actually had those funds available to bring to
10 closing on the 31st?

11 A Yes, sir

12 Q Okay, so, just so we're clear, what was the reason for
13 not closing on the 31st?

14 A We did not -- we had no idea there was going to be a
15 \$211,000 up front payment that we had to deposit into an
16 account for interest payments for the full 12 months of the
17 loan That was completely unexpected

18 Q Okay, assuming you had been given some additional period
19 of time past the 31st to close, in other words bring this
20 other \$211,000

21 A Yes, sir

22 Q --- do you have any knowledge as to whether that could
23 have been done?

24 A Yes

25 Q All right

1 A It would have been done

2 Q How?

3 A We would have brought -- each one of us would have
4 brought our shares to the closing of the \$211,000 I know I
5 talked personally to Steve Hill, to Bruce Marshall, to Jeremy
6 Walker Funk, everybody in the partner ---

7 MR ALTMAN I'm going to object if he's talking about
8 hearsay right now

9 THE COURT Ask another question

10 MR FUTERAL Your Honor can I be heard?

11 THE COURT Ask another question

12 MR FUTERAL One moment, Your Honor

13 BY MR FUTERAL

14 Q Okay Mr Hilleshiem, what if any damages have you all
15 sustained as a result of this transaction going awry?

16 A Well, the largest I think would be that we never got --
17 we never benefited from the bargain that we had in purchasing
18 or trying to purchase this land, and when I talked about a
19 bargain was that this land was purchased by the sellers and
20 they held on to it for and this was in 2005, you have to
21 remember this ---

22 MR ALTMAN Your Honor, I'm going to object to this
23 There's no basis for Mr Hilleshiem to know these facts on his
24 own

25 MR FUTERAL Your Honor ---

1 MR ALTMAN There's been no basis laid for that

2 A There's been testimony ---

3 THE COURT Hold on just a second

4 Members of the jury panel, ask you to go to the jury room
5 for just a few minutes, please

6 (Whereupon, the following takes place outside the
7 presence of the jury)

8 THE COURT Why don't you just go ahead examine him on
9 this issue and let's see what he says Go ahead

10 BY MR FUTERAL

11 Q Mr Hilleshiem, how would you measure the benefit of the
12 bargain as you just testified to?

13 A In the, in the market at that time ---

14 Q No, if I were going to express this as a calculation

15 A Oh as a calculation?

16 Q Yeah

17 A In five months it went from 1 4 million to two ---

18 Q Don't give me any numbers How would you express it as a
19 calculation?

20 A The calculation is the amount of money that it was
21 purchased, the appreciation over a period of time the amount
22 you sold it for or could sell it for at that time would be
23 would be how you would answer that question

24 Q Okay, so, the ---

25 A The difference would be your profit

1 months later minus what you were going to pay for it?

2 A Exactly

3 Q Okay

4 MR FUTERAL Your Honor, I wasn't going to ask him ---

5 THE COURT Well, go ahead Go ahead

6 MR FUTERAL Well, I wasn't going to ask him for that
7 figure because I don't believe he's qualified to testify to
8 that We have somebody to give that figure I wasn't going
9 to try and ---

10 THE COURT Mr Altman, what's your position about
11 that?

12 MR ALTMAN My position Your Honor, is that Mr
13 Hilleshiem started to answer about specific facts and numbers

14 THE COURT Well do you have any objection to just
15 what he asked him?

16 MR ALTMAN What he just said then no

17 THE COURT All right, bring the jury back in

18 (Whereupon, the following takes place in the presence of
19 the jury)

20 THE COURT All right, you may continue to examine the
21 witness

22 MR FUTERAL Thank you, Your Honor

23 BY MR FUTERAL

24 Q Mr Hilleshiem, earlier I was asking you a question
25 basically how do we get to or you testified earlier as to you

1 were seeking the benefit of the bargain that you had made?

2 A Yes sir

3 Q How would we calculate, explain to me what it is you
4 mean by benefit of the bargain? What is it you're seeking?

5 A What we're seeking is we purchased the -- we were going
6 to purchase the land for \$2 5 million

7 Q And I don't -- if you have an idea ---

8 A Yeah

9 Q --- what you think it's worth now, I don't want to hear
10 it

11 A Sure

12 Q I just want to ---

13 A And the benefit of the bargain would be whatever we
14 could sell it for seven months later, whatever that number
15 would be

16 Q So, you mean what the land would appraise for seven
17 months after you were going to buy it for 2 5 million?

18 A Correct, in a very hot market

19 Q All right, and do you seek any additional damages as a
20 result of this?

21 A Yes, sir, we do

22 Q Okay, attorney's fees and costs under the contract,
23 right?

24 A Yes, sir

25 Q Do you have a recollection of specifically what that

1 number might be at this point?

2 A Yes, sir I reviewed the bills over the last two days, up
3 through last night it's \$46,856

4 Q Okay

5 A And it's calculating at \$100 every 12 minutes

6 Q Okay, do you have any understanding about why so much
7 time has gone into this case, why the bill ---

8 MR ALTMAN Your Honor I would object to that
9 That'd be pure speculation

10 MR FUTERAL Your Honor, he's a client and has been
11 working on the case

12 THE COURT Let's see what his answer is Go ahead

13 A It's been a long process through the courts and there's a
14 lot of information you have to gather It's you know,
15 there's lawyer fees, of course There's paralegal fees
16 There's appraisal fees, testimony fees for expert witnesses
17 There's depositions that go into that, all the people here
18 that you've heard have all been depositioned, all those, all
19 those things over this period of time have added up to be that
20 number \$46,856

21 Q Okay, so, that's attorney's fees and costs like
22 depositions and so on?

23 A Correct, uh-huh

24 Q Okay, and of course, the other damages that were
25 testified to by Mr Marshall?

1 A To earlier, yes, correct

2 Q Okay

3 MR FUTERAL One moment, please, Your Honor

4 Your Honor, that's all the questions that we have Thank
5 you

6 THE COURT All right, cross examination

7 CROSS EXAMINATION

8 BY MR FUTERAL

9 Q Mr Hilleshnem, you became involved in this process,
10 this transaction early on, did you not?

11 A Yes, sir

12 Q Shortly after the contract was signed?

13 A Yes, sir

14 Q Were you actually consulted before the contract was
15 signed?

16 A I think I was I think I had looked at the land prior

17 Q The Marshalls actually work for you at this point?

18 A Correct They do Well, I shouldn't say that Let me
19 clarify Bruce is a consultant He doesn't actually work for
20 me Jeremy Marshall does work for me

21 Q Okay, I think you had said you bought the business from
22 Bruce Marshall?

23 A Correct

24 Q Well, it's not bought from Jeremy Marshall?

25 A Well Jeremy -- it was actually Jeremy Marshall Jeremy

1 Marshall actually owned the business

2 Q He owned the business and you bought it from him?

3 A Correct

4 Q But Bruce was pulling the strings, wasn't he?

5 A I wouldn't say pulling the strings but he was a helpful
6 father

7 Q Okay, you testified that you talked to many people about
8 investing in this property, correct?

9 A Correct

10 Q How many people did you talk to?

11 A I don't know A good guess would be 50

12 Q And over what period of time did you talk to those 50
13 people?

14 A From the time I got in and we were going to, we were
15 going to form a LLC till, you know, all the way till we
16 brought in Steve Hill

17 Q That was in late July of 2006, correct?

18 A No, we brought Steve Hill in, the conversations in late
19 June

20 Q Late June but Mr Hill, didn't provide information to the
21 bank until July 26th?

22 A That's what I've heard, yes I thought it was sooner
23 than that but that's what I've heard

24 Q When did you provide your financial information to the
25 bank?

- 1 A I don't know exactly
- 2 Q Was it before July 26th?
- 3 A Yes, it was
- 4 Q Was it before July 1st?
- 5 A Before July, yes, I think it was
- 6 Q Do you know if anybody else provided their information
- 7 before July 1st?
- 8 A You know, I don't know exactly when people brought their
- 9 information in
- 10 Q When did you first talk to Mr Curtis and Mr Bordine or
- 11 Bordine I've seen the name both ways?
- 12 A I don't remember the exact date but it was sometime in
- 13 the spring
- 14 Q Sometime in the spring
- 15 A Uh-huh
- 16 Q Do you know if Mr Curtis and Mr Bordine provided their
- 17 information to the bank?
- 18 A I don't know if they did or not We certainly didn't
- 19 require it
- 20 Q You didn't require it?
- 21 A No
- 22 Q But they gave it to the bank, but their name is on the
- 23 commitment letter, isn't it?
- 24 A Yeah it was
- 25 Q In fact, didn't Mr Bordine sign the commitment letter?

1 A I don't know

2 Q You signed the commitment letter, didn't you?

3 A Yes, I did

4 Q Let me show you Plaintiff's Exhibit Number 13, which is
5 the commitment letter and ask you to look on the last four
6 pages which are the signature pages Well, before we go there
7 when did you sign the commitment letter?

8 A I think it's the 28th of July

9 Q The 28th of July You went into the bank or was it sent
10 to you by fax or e-mail?

11 A I went into the bank

12 Q Did you read the commitment letter before you signed it?

13 A No, I didn't

14 Q You didn't?

15 A I don't remember seeing the commitment letter All I
16 remember seeing the line to sign

17 Q You were sitting here a few minutes ago when Mr Knight
18 testified, weren't you?

19 A Yes, I was

20 Q And he said he showed you the commitment letter, didn't
21 he?

22 A That's what he says I don't remember seeing it

23 Q You don't remember seeing it

24 A No, I was -- we were in a hurry that day We were going
25 out of town I came in He said "Sign here," in and out in

1 five minutes, said we needed this to close the loan I said
2 "Okay "

3 Q You just signed something without knowing what you were
4 signing, right?

5 A He had told me what the terms of the loan were prior to
6 that I asked him had anything changed He said no and I
7 left, signed and left

8 Q You didn't -- did you get a copy of it?

9 A I think he delivered one later that day to Low Country
10 Mag and Tire

11 Q When did you first sit down and read the commitment
12 letter?

13 A I think it was Monday

14 Q Okay, but Mr Knight, I believe, testified that you
15 asked questions about the commitment letter when you signed
16 it

17 A I did on I did on Monday

18 Q Not until Monday

19 A Correct

20 Q When you signed did you see there were signature lines
21 for other people?

22 A I really wasn't paying attention

23 Q You could tell there were more signature lines on the
24 letter than yours, couldn't you?

25 A The only person that I knew was Jeremy Marshall and

1 myself but as far as that were signing at that time

2 Q You looked at the commitment letter, you see where your
3 signature line is, don't you, or your signature lines because
4 you have to sign twice, didn't you?

5 A Yes, I do

6 Q Once as a member of Sheep Island Plantation, LLC, and
7 once as a guarantor, correct?

8 A Yeah

9 Q And how many signature lines are there for people to
10 sign?

11 A There's a number of them

12 Q A number of them Didn't you see that there were a
13 number of people signature lines when you signed?

14 A I figured it would take a number of them because we had
15 a number of partners, correct

16 Q And you see Mr Bordine and Mr Curtis's name on here,
17 don't you?

18 A I do see it now, yes, I do

19 Q Did you question Mr Knight about why their names were
20 on there?

21 A I already told you that I did not notice anybody's
22 name on here I signed it I asked him that one question and
23 I left

24 Q Did you ever ask him why Mr Bordine and Mr Curtis's
25 name were on there?

1 A I remember him telling us it was no big deal We'll
2 just line them out

3 Q When did he tell you that?

4 A I think that was on Monday

5 Q On Monday but you told him -- did you yourself tell Mr
6 Knight in June that Mr Bordine and Mr Curtis were not going
7 to be partners?

8 A Yes

9 Q But their names were still on there

10 A Yes

11 Q And you didn't notice it You were just in a hurry
12 You were going to get going

13 MR FUTERAL Your Honor, objection, asked and answered

14 MR ALTMAN I'll withdraw it

15 BY MR ALTMAN

16 Q Have you ever seen Jeremy Marshall's bank account?

17 A His bank account?

18 Q Yes sir, or bank accounts or investment accounts

19 A No, sir

20 Q Have you ever seen Steve Hill's investment account or
21 bank accounts?

22 A No, sir

23 Q Have you ever seen Walker Funk's bank or investment
24 accounts?

25 A No, sir

1 Q How do you know they had money available on July, on
2 July 31st?

3 A I saw their financial statements

4 Q No I asked you -- does financial statements show you
5 bank balance?

6 A No, sir

7 Q So, you don't know for a fact You were just
8 speculating when you told Mr Futeral that you knew they had
9 money, weren't you?

10 A Speculating?

11 Q Yeah, you were just ---

12 A No, they told me they had the money

13 Q They told you, but you didn't -- you never saw it for a
14 fact?

15 A No, sir

16 Q And the money was never put into the Sheep Island
17 Plantation bank account?

18 A It wasn't required to until we closed

19 Q Until you closed

20 A Yes

21 Q Had you gone to your bank and gotten a bank check or
22 cashier's check or certified check to put your money in the
23 bank or to give it to Mr Lafond?

24 A Hadn't even gotten that far We were still working on
25 the \$211,000

1 Q And Mr Lafond told you you were going to have to have a
2 bank check or cashier's check, certified check for the
3 closing?

4 A Yes

5 Q But you hadn't made arrangements for that yet had you?

6 A I was scrambling trying to come up with \$211,000 I was
7 very busy that day, but I would have had time to get my check
8 I mean, the funds were available

9 Q All right, your funds were available

10 A Yes, sir

11 Q You don't know for a fact anybody else's funds were
12 available, do you?

13 A I believe my partners when they tell me something

14 Q But you had no proof, did you?

15 MR FUTERAL Your Honor, I object, asked and answered

16 THE COURT Ask another question

17 Q Mr Hilleshiem, I'm going to ask you to look at
18 Defendant's Exhibit Number Two That's the letter from Mr
19 Marshall to Mr Knight dated August 2nd, 2006 Did you know
20 he wrote that letter?

21 A No I did not

22 Q Have you ever seen it before right now?

23 A A couple of days ago somebody showed it to me

24 Q The second sentence in the letter, I'm going to ask you
25 to read that to yourself We've read it several times in

1 court today already and I believe yesterday I'm going to ask
2 you something about it

3 A Okay

4 Q It says here the reason you didn't have the funds for
5 closing is Mr Curtis and Mr Bordine didn't come up with
6 their money It doesn't say that Mr Curtis and Mr Bordine
7 were not members of the LLC, Sheep Island Plantation, LLC It
8 says they didn't come up with their money, correct?

9 A That's what it says, yes

10 Q You knew in your mind that Mr Bordine and Mr Curtis
11 were not members of the LLC as of June, correct?

12 A Correct

13 Q Do you have any idea from your knowledge why Mr
14 Marshall would have said what he said in this letter?

15 A I don't know

16 Q But he said it, that, the way he said it, correct?

17 A If he wrote this, then yes, then that's -- yeah, he
18 testified to it, yes

19 Q Okay

20 MR ALTMAN I have nothing further Your Honor

21 THE COURT Anything on redirect?

22 MR FUTERAL Yes, Your Honor

23 REDIRECT EXAMINATION

24 BY MR FUTERAL

25 Q Did you ever have any discussions with any other members

1 of the LLC prior to the closing about Mr Curtis and Mr
2 Bordine? Did you talk to anybody within your organization?

3 A Yes, sir

4 Q All right, who did you talk to about Mr Curtis and Mr
5 Bordine?

6 A I talked to Bruce Marshall, Walker Funk and Benji
7 Lafond

8 Q Okay, and it was then your position that they weren't
9 going to be members?

10 A Correct

11 Q Okay was that decision ever formally made between all
12 of you, you're all in agreement they're not going to be
13 members?

14 A I thought so yes

15 Q Perhaps not?

16 A Perhaps not

17 Q Okay Thank you That's all the questions that I have

18 THE COURT Thank you very much Step down Call
19 your next witness Anybody on the jury need a break at this
20 point? Everybody okay right now? If you need a break, let me
21 -- raise your hand

22 (No response)

23 THE COURT Call your next witness

24 MR FUTERAL All right Your Honor, we'd like to call

25 Mr Edward Carter to the stand please

1 MR ALTMAN Your Honor, I have a matter

2 THE COURT Members of the jury panel, we're going to
3 take a break I need to discuss something with the lawyers
4 about this witness So, I'll let you go to the jury room
5 You're going to get a break whether you want it or not

6 (Whereupon, the following takes place outside the

7 presence of the jury)

8 THE COURT All right, what?

9 MR ALTMAN Your Honor we would ask that the
10 Plaintiff not be allowed to call this witness because he was
11 not -- we were not made aware of this witness until the very
12 end of last month, sometime after the 20th at a time when I
13 was leaving for vacation I left for vacation on the 27th
14 We did scramble and my partner was able to take Mr Curtis's
15 or Mr Carter's deposition However, we did not have
16 sufficient time to get a witness that could give his opinion
17 or their opinion with regard to value So, we cannot counter
18 it We did realize at the very end of last week or early this
19 week that there was an appraisal done for the bank So, we
20 immediately tried to subpoena that appraiser to try to get him
21 here today

22 THE COURT Did you get him?

23 MR ALTMAN No, sir

24 THE COURT Why not?

25 MR ALTMAN Because he is in court in Charleston

1 County

2 THE COURT How does that keep him from using him
3 You tried you subpoenaed the appraiser?

4 MR ALTMAN The appraiser who did the appraisal for
5 the ---

6 THE COURT Did you get that, did you get the
7 appraisal itself?

8 MR ALTMAN I have the appraisal from the
9 bank

10 THE COURT Okay

11 MR ALTMAN But Your Honor, I don't have any
12 way of getting it in unless I can get it in through Mr
13 Knight and of course that's why I wouldn't excuse
14 him

15 THE COURT Okay

16 MR ALTMAN And if they ---

17 THE COURT Well we may -- how about that -- well,
18 who, who is, who is the appraiser and he's in court Where is
19 he in court?

20 MR ALTMAN He's in the master-in-equity's court in
21 Charleston County

22 THE COURT And who is he?

23 MR ALTMAN Mr Michael White

24 THE COURT Maybe I can call down there and see about
25 when they're going to be through with him and get him here or

1 later on or something

2 MR ALTMAN We were informed by Mr White that he was
3 supposed to be in court all day today

4 THE COURT Okay, maybe I can help you a little bit
5 We'll see, but what -- okay, so your objection to Mr
6 Carter's testimony is that -- well, tell me what your
7 objection is exactly

8 MR ALTMAN My objection is ---

9 THE COURT Is it something that you're operating
10 under some rule or what?

11 MR ALTMAN Your Honor ---

12 THE COURT Or scheduling order, anything like that?

13 MR ALTMAN No, we were not operating under a
14 scheduling order, Your Honor, but you know, there's fairness
15 with regard to the system that we're dealing with that to drop
16 this on us at the very last minute because we had no idea we
17 would need to have an appraiser because if there was going to
18 be an appraisal that should have been done early on as far as
19 their damages and here we're sitting here with this surprise
20 that this problem that we have in trying to counter anything
21 that Mr Carter might testify to, the information he provides
22 and there is some dramatic difference between these two
23 appraisals and we would have had ---

24 THE COURT So let me -- so give me your appraiser's
25 name

1 MR ALTMAN The appraiser's name ---

2 THE COURT The guy, the guy, the guy that you say is
3 down in the master's, what's his name?

4 MR ALTMAN Michael White

5 THE COURT And is he an independent appraiser?

6 MR ALTMAN Yes, sir he has Charleston Appraisal
7 Company He has worked for Hartnett Appraisal till sometime -
8 --

9 THE COURT That's all right It's Michael White,
10 Charleston Appraisal Company, so forth, and he's in the --
11 from your information he's in the master's court today, all
12 day?

13 MR ALTMAN Yes, sir

14 THE COURT Okay, let me call down there and see when
15 he's -- and maybe if I can find out when he's going to be --
16 through All right, we'll take a short break

17 *****OFF THE RECORD*****

18 (On the record)

19 (Whereupon, the following takes place outside the
20 presence of the jury)

21 THE COURT All right, bring the jury in Come on
22 up Mr Carter

23 MR FUTERAL Your Honor, if I may also hand up just
24 for, just for the Court's record it's -- I know we're moving
25 on but just so it's on file Mr Nelson worked hard on this

1 memorandum so I wanted to make sure it ---

2 THE COURT All right

3 MR FUTERAL --- it got to the Court, thanks

4 (Whereupon, the following takes place in the presence of
5 the jury)

6 THE COURT Let's see, this is your next witness, is
7 that right?

8 MR FUTERAL Mr Carter

9 THE COURT Okay, raise your right hand

10 WHEREUPON, Edward Carter was called to the stand, duly
11 sworn by the Court and testified as follows

12 THE COURT All right, have a seat Tell us your
13 name

14 MR CARTER My name is Edward Carter

15 THE COURT All right You may examine the witness

16 MR FUTERAL Thank you Your Honor

17 DIRECT EXAMINATION

18 BY MR FUTERAL

19 Q Mr Carter, can you tell these folks what it is you do
20 for a living?

21 A I am a real estate appraiser

22 Q Okay, how long have you been a real estate appraiser?

23 A Since 1999, 2000

24 Q Before we start talking more about real estate
25 appraisals and your background in that can you give us your

1 well, some of your personal background?

2 A I was born in North Charleston, graduated from the
3 Citadel with a degree in political science, went in the Air
4 Force was a fighter pilot for 26 years, two combat tours in
5 Vietnam I retired as a colonel became the airport's manager
6 and county administrator for Dorchester County for five years,
7 and then started this business with another person in 2000

8 Q What kind of training have you had to become an
9 appraiser?

10 A The education to be an appraiser is defined by the
11 Appraisal Foundation and administered by the states and it's
12 the same for everybody You have formal education, as well as
13 apprenticeship as well as testing, as well as additional
14 education to reach different levels to go from licensed to
15 certified to commercial, general certified general which I am
16 now and then you have to do continuing education each year

17 Q Okay, and so, you've attended all of this schooling,
18 received your certification? I'm assuming that's in part
19 through the State of Carolina, correct?

20 A Through LLR, that's correct

21 Q Okay, and you are still currently licensed through labor
22 licensing and regulations

23 A I am currently licensed by the State of South Carolina

24 Q Sir, have you ever testified in court regarding the value
25 of real estate?

1 A I have

2 Q Can you tell us approximately how many times you've
3 testified in court regarding real estate appraisals?

4 A Three to four times that I actually testified, other
5 times that the testimony was not required

6 Q Okay, in the three to four times that you've testified
7 in court I'm assuming this is in South Carolina?

8 A Correct

9 Q Were you qualified as an expert in real estate
10 appraisals?

11 A In Orangeburg County I was

12 Q Okay, you also do -- well, I want to make sure I'm
13 correct on this You do both residential people's homes and
14 commercial real estate appraisals?

15 A I do primarily commercial I have done residential in
16 the past but we have other appraisers in the office that
17 handle the residential and I focus primarily on commercial

18 Q Okay, and in layperson's terms can you tell us please
19 what it is you are doing to prepare a commercial real estate
20 appraisal, and before you begin, tell us what a commercial
21 real estate appraisal is?

22 A Well, it depends It could be anything from a golf
23 course to a hotel to an unimproved piece of commercial
24 property that's zoned commercial It just depends It can be
25 pretty much anything

1 Q So, you're putting a value on property then

2 A You are You're putting a value upon that property If
3 it's an income producing property then you're going to develop
4 an income approach to value because it is an income producing
5 property and that's where the value lies

6 Q Okay can you tell us the types of things that you have
7 to do in order to prepare an appraisal or put a value on these
8 properties?

9 A Well, the first thing is the scope of work and that's
10 where you sit down with your client and identify what it is
11 the client would like That's called the scope of work and
12 you detail that Then you start your research, county
13 records, town records, MLS Any sources of information on the
14 subject property as well as comparable properties you're going
15 to pull and gather all that data together You're going to
16 build your appraisal report and depending upon what type of
17 property it is you will develop one of three, two of three or
18 all three approaches to value

19 The first approach is the cost approach That's where
20 you find if you have improvements on the land you find the
21 value of the unimproved land Then using Marshall and Swift
22 or a nationally recognized cost service you fund the buildings
23 and then you depreciate them based on age and that's how you
24 come up with a cost approach

25 Then a direct sales comparison approach which is the one

1 that is normally has the most validity, is where you find
2 comparable sales to your subject and make any adjustments
3 necessary to come up with a value on the sales comparison
4 approach Then again, if it's an income producing property
5 such as a motel then you're going to have to analyze all of
6 the income stream, expenses and come up with a cap and it's
7 called direct capitalization come up with an income approach
8 to value

9 Q Okay, so, when you're talking about the best approach
10 being comparables you're, would I be correct, you're basically
11 talking about looking at properties that are similar somehow
12 that have sold recently to figure out how much people are
13 willing to buy it for

14 A That's correct

15 MR FUTERAL Your Honor, at this time I'd like to ask
16 the Court ---

17 THE COURT You have any questions you want to ask him
18 about his qualifications?

19 MR ALTMAN No, Your Honor

20 THE COURT Go ahead

21 MR FUTERAL All right, I'm assuming Your Honor means
22 he's qualified

23 THE COURT Just go ahead and ask your questions If
24 there's an objection he'll object

25 MR FUTERAL All right, thank you

1 BY MR FUTERAL

2 Q Mr Carter, you were contacted by my office in this
3 particular case?

4 A I was Mr Tom Nelson

5 Q Okay, what were you asked to do by Mr Tom Nelson?

6 A I was asked to render a retrospective value opinion
7 retrospective is looking back, and I was given the date of 1
8 August, 2006, as the retrospective date and to render a value
9 opinion of that property on that day

10 Q Would I be correct that normally say if the bank or
11 somebody asks you to do an appraisal on a piece of property
12 they want to know what it's worth today, typically

13 A Typically that's correct

14 Q Okay, but you were asked to give an opinion as to what
15 the property was worth on August 1st, 2006?

16 A Correct

17 Q All right I'm -- is that possible to do?

18 A Yes we do it all the time As you said normally let's
19 say for mortgage financing if you're purchasing a house the
20 bank will want you to go out and normally the effective date
21 of value is the date you go out and inspect the property, but
22 then you have retrospective, in this case because the scope of
23 work was to do it as of August 1st, 2006, or most of the time
24 retrospectively is done for estates, death of a property
25 owner then you go back and it's retrospective Now, --

1 you can also do them prospective, into the future, which
2 typically you do for subdivision developments, which I do a
3 lot of

4 Q The real estate market about the time that you were asked
5 to do an appraisal, I mean, back in 2006 that is ---

6 A As of the effective date

7 Q --- how would you characterize property values at that
8 time in terms of whether they were appreciating quickly or not
9 appreciating at all or ---

10 A For the Summerville and the Berkeley County area that I
11 define as the triangle area in Berkeley County, 176, Carnes
12 Crossroads, 17A over to the interstate up to Jedburg Road we
13 define those as rapidly appreciating

14 Q Okay, and the property that we're talking about here, the
15 101 acres or so, was that within this rapidly appreciating
16 area at that time?

17 A It does It lies within a market area that's going
18 through rapid subdivision development

19 Q Okay, I'm assuming currently it's not doing the same as
20 it did back then?

21 A That area of Berkeley County is still a strong market

22 Q Okay, all right, Mr Carter, prior to being contacted by
23 Mr Nelson, well, have you ever met anybody from my office?

24 A No I have not

25 Q Okay, do you know any of the members of Sheep Island

1 Plantation, LLC?

2 A I did not even know who they were

3 Q Okay, prior to being contacted by us do you -- did you
4 even know there was an LLC called Sheep Island?

5 A I had seen it on documents before when I pulled deeds in
6 that area doing other properties I have seen Sheep Island,
7 LLC on a deed

8 Q All right, and were you given any instructions or any
9 expectations as to what values you were supposed to come up
10 with?

11 A I cannot do that Under USPAP I'm specifically
12 prohibited from accepting any assignment with a predetermined
13 value or any mention of value

14 Q Okay, did you know anything about this lawsuit when you
15 were asked to put a value on this property as of August 1st,
16 2006?

17 A I did not

18 Q Did you put a value on this property?

19 A After I developed my appraisal, yes, I did

20 Q Okay

21 A I rendered a value opinion

22 Q So, you have prepared a written appraisal in this case,
23 correct?

24 A I have

25 Q Sir, let me show you what's been marked as Plaintiff's

1 Exhibit Number 18

2 MR ALTMAN Your Honor, could I please have that
3 identified I have not been told ---

4 MR FUTERAL Oh, I'm sorry I asked him whether he
5 prepared an appraisal and then ---

6 MR ALTMAN This is the appraisal that we were given
7 at the deposition?

8 MR FUTERAL Correct

9 MR ALTMAN No changes to it

10 MR FUTERAL No Okay?

11 BY MR FUTERAL

12 Q Plaintiff's Exhibit Number 18, Mr Carter, do you
13 recognize these pages?

14 A I do

15 Q And what is this, this binder here?

16 A It is a narrative appraisal report, a summary report,
17 not a complete report but what's known as a summary report of
18 the 101 65 acres of unimproved property on Sheep Island Road

19 Q All right, and to move this along a little faster, page
20 47 of your report or actually even before page 47 beginning on
21 page 45 of the report is where you start talking about sales
22 comparison approach or 44 rather?

23 A Actually before in there you will address during the
24 scope of work sales comparison approach but the actual
25 approach itself where it's developed begins on page 44

1 Q Okay, and after 44 and turning through this document
2 that you've indicated what the comparable properties that you
3 looked at to arrive at your value, am I correct?

4 A Correct each page summarizes the comparable There are
5 six comparables on six pages Then there is a table where I
6 adjust and compare the comparables

7 Q Well, tell us a little bit about the adjustment of the
8 comparables, what you're doing there?

9 A No two properties are 100% the same So, normally just
10 like a house you have to make adjustments, if a house, one
11 house is going to be bigger than the other you may need to
12 make an adjustment for square footage, one might have a porch
13 the other one may not You have to make an adjustment Well
14 property is the same way You may adjust for utilities, you
15 may adjust for shape, access, road frontage, topography
16 There are a lot of things that bring out differences in
17 unimproved sites which is what we're talking about here

18 Q So, if I'm understanding what you're saying would that
19 be like sort of trying to come up with a mean or an average
20 value then by looking at that sort of equalizing things?

21 A Well, what you're doing is you're bringing them together
22 to find out what the value is

23 Q Okay, do you indicate in your report what it is the
24 price or I don't know if you have a copy of the deed in here,
25 as to what the sellers in this case purchased this property

1 for?

2 MR ALTMAN Objection, Your Honor, that's totally
3 irrelevant to the value

4 MR FUTERAL I'm laying a foundation, Your Honor

5 MR ALTMAN You're talking about a value as of August
6 1st, not a value as of the time of purchase

7 THE COURT Members of the jury panel ask you to go to
8 the jury room for a moment, please

9 MR FUTERAL I'll just withdraw it and move forward,
10 Your Honor

11 THE COURT All right

12 MR FUTERAL How about that?

13 THE COURT All right

14 MR FUTERAL Okay

15 BY MR FUTERAL

16 Q Sir, can you tell us the value that you placed on this
17 property as of August 01, 2006? How much was the property
18 worth?

19 A I appraised the property, my value of opinion was
20 \$31,000 per acre or \$3,136,000

21 Q Okay, and how ---

22 THE COURT Three million what?

23 A \$136,000

24 Q And in lay terms if you can explain to us basically, I
25 think you've been doing that all along, how you came to that

1 particular number?

2 A Okay, I selected six comparables and ideally when you
3 pull your comparables you want to get properties that are as
4 close to your subject as possible

5 Q You mean geographically close?

6 A That's part of it You want them geographically You
7 want them in the same market area You want them fairly close
8 in size, not a great disparity and you want the most recent
9 sales you can, especially if you've got a very volatile
10 market, which that market was at the time You want to find
11 close sales that are as close to the date of value as possible
12 to eliminate that time concern If you're going back two or
13 three years for sales, then you're probably not using a very
14 effective comparable because so much has changed during that
15 period of time Now, the principle of appraising is based on
16 matched pairs and let me give you an example of what that
17 means If I'm appraising a house in a subdivision and it
18 has a swimming pool, it's the subject, I pull three
19 comparables and none of them have a swimming pool, there's no
20 way I can abstract from the market what that swimming pool is
21 worth I just have to make an across the board adjustment
22 which is subjective not objective, and it's just purely an
23 opinion of what that's worth If I get a matched pair if I
24 pull three comparables, one of those houses in the subdivision
25 will have sold with a swimming pool So, everything else

1 being equal, the house without a pool and the house with a
2 pool the difference in what they sold for is the value of the
3 swimming pool, and then I can make an objective data-based
4 adjustment to those without it just being an opinion So
5 it's the same with unimproved land If you're going to make
6 an adjustment to those comparables for what you perceive as
7 differences you need data to base that adjustment on So,
8 now, if you look at the location adjustment let's say that in
9 your opinion you might say this property over here is in a
10 better location than this one, then you need to have a sale
11 right near yours and a sale over there, and then again, the
12 difference would be the data abstracted from the market If
13 you don't have a sale right by yours and you want to make a
14 location adjustment across the board then it's just purely an
15 opinion and not based on any hard data

16 Q Okay

17 A So now ---

18 Q I'm sorry Go ahead

19 A So, now, as you go through the process of reconciliation
20 with the comparables to come up with your value opinion, if I
21 can't base it on hard data and a lot of times it's very
22 difficult when you get in a particular market to find
23 comparables that are exactly like your subject. Instead of
24 making arbitrary adjustments I will try to pull enough
25 comparables to eliminate those variables Typically in most

1 appraisals an appraiser will pull three maybe four
2 comparables I went ahead and pulled six in this and tried to
3 find different zoning, different areas within that triangle
4 I even went right outside that market area slightly to see if
5 there was any differences in what sales were for development
6 properties, PUDS, in that area so I could eliminate as many
7 variables as possible So, I end up making no adjustments on
8 any of mine and I had six comparables, one that was high, one
9 that was low, and when I threw those out the other four were
10 all virtually the same with no adjustments

11 Q Okay, all right So, the number that you've stated that
12 is your expert opinion as to the value of the property as on
13 August 1st, 2006?

14 A Effective that date that is my value opinion of what that
15 property should bring in an open market

16 Q Okay, and finally I want to ask you when you say -- when
17 we say it's your opinion, are there any guidelines, rules or
18 regulations that you have to follow in rendering this kind of
19 valuation? Can it be just Edward Carter says it's worth this
20 much or do you have to follow some sort of standards in doing
21 this?

22 A Yeah, it's called Uniform Standards of Professional
23 Appraisal Practice That's our Bible That's what we must go
24 by and what we must adhere to Just like you asked about
25 sales history earlier I must in my appraisal cover the three

1 year sales history of the property Otherwise, I'm in
2 violation of USPAP and I can lose my license So, I must
3 follow that document

4 Q Okay, and I would assume you followed USPAP in preparing
5 this particular ---

6 A Yes I have to sign a certification letter which is in
7 the appraisal and that certification of appraisal that I sign
8 is saying that I have complied with USPAP

9 Q Okay

10 MR FUTERAL Your Honor, at this time we'd like to move
11 to introduce Plaintiff's Exhibit Number ---

12 A 18

13 MR FUTERAL --- 18 into evidence?

14 THE COURT Any objection?

15 MR ALTMAN Your Honor, the objection I had
16 previously

17 THE COURT Subject to that I overrule your objection
18 (Whereupon, Plaintiff's Exhibit Number 18 moved into
19 evidence and appropriately marked)

20 MR FUTERAL One moment, Your Honor

21 MR ALTMAN Your Honor, I believe this is 17, not 18

22 THE COURT No, I think it's 18

23 MR FUTERAL It's 18

24 THE COURT Had two marked for ID purposes only

25 MR FUTERAL Your Honor, that's all the questions that