

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
R. Markley Dennis
Circuit Court Judge

Appellate Case No. 2015-001461

RECEIVED

AUG 14 2015

SC Court of Appeals

Wells Fargo Bank, N.A., as Successor by Merger
to Wachovia Bank, National Association, as
Successor by Merger to First Union National Bank..... Respondent,

v.

Penny Creek Associates, L.L.C. a/k/a Penny
Creek Associates, LLC; The Grove at Fenwick
Plantation, LLC; Michel F. LaPlante a/k/a Michel
Laplante a/k/a Mitch Laplante; Charlotte R.
Zurlo; Eugene J. Zurlo; Charlotte R. Zurlo and
Eugene J. Zurlo, as Co-Trustees of The Nicklaus
Lane Realty Trust No. 1 under Declaration of
Trust dated May 22, 1998; Fenwick Hall
Plantation Property Owners Ass'n., Inc. a/k/a
Fenwick Hall Plantation Property Owners'
Association, Inc.; Preserve at Fenwick Hall
Property Owners' Association, Inc.; and The
Grove at Fenwick Plantation Condominium
Association, Inc. Defendants,

Of Whom Penny Creek Associates, L.L.C. a/k/a
Penny Creek Associates, LLC; The Grove at
Fenwick Plantation, LLC; Charlotte R. Zurlo;
Eugene J. Zurlo; Charlotte R. Zurlo and Eugene
J. Zurlo, as Co-Trustees of The Nicklaus Lane
Realty Trust No. 1 under Declaration of Trust
dated May 22, 1998; Fenwick Hall Plantation
Property Owners Ass'n., Inc. a/k/a Fenwick Hall
Plantation Property Owners' Association, Inc.;
Preserve at Fenwick Hall Property Owners'
Association, Inc.; and The Grove at Fenwick
Plantation Condominium Association, Inc. are the Respondents,

**Michel F. LaPlante a/k/a Michel Laplante
a/k/a Mitch Laplante.....Appellant,**

v.

**The Eugene J. Zurlo Living Trust, Dated
December 11, 1997 and Paul ZurloRespondents.**

**RETURN TO RESPONDENT WELLS FARGO BANK, N.A.'S MOTION TO
DISMISS**

Appellant Michel F. LaPlante a/k/a Michel Laplante a/k/a Mitch Laplante (“Laplante”) would show this Court the following in opposition¹ to Respondent’s Motion to Dismiss:

I. The trial court’s denial of Laplante’s Motion to Alter or Amend is immediately appealable.

An erroneous reference to the Master-in-Equity is immediately appealable. See Creed v. Stokes, 285 S.C. 542, 331 S.E.2d 351 (1985). In Creed, a land title dispute, the defendant asserted a claim for adverse possession. The case was referred to the Master-in-Equity, and after a verdict was returned the defendant appealed. According to the Supreme Court, the order of reference “should have been appealed immediately because it affected the mode of trial, a substantial right.” Id. at 543, 331 S.E.2d at __ (citing S.C. Code § 14-3-330(2) (1976)). Failure to immediately appeal would render the order of reference the law of the case. Id.

While the trial court refused to rule on Wells Fargo’s motion to strike, it did refer the case to the Master-in-Equity. Not only is the order of reference immediately

¹ Laplante does not oppose the dismissal of Respondent Paul Zurlo, who has been dismissed from the underlying action.

appealable, the order of reference has the practical effect of striking the jury demand, because the Master-in-Equity, as an equity court, does not have the jurisdiction to hear jury matters. See S.C. Code § 14-11-15 (is a court of equity). Accordingly, the issue of the denial of Laplante's (and other parties') right to a jury trial is properly before this appellate court.

II. The intertwined nature of the cross-claims and third-party claims to the main action require the claims be tried by jury in this action.

While this is an argument best reserved for the briefs (see section III), Laplante has asserted defenses that are also cross-claims and third-party claims. The facts and legal arguments are identical for each, and they cannot be separated without creating the possibility of multiple inconsistent judgments and possible *res judicata* issues. Accordingly, they must be decided in this action by a jury.

Laplante has asserted causes of action for Breach of Fiduciary Duty and Civil Conspiracy against Respondents Charlotte R. Zurlo; Eugene J. Zurlo; Charlotte R. Zurlo and Eugene J. Zurlo, as Co-Trustees of The Nicklaus Lane Realty Trust No. 1 under Declaration of Trust dated May 22, 1998 ("Zurlo") (as cross-claims) and against Respondent Eugene J. Zurlo Living Trust dated December 11, 1997 ("Living Trust") (as third-party claims). (Ex. A pp. 4-10). All of these parties have requested jury trials. (Ex. B p. 6; Ex. C p. 5). Laplante also asserts these causes of action as affirmative defenses to Respondent Wells Fargo's foreclosure action (Ex. A p. 4). All the Zurlo Respondents, save the Living Trust, have asserted jury cross-claims for, *inter alia*, breach of fiduciary duty against Laplante. (Ex. B pp. 4-5).

Laplante has asserted compulsory defenses that also act as cross-claims and third-party claims. Laplante, as a defense and as cross/third-party claims, has alleged that said

foreclosure would not be possible but for the misconduct and conspiratorial conduct of certain co-defendants and third-party defendants. The same facts that will prove the defenses to Wells Fargo's claims are also the same facts that prove the cross-claims and third-party claims. Because they are so intertwined, the defenses, cross-claims, and third-party claims cannot be severed and must be decided together.

Respondent Wells Fargo cites N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 381 S.E.2d 903 (1989) for the proposition that a cross-claim is "permissive by definition." (Motion to Dismiss. p. 5). A careful reading of this opinion's language indicates that the Supreme Court was not making such an absolute statement: "[g]enerally, cross-claims are permissive..." DAV Corp. at 519, 381 S.E.2d at ___. (emphasis added). Further, the Rules of Civil Procedure contemplate compulsory defenses, counterclaims, cross-claims, and third-party claims: "Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, **shall** be asserted in the responsive pleading thereto..." Rule 12(b), SCRPC (emphasis added).

Laplante's defenses, cross-claims, and third-party claims also meet the tests used to determine if a counterclaim is compulsory. In Plantation Fed. Bank v. Gray, 401 S.C. 507, 737 S.E.2d 515 (Ct. App. 2013), the lender brought a mortgage foreclosure action, the borrower answered, and, after the matter had been referred to the master-in-equity, "[the borrower] amended her answer and asserted five counterclaims: breach of contract, breach of fiduciary duty, fraud, violations of the South Carolina Unfair Trade Practices Act, and tortious interference with economic opportunities." Id. The master bifurcated the case and ruled that the bank's foreclosure claim would be heard first, before a jury

trial on the counterclaims. Id. The lender appealed, contending “her actions are compulsory legal counterclaims and that there are factual issues common to both claims.” Id.

The Court of Appeals agreed with the borrower, noting as follows:

[borrower’s] counterclaims, which are compulsory, rest on her allegations, inter alia, that Bank “wrongfully, unlawfully, intentionally, willfully, and illegally declared [borrower] to be in default and/or...accelerated the balance due on the note and mortgage[,]” fraudulently induced [borrower] into executing the note and mortgage, and intentionally “frustrated [borrower’s] ability to comply with the terms and conditions on her part to be performed.” These allegations all involve questions of fact that will most certainly arise in the foreclosure action, especially when considered in light of [borrower’s] defenses to the foreclosure action, including unclean hands.

Because we find that Bank’s equitable claim and [borrower’s] legal counterclaims share common questions of fact, [borrower’s] counterclaims must be tried first[.]

Id.

Here, as in Plantation Federal, common questions of fact underlie the defenses, cross-claims, and third-party claims that could defeat any ability of Wells Fargo to enforce the note and mortgages at issue. Laplante has asserted causes of action for Breach of Fiduciary Duty and Civil Conspiracy (these are also asserted as compulsory defenses). Wells Fargo’s action for foreclosure is based upon a default that was procured by the acts that are set forth in these causes of action. Because this action concerns real property, the preferred form of relief would be to return the parties to their respective positions *status quo ante bellum*, which is most simply accomplished by dismissing the foreclosure action (avoiding a sale of the property at issue). A decision for Laplante on any of his cross-claims or third-party claims would extinguish Wells Fargo’s right to enforce its note via

foreclosure. The facts to resolve the cross-claims and third-party claims are also the facts necessary to resolve defenses to the Wells Fargo's cause of action. Under Plantation Federal, the cross-claims and third-party claims are entitled to a jury trial.

Because the Wells Fargo's ability to pursue their foreclosure would be curtailed by Laplante prevailing on his claims, these claims are also compulsory (and thus must be tried via jury) under the "logical relationship" test. See Wells Fargo Bank, N.A. v. Smith, 398 S.C. 487, 495, 730 S.E.2d 328, 332-33 (Ct. App. 2012). Under this test, "the 'logical relationship' determination is made by asking whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage." Wells Fargo Bank, 398 S.C. at 496, 730 S.E.2d at 333. If the defendant prevailing on his claim would affect the bank's right to enforce the note and foreclose the mortgage, there is a logical relationship between the counterclaim and the underlying suit, and the claim is therefore compulsory. See Wells Fargo Bank, 398 S.C. at 496, 730 S.E.2d at 333 (determining a counterclaim alleging a note was unconscionable was logically related to the enforceability of the note and thus was compulsory).

Thus, under Rule 12(b), SCRCF, Plantation Federal, and Wells Fargo, Laplante's cross-claims and third-party claims are entitled to a trial by jury.²

² The trial court did not issue a ruling on any party's waiver of a jury trial, so this issue is not before this Court. Without waiving this position, Laplante would point out that Respondent Living Trust was not a signatory or guarantor to the loans at issue in this action, and thus did not allegedly waive any rights to a jury trial. Forcing the Living Trust to litigate compulsory legal claims non-jury violates its right to a civil trial by jury protected by the South Carolina Constitution. S.C. Const. art. 1 § 14; accord U.S. Const. amend. VII.

III. Due to the incomplete nature of the record, Respondent's motion should be dismissed or held in abeyance.

Respondent Wells Fargo submitted over 200 pages of exhibits to its Motion to Dismiss. This Return has over twenty pages in exhibits, and the transcript for the relevant hearing has already been ordered. Any decision on appealability is premature, and a better use of judicial resources would be to deny this motion or hold it in abeyance until the appeal can be fully briefed with a complete record. See e.g. Steinmetz v. American Media Servs., 393 S.C. 72, 709 S.E.2d 708 (Ct.App. 2011) (denying a motion to dismiss for lack of jurisdiction to allow the issue it contained to be addressed in the briefs).

Dated: 08/12/2015



John P. Seibels, Jr.
jseibels@seibelsfirm.com
Jason Scott Luck
jluck@seibelsfirm.com
SEIBELS LAW FIRM, P.A.
38 Broad Street, Suite 200
Charleston, SC 29401
843.722.6777 (phone)
843.722.6781 (telefax)
Attorneys for Appellant

For a First Defense

1. Defendant denies each and every allegation of the Complaint not specifically admitted, qualified or explained and demands strict proof thereof.
2. Defendant lacks knowledge and information sufficient to form a belief as to the allegations of paragraph 1, and therefore denies the same and demand strict proof thereof.
3. Defendant admits that the allegations of Paragraphs 2 and 3.
4. The allegations of paragraphs 4, 5, and 6 constitute conclusions of law that do no require a response. To the extent a response is needed, they are denied.
5. In response to the allegations of paragraph 7, Defendant repeats and realleges his responses set forth above as if restated fully verbatim herein.
6. In response to the allegations of paragraphs 8, 9, and 10, Defendant craves reference to the documents and public records evidencing the agreements in question and denies any allegations inconsistent with the same.
7. Defendant lacks knowledge and information sufficient to form a belief as to the allegations of paragraph 11, and therefore denies the same and demands strict proof thereof.
8. In response to the allegations of paragraphs, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22, Defendant craves reference to the documents and public records evidencing the agreements in question and denies any allegations inconsistent with the same.
9. Defendant denies the allegations of paragraphs 23, 24, and 25.
10. In response to the allegations of paragraph 26 Defendant craves reference to the documents in question and denies any allegations inconsistent with the same.
11. Defendant denies the allegations of paragraph 27.

12. Defendant lacks knowledge and information sufficient to form a belief as to the allegations of paragraphs 28, 29, and 30, and therefore denies the same and demands strict proof thereof.

13. The allegations of paragraph 31 are a prayer for relief that does not require a response by Defendant. To the extent a response may be required, this paragraph is denied.

14. In response to the allegations of paragraph 32, Defendant repeats and realleges his responses set forth above as if restated fully verbatim herein.

15. In response to the allegations of paragraphs 33, 34, 35, and 36, Defendant craves reference to the documents and public records evidencing the agreements in question and denies any allegations inconsistent with the same.

16. Defendant denies the allegations of paragraphs 37, 38, and 39.

17. In response to the allegations of paragraph 40 Defendant craves reference to the documents and public records evidencing the agreements in question and denies any allegations inconsistent with the same.

18. Defendant denies the allegations of paragraph 41.

19. Defendant lacks knowledge and information sufficient to form a belief as to the allegations of paragraphs 42, 43, and 44, and therefore denies the same and demands strict proof thereof.

20. The allegations of paragraph 45 are a prayer for relief that does not require a response by Defendant. To the extent a response may be required, this paragraph is denied.

21. In response to the allegations of paragraph 46, Defendant repeats and realleges the responses set forth above as if restated fully verbatim herein.

22. In response to the allegations of paragraph 47 Defendant craves reference to the documents in question and denies any allegations inconsistent with the same.

23. Defendant denies the allegations of paragraphs 48, 49, and 50.

24. In response to the allegations of paragraph 51, Defendant repeats and realleges the responses set forth above as if restated fully verbatim herein.

25. In response to the allegations of paragraph 52 Defendant craves reference to the documents in question and denies any allegations inconsistent with the same.

26. Defendant denies the allegations of paragraphs 53, 54, and 55.

27. The Final Paragraph of the Complaint, which is unnumbered (beginning with "WHEREFORE,") constitutes a prayer for relief which requires no response from Defendant. To the extent any response may be required, Defendant denies the allegations of the Final Paragraph of the Complaint.

As Further Defenses

28. The Complaint should be dismissed pursuant to Rule 12(b)(6), SCRCPP, for failure to state facts sufficient to constitute a cause of action.

29. Plaintiff may not have the requisite standing to bring this action.

30. Plaintiff has failed to mitigate its damages.

31. Defendant reserves and does not waive any additional or further defenses or potential counterclaims as may be revealed by additional information that may be acquired in discovery.

As a Further Defense And by way of Cross-Claims and Third-Party Claims

32. Defendant incorporates by reference all of the foregoing paragraphs as if set forth fully herein verbatim.

33. Defendants Eugene Zurlo and Charlotte Zurlo are, upon information and belief, the trustees of the Nicklaus Lane Realty Trust.

34. At all times relevant to this action, Defendant Eugene Zurlo, together with his wife Charlotte Zurlo, were the trustees of the Third-Party Defendant Eugene J. Zurlo Living Trust dated December 11, 1997 (“Living Trust” or “Third-Party Defendant”). The Living Trust and Defendant/Third-Party Plaintiff Laplante have been the only Class A members of Defendant Penny Creek Associates, LLC (“Penny Creek”).

35. At all times relevant to this action, Penny Creek has been the only member of Defendant The Grove at Fenwick Plantation, LLC (“The Grove”).

36. Defendant/Third-Party Plaintiff Laplante is the managing member of Penny Creek and The Grove.

37. Laplante fairly and adequately represents the interests of all members similarly situated in enforcing the rights of Penny Creek and The Grove. Laplante is entitled to pursue this action as a derivative action pursuant to Rule 23(b)(1) of the South Carolina Rules of Civil Procedure.

38. Paul Zurlo is a citizen and resident of a state other than South Carolina and is the adult son of Mr. and Mrs. Zurlo. Paul Zurlo is managing director and chief operating officer of Bain Capital Ventures and a co-tortfeasor and co-conspirator with Mr. and Mrs. Zurlo as more fully set forth herein.

39. Mr. and Mrs. Zurlo regularly consult with Paul Zurlo with regard to their options and duties in connection with the business affairs of Penny Creek and The Grove, and Paul Zurlo has acted individually and in concert with Mr. and Mrs. Zurlo to cause harm to Laplante individually and as a member of Penny Creek, Penny Creek and The Grove as more specifically set forth herein.

40. This court has subject matter jurisdiction of this action, and personal jurisdiction over the parties.

For a First Cross-Claim and Third-Party Claim
(Breach of Fiduciary Duty)
(Breach of Obligations of Good Faith and Fair Dealing)

41. Laplante incorporates by reference his responses and allegations in Paragraphs 1 through 40 as if fully restated verbatim herein.

42. The Living Trust, in its capacity as a member of Penny Creek and a party to the Penny Creek Operating Agreement, and Mr. and Mrs. Zurlo individually and as Co-Trustees, owe the implied duties of good faith and fair dealing to The Grove, Penny Creek, and their fellow members of Penny Creek.

43. The Living Trust and Mr. and Mrs. Zurlo owe certain fiduciary duties as more particularly set forth in the Penny Creek Operating Agreement, and they further owe the fiduciary duties set forth in South Carolina Code Section 33-44-409 to the extent they have exercised managerial authority vested in the Penny Creek manager. The Living Trust and Mr. and Mrs. Zurlo have committed certain acts and omissions in breach of their covenants of good faith and fair dealing and their fiduciary duties, including but not limited to:

- a. Acting individually and in concert with co-conspirator Paul Zurlo to refuse to participate in discussions regarding the refinancing of the assets of Penny Creek and The Grove, thus creating the appearance that the properties' rents and profits are in danger of being lost or materially injured or impaired, and creating the impression that Penny Creek and/or The Grove are in imminent danger of becoming insolvent, where no such appearance would otherwise exist;
- b. Repeatedly expressing their desire to allow the real estate investments of Penny Creek and The Grove to collapse so that the Living Trust and/or Mr. and Mrs. Zurlo can purchase the assets in a foreclosure sale to the exclusion of Laplante and the other members of Penny Creek;

- c. Spreading false rumors regarding Penny Creek's financial health suggesting a receiver is necessary because the company is in imminent danger of becoming insolvent, causing diminished real estate values and confidence among parties with whom Penny Creek does business;
- d. Falsely representing to third parties that Eugene Zurlo is the managing member of Penny Creek Associates, LLC, and directing said third parties to take actions against the interests of Penny Creek and its other members;
- e. Causing Penny Creek and/or The Grove to pay fees to accountants and legal counsel for work unrelated to Penny Creek's business or work that served only their interests;
- f. Acting in a racist, sexist, unprofessional, crass, abusive, bullying and belittling manner to Penny Creek's members, consultants, real estate brokers, prospective investors, and homeowners to such an extent that Eugene Zurlo agreed he should no longer attend meetings with third parties on behalf of Penny Creek or The Grove; and
- g. Acting individually and with their co-conspirator Paul Zurlo to refuse to execute "Pre-Negotiation Letters" with Wells Fargo Bank in the spring of 2014, which were a precondition to negotiating mortgage modifications with Wells Fargo, thus prohibiting Laplante from obtaining modification terms that would have prevented the institution of this action.

44. The Living Trust's acts and the actions of Mr. and Mrs. Zurlo as pleaded herein constitute intentional misconduct or, in the alternative, grossly negligent or reckless conduct.

45. As a direct and proximate result of violations by the Living Trust and Mr. and Mrs. Zurlo of their fiduciary and other duties, Penny Creek, The Grove, Laplante, and the other members of Penny Creek have suffered actual and special damages as pleaded herein in an amount to be proven at trial, including but not limited to the risk of total loss of their investment, harm to

Laplante's professional reputation, economic harm to Laplante's architectural business, loss in value of Penny Creek's assets, loss of a contract with True Homes, LLC which was producing income to Penny Creek and which would have produced over \$12 Million over the course of its term, the loss of an option with True Homes, LLC which would have grossed over \$7 Million to Penny Creek, decreased property values, the costs of the resulting foreclosure action, and such other damages as may be shown at trial.

46. The Living Trust's and Mr. and Mrs. Zurlo's willful, wanton and reckless acts and omissions as pleaded herein entitle Penny Creek, The Grove, Laplante and the other members of Penny Creek to punitive damages in an amount to be determined at trial.

FOR A SECOND CAUSE OF ACTION
(Civil Conspiracy)

47. Laplante incorporates by reference his responses and allegations in Paragraphs 1 through 46 as if fully restated verbatim herein.

48. The Living Trust, Paul Zurlo, and Mr. and Mrs. Zurlo have combined with one another for the purpose of injuring Laplante and/or Penny Creek, The Grove, and the other members of Penny Creek by:

- a. Refusing to cooperate or even communicate with the manager regarding the impending refinance needs of the assets of Penny Creek;
- b. Approving the Penny Creek tax return for 2012 without authority;
- c. Overdrawing the Penny Creek Operating Account;
- d. Publishing false accusations that Laplante has caused Penny Creek to pay the property owners association dues of his children;

- e. Threatening protracted litigation in an effort to coerce Laplante to vote to replace the manager of Penny Creek and The Grove, and to vote to liquidate and dissolve each entity;
- f. Falsely representing to third parties that Eugene Zurlo is the managing member of Penny Creek Associates, LLC, and directing said third parties to take actions against the interests of Penny Creek and its other members;
- g. Falsely representing to third parties that Laplante dishonestly distributed Penny Creek real estate to his children when in fact such distributions were approved by the Class A members;
- h. Refusing to execute "Pre-Negotiation Letters" with Wells Fargo Bank in the spring of 2014, which were a precondition to negotiating mortgage modifications with Wells Fargo, thus prohibiting Laplante from obtaining modification terms that would have prevented the institution of this action; and
- i. Taking such other actions in furtherance of their stated goal of allowing the assets of Penny Creek and The Grove to fall into foreclosure so that they may seize a business opportunity to the exclusion of Laplante and the other members of Penny Creek.

49. All of the above conduct by the Living Trust, Paul Zurlo, and Mr. and Mrs. Zurlo have caused actual, consequential, and special damages to Laplante, Penny Creek, The Grove, and the other members of Penny Creek in the form of harm to Laplante's professional reputation, economic harm to Laplante's architectural business, loss in value of Penny Creek's assets, loss of a contract with True Homes, LLC which was producing income to Penny Creek and which would have produced over \$12 Million over the course of its term, the loss of an option with True Homes, LLC which would have grossed over \$7 Million to Penny Creek, decreased

property value, the costs of the resulting foreclosure action, the costs of this action, including attorneys fees, and such other damages as may be shown at trial.

50. The Living Trust's, Paul Zurlo's and Mr. and Mrs. Zurlo's acts and omissions as pleaded herein were willful, wanton, and done with reckless disregard for the rights of Laplante. Laplante is therefore entitled to an award of punitive damages in an amount to be determined at trial.

AS AN ADDITIONAL CAUSE OF ACTION AGAINST THIRD-PARTY DEFENDANT
PAUL ZURLO
(Interference with Contractual Relationships)

51. Laplante incorporates by reference his responses and allegations in Paragraphs 1 through 50 as if fully restated verbatim herein.

52. Penny Creek, The Grove, and Laplante have a property right in certain contracts, including but not limited to the Penny Creek and The Grove Operating Agreements.

53. Third-Party Defendant Paul Zurlo had knowledge of each contract.

54. By assisting, advising, and instructing Mr. and Mrs. Zurlo to take certain steps, including but not limited to refusal to cooperate with Laplante's efforts to refinance The Grove in January, 2014 as shown on Exhibit A, and such other assistance, advice, and instruction as may be shown at trial, Paul Zurlo intentionally and maliciously procured breaches of covenants of good faith and fair dealing by the Trust and Mr. and Mrs. Zurlo, who did in fact refuse to cooperate with Laplante, Penny Creek, and The Grove on reasonable refinancing opportunities, and who further refused to execute Wells Fargo's "Pre-Negotiation Letters" until such time as Wells Fargo commenced foreclosure proceedings all to the detriment of Laplante individually, Penny Creek, its other members, and The Grove.

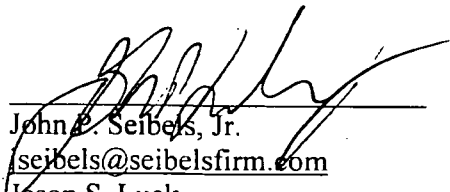
55. The conduct of Paul Zurlo as described herein lacked any legitimate business purpose or other justification.

56. As a direct and proximate result of Paul Zurlo's conduct, the Plaintiff withdrew The Grove's refinance opportunity, and ultimately commenced foreclosure proceedings against The Grove and Penny Creek, and their guarantors who include Laplante individually. The existence of the foreclosure action, and the lis pendens, caused Penny Creek to lose contracted sales of Penny Creek real estate and prospective sales of Penny Creek real estate, including but not limited to an agreement with True Homes, LLC which was providing, and would have provided, cash flow for Penny Creek's operational costs, debt service, and debt reduction or elimination.

57. Upon information and belief, Paul Zurlo's actions have directly and proximately caused such other damages, including but not limited to diminution of real estate values and assets of Penny Creek and The Grove, plus such other actual, consequential, and special damages as may be shown at trial.

58. In addition to actual, consequential, and special damages, Laplante, Penny Creek, and The Grove are entitled to punitive damages arising from the wrongful conduct of Paul Zurlo as plead herein.

Wherefore, having answered the Plaintiff's Complaint and asserted meritorious Cross-Claims and Third-Party Claims, Defendant asks this Court to dismiss the Plaintiff's Complaint, grant the relief requested in the Cross-Claims and Third-Party Claims, and award Defendant whatever further relief it deems just and proper.



John P. Seibels, Jr.
seibels@seibelsfirm.com

Jason S. Luck

jluck@seibelsfirm.com

SEIBELS LAW FIRM, P.A.

127 King Street, Suite 100

Charleston, SC 29401

843.722.6777 (phone)

843.722.6781 (telefax)

**Attorneys for Defendant Michel F.
LaPlante a/k/a Michel Laplante
a/k/a Mitch Laplante**

Charleston, SC
October 27, 2014

Certificate of Service
Case No.: 2014-CP-10-4946

I, Erin Magera, of the Seibels Law Firm, P.A., do hereby certify that a true and correct copy of the *Answer, Cross Claims, and Third-Party Claims of Michel F. LaPlante a/k/a Michel Laplante a/k/a Mitch Laplante* was properly addressed, postage pre-paid, and sent US Mail to counsel of record as follows:

Frank B. Ulmer, Esquire
Robert C. Byrd, Esquire
Parker Poe Adams & Bernstein LLP
200 Meeting Street, Suite 301
Charleston, SC 29401
frankulmer@parkerpoe.com
bobbybyrd@parkerpoe.com

Attorneys for Plaintiff

FILED

OCT 27 2014

**JULIE J. ARMSTRONG
CLERK, C.P. & G.S.**

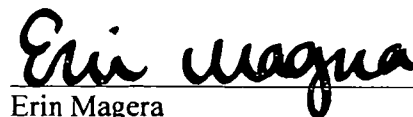
J. Rutledge Young, Jr., Esquire
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401
jry@duffyandyoung.com

**Attorney for Eugene J. Zurlo; Charlotte R. Zurlo
and Eugene J. Zurlo, as Co-Trustees of The
Nicklaus Realty Trust No. 1 under Declaration of
Trust dated May 22, 1998**

Robert B. Varnado, Esquire
Brown & Varnado, LLC
P.O. Box 1127
Mt. Pleasant, SC 29465
rvarnado@brown-varnado.com

**Attorney for Fenwick Hall Plantation Property
Owners Assn., Inc. a/k/a Fenwick Hall Property
Owners Association, Inc. a/k/a The Preserve at
Fenwick Hall Property Owners' Association, Inc.
and The Grove at Fenwick Plantation
Condominium Association, Inc.**

October 27, 2014


Erin Magera

1-8-14 Im for Gene Zurlo

Richter, Christine

From: Barnes, Scott
Sent: Monday, January 06, 2014 5:06 PM
To: Richter, Christine
Subject: FW: Wells Fargo 3 year commitment
Attachments: Grove Term Sheet January 2014.pdf

Chris, see if you can find the loan documents in the file for the Grove and Penny creek. We have pulled them in the past so I know they are there. Once you have them send them to Paul Zurlo

**Haynsworth
Sinkler Boyd, PA.**

ATTORNEYS AND COUNSELORS AT LAW

Scott Y. Barnes | Attorney | Haynsworth Sinkler Boyd, P.A.
134 Meeting Street, 3rd Floor (29401) | Post Office Box 340 (29402) | Charleston, South Carolina
Phone: 843.722.3366 | Fax: 843.722.2266 | Direct: 843.720.4458

website | blo | vCard | map | email

From: Genezurlo [mailto:genezurlo@aol.com]
Sent: Monday, January 06, 2014 4:53 PM
To: Barnes, Scott
Subject: Fwd: Wells Fargo 3 year commitment

Scott

Contained herein is the contact information for Paul Zurlo. As I mentioned on the voicemail, Paul would like to get copies of the relevant loan docs.

Gene

Begin forwarded message:

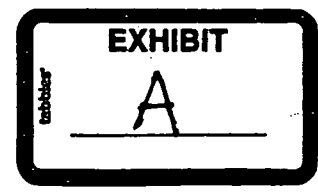
From: "Zurlo, Paul" <pzurlo@baincapitalventures.com>
Date: January 6, 2014, 3:26:44 PM EST
To: 'Genezurlo' <genezurlo@aol.com>
Subject: FW: Wells Fargo 3 year commitment

Dad

This is where you have all the leverage. They need you to sign on as guarantor to this term sheet. I would withhold that until you get what you want. For me, that would be the ability to be the sole check writer. At minimum, make Mitch and a representative for you (i.e. me) be co-mgrs of Penny Creek and the grove. Both of us would have to sign all checks. But I would push this to full manager control.

I would want to talk with Wells Fargo separately from and explain the situation. I believe you to be more aligned with them.

PZ



Paul Zurlo
Managing Director
Bain Capital Ventures
200 Clarendon Street, 39th Floor
Boston, MA 02116
617-516-2492 (o)
617-947-2809 (m)
pzurlo@baincapital.com

From: Mitch LaPlante [<mailto:scmitch@bellsouth.net>]
Sent: Monday, January 06, 2014 3:17 PM
To: Jared Becknell
Cc: Gene Zurlo; John laplante; mitch laplante
Subject: Wells Fargo 3 year commitment

jared

please review and re confirm that we can meet these terms under continued your strong management.

they are looking for a \$20,000 principal paydown upfront, can we handle that with available cash flow ?

I think this will afford a stable financing for 3 years, in which time we can either arrange a strong sale, sell condos w/ financing in place, or replace it with a long term loan

this has not been easy to arrange, but they have been understanding and are impress with the Grove's current operation.

Once this loan is in place we have great options available to us, now that we, mostly you and john, have stabilized the Grove as a well run, positive cash flow apartment complex. Thanks

let us know.

best

mitch

----- Forwarded Message -----

From: "Steven.A.Jasinski@wellsfargo.com" <Steven.A.Jasinski@wellsfargo.com>
To: scmitch@bellsouth.net
Cc: GeneZurlo@aol.com; john.laplante@gmail.com
Sent: Monday, January 6, 2014 2:58 PM
Subject: RE: phone call

Mitch,

Per our phone call this afternoon, please see the attached Term Sheet. Please forward to Jared if you wish.

Thanks,

Steve
Risk Management, Wealth Brokerage Retirement
NMLSR ID 634163

Tel 612-667-1741 | Fax: (612) 316-4910

steven.a.jasinski@wellsfargo.com

This message may contain confidential and/or privileged information. If you are not the addressee or authorized to receive this for the addressee, you must not use, copy, disclose, or take any action based on this message or any information herein. If you have received this message in error, please advise the sender immediately by reply e-mail and delete this message. Thank you for your cooperation.

From: Mitch LaPlante [<mailto:scmitch@bellsouth.net>]
Sent: Monday, January 06, 2014 8:30 AM
To: Jasinski, Steven A.
Cc: Gene Zurlo; John laplante
Subject: phone call

Steve

I trust you had a great holiday season

happy new year

let me know when I good time to return your call from over the holidays, I free most of today and Tuesday

look forward to hearing your thoughts on working out the extended loan on the Grove.

best

mitch

The information transmitted is intended only for the person or entity to which it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination or other use of, or taking of any action in reliance upon, this information by persons or entities other than the intended recipient is prohibited. If you received this in error, please contact the sender and delete the material from any computer.

Bain Capital, LLC
Boston, MA USA
+1 (617) 516 2000



Preliminary Term Sheet

FOR DISCUSSION PURPOSES ONLY-
NOT A COMMITMENT TO LEND

LENDER: Wells Fargo Bank, National Association ("Wells Fargo")

BORROWER(S): Grove at Fenwick Plantation, LLC

GUARANTOR(S): Gene Zurlo, Charlotte Zurlo, Zurlo Investment Trust No. 1, Michel LaPlante

TYPE OF CREDIT: Term Loan

PURPOSE: To renew financing of the existing obligation

LOAN AMOUNT: \$3,178,671.93 (reflects \$20,000 principal paydown)

FACILITY FEE(S): None

MATURITY DATE: January 31, 2017

COLLATERAL: A first mortgage on the real property currently known as The Grove at Fenwick Plantation

INTEREST RATE: The Wells Fargo Prime Rate plus 1%, this indicative floating rate as of today is 4.25%. All rates as defined and determined by Wells Fargo, with rounding upward as Wells Fargo requires.

REPAYMENT TERMS: \$23,000 Principal and Interest payable monthly with minimum monthly principal of \$10,000; remaining Principal payable at the Maturity Date.

COVENANTS & OTHER TERMS: Borrower and Guarantors agree that a minimum of \$10,000 shall be paid to principal monthly which could result in a total payment in excess of that which is cited above. Wells Fargo's usual and customary covenants and provisions, including any applicable fees, for credit of the kind, size and features above and such others as Wells Fargo determines may be needed during underwriting and due diligence, including requests for updated financial information.

This Preliminary Term Sheet presentation is for discussion purposes only and is not intended to be and should not be construed as an offer, a commitment, nor agreement to lend, nor should it be construed as an attempt to establish all of the terms and conditions relating to any loan or credit facility described above. It is intended only to be indicative of certain terms and conditions around which credit approval may be sought, and if approved, how the loan documents might be structured, and shall not preclude negotiations over these or any other terms and conditions.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2014-CP-10-4946

Wells Fargo Bank, N.A., as Successor by Merger to Wachovia Bank, National Association as Successor by Merger to First Union National Bank,

Plaintiff,

vs.

Penny Creek Associates, L.L.C. a/k/a Penny Creek Associates, LLC; The Grove at Fenwick Plantation, LLC; Michel F. Laplante a/k/a Michel Laplante a/k/a Mitch Laplante; Charlotte R. Zurlo; Eugene J. Zurlo; Charlotte R. Zurlo and Eugene J. Zurlo, as Co-Trustees of The Nicklaus Lane Realty Trust No. 1 under Declaration of Trust dated May 22, 1998, and The Zurlo Investment Trust No. 1 pursuant to trust agreement dated August 10, 1998; Fenwick Hall Plantation Property Owners Assn., Inc. a/k/a Fenwick Hall Plantation Property Owners' Association, Inc.; Preserve at Fenwick Hall Property Owners' Association, Inc.; and The Grove at Fenwick Plantation Condominium Association, Inc.,

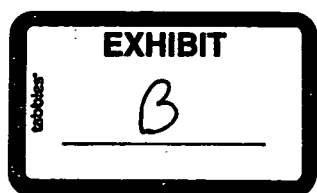
Defendants.

AMENDED ANSWER OF EUGENE J. ZURLO; CHARLOTTE R. ZURLO; AND CHARLOTTE R. ZURLO AND EUGENE J. ZURLO, as Co-Trustees of The Nicklaus Realty Trust No. 1 under Declaration of Trust dated May 22, 1998 and THE ZURLO INVESTMENT TRUST NO. 1 pursuant to trust agreement dated August 10, 1998, and CROSS CLAIM AGAINST Michel F. Laplante a/k/a Michel Laplante a/k/a Mitch Laplante

FILED
2015 APR 15 PM 3:07
JULIE T. FARRINGTON
CLERK OF COURT

Defendants, Eugene J. Zurlo ("Gene"); Charlotte R. Zurlo ("Charlotte"); and Charlotte R. Zurlo and Eugene J. Zurlo, as Co-Trustees of The Nicklaus Realty Trust No. 1 under Declaration of Trust dated May 22, 1998, and The Zurlo Investment Trust No. 1 pursuant to trust agreement dated August 10, 1998 ("Trustees") (collectively referred to as the "Zurlo Defendants"), by and through counsel, answer Plaintiff's Complaint AND Cross Claim against the Co-Defendant Michel F. Laplante a/k/a Michel Laplante a/k/a Mitch Laplante as follows:

DY
1



GENERAL DENIAL

The Zurlo Defendants deny all allegations of Plaintiff's Complaint not specifically admitted herein.

FIRST DEFENSE AND ANSWER

1. The Zurlo Defendants admit the allegations of Paragraphs 1-6

2. The Zurlo Defendants do not have sufficient knowledge or information to form a belief as to the truth of Paragraphs 7-45 since these documents, in accordance with the Third Amended and Restated Operating Agreement of Penny Creek Associates, LLC, ("Penny Creek") dated October 15, 2005 and the Operating Agreement of The Grove at Fenwick Plantation, LLC, ("The Gove") dated June 3, 2004, were negotiated and executed by Mitch Laplante as the sole Managing Member of each LLC. However, based on the attachments to Plaintiff's complaint, the Zurlo Defendants admit the allegations of Paragraphs 7-45 on information and belief.

D:Y
N

3. The Zurlo Defendants admit the allegations of Paragraphs 46-54 but allege that the primary borrowers and obligors, Penny Creek Associates, LLC and The Grove at Fenwick Plantation, LLC have given the Plaintiff a First Mortgage on their real property, which gives the Plaintiff lender sufficient security and collateral to pay the Plaintiffs Penny Creek and The Grove Notes since the fair market value of the properties owned by the two LLC's exceeds the amount due and owed under the two Notes. This property should be seized and sold by Plaintiff, which should pay off Plaintiff's two notes in full or in part, which would relieve the Zurlo Defendants of any payments or performance liability under the terms of their Guaranty of the Penny Creek Note or The Grove Note which is the subject of Plaintiff's Third and Fourth Causes of Action against the Zurlo Defendants.

FOR A SECOND AFFIRMATIVE DEFENSE
(Waiver)

4. Further answering said Complaint and as a Second Affirmative Defense thereto, the Zurlo Defendants allege that Plaintiff has waived its rights to the relief requested by its actions and course of conduct.

FOR A THIRD AFFIRMATIVE DEFENSE
(Estoppel)

5. Further answering said Complaint and as a Third Affirmative Defense thereto, the Zurlo Defendants allege that Plaintiff is estopped from claiming the relief requested.

FOR A FOURTH AFFIRMATIVE DEFENSE
(Failure to Mitigate Damages)

6. Further answering said Complaint and as a Fourth Affirmative Defense thereto, the Zurlo Defendants allege that Plaintiff should be required to collect the Penny Creek Note and The Grove Note from its primary collateral, a security interest and First Mortgage on the debtors' real property, which real property, on information and belief, has sufficient equity, worth and value to pay all of the Penny Creek and The Grove Notes, therefore the Plaintiff has failed to mitigate its damages and should be barred from recovery against the Zurlo Defendants until it has seized and sold the real property in this foreclosure proceeding.

D:Y
—
3

FOR A FIFTH AFFIRMATIVE DEFENSE
(Reservation and non-waiver of Additional Affirmative Defenses)

7. Further answering said Complaint and as a Fifth Affirmative Defense thereto, the Zurlo Defendants allege that discovery may reveal that they have other affirmative defenses and thus the Zurlo Defendants reserve their right to amend their Answer to assert any such defense after discovery has taken place.

**FOR AN ADDITIONAL DEFENSE AND BY WAY OF A CROSS CLAIM AGAINST
THE CO-DEFENDANT MITCH LAPLANTE,
THE ZURLO DEFENDANTS ALLEGE AS FOLLOWS:**

8. Defendant and Cross Plaintiff Eugene J. Zurlo, together with his wife Charlotte Zurlo, are Co-Trustees of The Nicklaus Lane Realty Trust No. 1 under Declaration of Trust dated May 22, 1998 (the "NL Trust") and as such individually, as Trustees, guaranteed the Penny Creek and The Grove notes.

9. Eugene Zurlo and his wife Charlotte are citizens and residents of Charleston County, South Carolina. The Trust is formed under the laws of the State of South Carolina and administered in Charleston County, South Carolina.

10. Defendant Michel "Mitch" Laplante is a citizen and resident of Charleston County, South Carolina.

11. At all times relevant to this action, the Defendant Eugene J. Zurlo, together with his wife Charlotte Zurlo, were the Trustees of the Eugene J. Zurlo Living Trust dated December 11, 1997 Trust (the "Living Trust"). The Living Trust and Defendant Laplante have been the only Class A members of Penny Creek Associates, LLC.

D.Y
4

12. At all times relevant to this action, Penny Creek has been the only member of The Grove and as such is the only Class A member of The Grove at Fenwick Plantation, LLC.

13. Under their Operating Agreements and the South Carolina law, Penny Creek Associates, LLC and The Grove at Fenwick Plantation, LLC are manager-managed LLC's.

14. At all times relevant to this action, under the Third Amended and Restated Operating Agreement of Penny Creek, dated October 15, 2005 and the Operating Agreement of The Grove dated June 3, 2004, Defendant Laplante has been the sole manager of Penny Creek and The Grove.

15. As the sole manager of the two LLCs, Laplante has repeatedly acted as Manager in a manner inconsistent with his managerial and fiduciary duties to the Zurlos, The Nicklaus Realty Trust No.1, Eugene J. Zurlo Living Trust dated December 11, 1997 Trust (the "Living Trust"), Penny Creek Associates, LLC, and The Grove at Fenwick Planation, LLC, particularly with regard to negotiating extensions and renewals or new loans for Penny Creek and The Grove from the Plaintiff or other lending institutions.

16. Laplante has failed to comply with his managerial and fiduciary duties, breached the terms of the two Operating Agreements and refuses to allow the Zurlo Defendants to assist (see Exhibit A) in renegotiating the two Notes and Mortgages. These acts and omissions put the two LLCs in serious jeopardy of foreclosure and expose the Zurlo Defendants to possible obligations on the two guarantees they have signed.

17. As a direct and proximate result of his breach of his duties under the South Carolina Limited Liability Act, the two Operating Agreements and the South Carolina common law, if the Zurlo Defendants are liable on their two guarantees, they are entitled to be fully indemnified and reimbursed by Mitch Laplante.

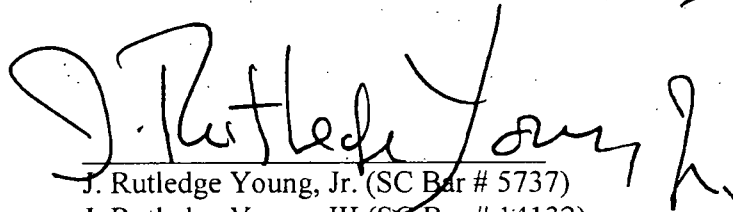
D:4
5

PRAYER FOR RELIEF

WHEREFORE, Eugene J. Zurlo ("Gene"); Charlotte R. Zurlo ("Charlotte"); and Charlotte R. Zurlo and Eugene J. Zurlo, as Co-Trustees of The Nicklaus Realty Trust No. 1 under Declaration of Trust dated May 22, 1998, and The Zurlo Investment Trust No. 1 pursuant to trust agreement dated August 10, 1998 ("Trustees") (collectively referred to as the "Zurlo Defendants"), pray the Court to enter an Order:

1. Declaring that the Plaintiff shall have and recover nothing from the Zurlo Defendants;

2. If the Zurlo Defendants are held liable on either of their two Guarantees, then they demand judgment against Co-Defendant and Cross Defendant Mitch Laplante for the full amount of such judgment;
3. Provide for a jury trial as to all issues in all claims so triable; and
4. Provide such other relief in this action as may be just and proper.



D:Y
6

J. Rutledge Young, Jr. (SC Bar # 5737)
J. Rutledge Young, III (SC Bar # 14132)
Seth W. Whitaker (SC Bar # 77102)
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401
jry@duffyandyoung.com
ryoung@duffyandyoung.com
swhitaker@duffyandyoung.com
Attorneys for the Zurlo Defendants

April 15, 2015
Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Wells Fargo Bank, N.A., as Successor by Merger to Wachovia Bank, National Association as Successor by Merger to First Union National Bank,

Plaintiff,

vs.

Penny Creek Associates, L.L.C. a/k/a Penny Creek Associates, LLC; The Grove at Fenwick Plantation, LLC; Michel F. Laplante a/k/a Michel Laplante a/k/a Mitch Laplante; Charlotte R. Zurlo; Eugene J. Zurlo; Charlotte R. Zurlo and Eugene J. Zurlo, as Co-Trustees of The Nicklaus Lane Realty Trust No. 1 under Declaration of Trust dated May 22, 1998; Fenwick Hall Plantation Property Owners Assn., Inc. a/k/a Fenwick Hall Plantation Property Owners' Association, Inc.; Preserve at Fenwick Hall Property Owners' Association, Inc.; and The Grove at Fenwick Plantation Condominium Association, Inc.,

Defendants.

Michel Laplante,

Third-Party Plaintiff,

vs.

The Eugene J. Zurlo Living Trust, Dated December 11, 1997 and Paul Zurlo,

Third-Party Defendants.

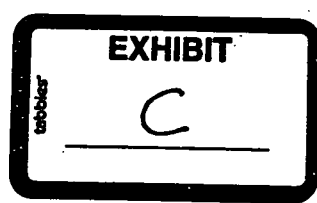
IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2014-CP-10-4946

FILED
2014 NOV 26 1:04
JULIE J. ABERSTRONG
CLERK OF COURT
BY _____
Clocked in date

ANSWER OF THE EUGENE J. ZURLO
LIVING TRUST, dated December 11, 1997
TO MICHEL LAPLANTE'S CROSS-
CLAIMS AND THIRD-PARTY
COMPLAINT

FILED
2014 NOV 26 AM 11:07
JULIE J. ABERSTRONG
CLERK OF COURT
BY _____

D:Y
/



Third-Party Defendant, The Eugene J. Zurlo Living Trust dated December 11, 1997 (the "Zurlo Trust"), by and through counsel, answer Third-Party Plaintiff's Third-Party Complaint and Cross Claims as follows:

GENERAL DENIAL

The Zurlo Trust denies all allegations of Third-Party Plaintiff's Third-Party Complaint and Cross Claims not specifically admitted herein.

FIRST DEFENSE AND ANSWER

1. The Zurlo Trust admits the allegations of Paragraphs 33-36.
2. Responding to Paragraph 37, the Zurlo Trust denies that Laplante fairly and adequately represents the interests of all members in enforcing the rights of Penny Creek and The Grove. The remainder of Paragraph 37 sets forth a legal conclusion which requires no response. To the extent a response is required, the Zurlo Trust denies the allegations of Paragraph 42 and demands strict proof thereof.
3. Responding to Paragraph 38, the Zurlo Trust denies that Paul Zurlo is a co-tortfeasor or co-conspirator with the Zurlo Trust or Mr. and Mrs. Zurlo, but admits the remaining allegations of Paragraph 38.
4. The Zurlo Trust admits that Mr. and Mrs. Zurlo are in regular family contact with their son, Paul Zurlo, and that such contact sometimes includes communications regarding Gene and Charlotte's business and financial affairs. The Zurlo Trust denies the remaining allegations of Paragraph 39.
5. The Zurlo Trust admits the allegations of Paragraph 40 as to itself, but denies the allegations of Paragraph 40 regarding personal jurisdiction with respect to co-Defendant Paul Zurlo.

D.Y.
/2

6. Responding to Paragraph 41, the Zurlo Trust incorporates its responses to Paragraphs 33-40 of Michel Laplante's Third-Party Complaint and Cross Claims as if fully set forth herein.

7. Paragraph 42 sets forth a legal conclusion which requires no response. To the extent a response is required, the Zurlo Trust denies the allegations of Paragraph 42 and demands strict proof thereof.

8. The Zurlo Trust denies the allegations of Paragraph 43 including all subparagraphs thereof, especially the allegation that it has inappropriately exercised managerial authority vested in the Penny Creek manager.

9. The Zurlo Trust denies the allegations of Paragraphs 44-46.

10. Responding to Paragraph 47, the Zurlo Trust incorporates its responses to Paragraphs 33-46 of Michel Laplante's Third-Party Complaint and Cross Claims as if fully set forth herein.

11. The Zurlo Trust denies the allegations of Paragraph 48, including all subparagraphs thereof.

12. The Zurlo Trust denies the allegations of Paragraphs 49-50.

13. Responding to Paragraph 51, the Zurlo Trust incorporates its responses to Paragraphs 33-50 of Michel Laplante's Third-Party Complaint and Cross Claims as if fully set forth herein.

14. Paragraphs 52-58 do not attempt to state a claim against the Zurlo Trust, and no response from it is therefore required. To the extent a response is required, the Zurlo Trust denies the allegations of Paragraphs 52-58.

DiY
3

FOR A SECOND AFFIRMATIVE DEFENSE
(Failure to State a Claim)

15. Third-Party Plaintiff's Third-Party Claims and Cross Claims should be dismissed pursuant to Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action or a claim upon which relief can be granted.

THIRD DEFENSE
(Unclean Hands)

16. Third-Party Plaintiff's Third-Party Claims and Cross Claims are barred by the doctrine of unclean hands.

FOURTH DEFENSE
(Waiver, Estoppel, Frustration of Purpose, and Laches)

17. Third-Party Plaintiff's Third-Party Claims and Cross Claims are barred by the equitable doctrines of waiver, estoppel, frustration of purpose and laches.

FIFTH DEFENSE
(Failure to Mitigate)

18. Third-Party Plaintiff's Third-Party Claims and Cross Claims are barred, in whole or in part, by their failure to mitigate any damages.

SIXTH DEFENSE
(Reservation of Rights for Additional Defenses)

19. Third-Party Defendant reserves the right to amend its responses to the Third-Party Complaint and Cross Claims after discovery has transpired.

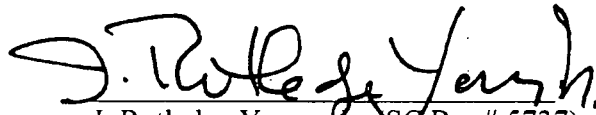
PRAYER FOR RELIEF

WHEREFORE, the Zurlo Trust respectfully prays this Court to:

- i. Enter judgment that Third-Party Plaintiff shall have and recover nothing from Third-Party Defendant on the Cross Claims and Third-Party Claims;

D:Y
4

- ii. Tax the costs of this action against Third-Party Plaintiff;
- iii. Award Third-Party Defendant attorneys' fees if Zurlo Trust prevails;
- iv. Provide for a jury trial on all issues so triable; and
- v. Provide such other relief in this action as may be just and proper.



J. Rutledge Young, Jr. (SC Bar # 5737)
J. Rutledge Young, III (SC Bar # 14132)
Seth W. Whitaker (SC Bar # 77102)
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401
jry@duffyandyoung.com
ryoung@duffyandyoung.com
swhitaker@duffyandyoung.com

*Attorneys for Defendants Charlotte R. Zurlo and
Eugene J. Zurlo and Third-Party Defendant The
Eugene J. Zurlo Living Trust*

*D:Y
S*

November 26, 2014
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
AUG 14 2015
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
R. Markley Dennis
Circuit Court Judge

Appellate Case No. 2015-001461

Wells Fargo Bank, N.A., as Successor by Merger
to Wachovia Bank, National Association, as
Successor by Merger to First Union National Bank..... Respondent,

v.

Penny Creek Associates, L.L.C. a/k/a Penny Creek
Associates, LLC; The Grove at Fenwick Plantation,
LLC; Michel F. LaPlante a/k/a Michel Laplante a/k/a
Mitch Laplante; Charlotte R. Zurlo; Eugene J. Zurlo;
Charlotte R. Zurlo and Eugene J. Zurlo, as Co-Trustees
of The Nicklaus Lane Realty Trust No. 1 under
Declaration of Trust dated May 22, 1998; Fenwick Hall
Plantation Property Owners Ass'n., Inc. a/k/a Fenwick
Hall Plantation Property Owners' Association, Inc.;
Preserve at Fenwick Hall Property Owners' Association,
Inc.; and The Grove at Fenwick Plantation
Condominium Association, Inc..... Defendants,

Of Whom Penny Creek Associates, L.L.C. a/k/a Penny
Creek Associates, LLC; The Grove at Fenwick
Plantation, LLC; Charlotte R. Zurlo; Eugene J. Zurlo;
Charlotte R. Zurlo and Eugene J. Zurlo, as Co-Trustees
of The Nicklaus Lane Realty Trust No. 1 under
Declaration of Trust dated May 22, 1998; Fenwick Hall
Plantation Property Owners Ass'n., Inc. a/k/a Fenwick
Hall Plantation Property Owners' Association, Inc.;
Preserve at Fenwick Hall Property Owners' Association,
Inc.; and The Grove at Fenwick Plantation
Condominium Association, Inc. are the..... Respondents,

Michel F. LaPlante a/k/a Michel Laplante
a/k/a Mitch Laplante..... Appellant,

RECEIVED
AUG 14 2015
SC Court of Appeals

v.

**The Eugene J. Zurlo Living Trust, Dated
December 11, 1997 and Paul Zurlo Respondents.**

CERTIFICATE OF SERVICE

I certify that on August 12, 2015 I have served Appellant Michel F. LaPlante a/k/a Michel Laplante a/k/a Mitch Laplante's Return to Respondent Wells Fargo Bank, N.A.'s Motion to Dismiss on the Clerk of the South Carolina Court of Appeals with copies to the following:

Robert C. Byrd, Esquire
A. Smith Podris, Esquire
Parker Poe Adams & Bernstein LLP
200 Meeting Street, Suite 301
Charleston, SC 29401
bobbybyrd@parkerpoe.com
smithpodris@parkerpoe.com
Attorneys for Plaintiff/Respondent Wells Fargo Bank, N.A., as Successor by Merger to Wachovia Bank, National Association as Successor by Merger to First Union National Bank

Thomas B. Pritchard, Esquire
Pritchard Law Group, LLC
PO Box 630
Charleston, SC 29402
tpritchard@pritchardlawgroup.com
Attorney for Defendant/Respondents Penny Creek Associates, LLC a/k/a Penny Creek Associates, LLC and The Grove at Fenwick Plantation, LLC

Robert B. Varnado, Esquire
Brown & Varnado, LLC
P.O. Box 1127
Mt. Pleasant, SC 29465
rvarnado@brown-varnado.com

J. Rutledge Young, Jr., Esquire
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401
jry@duffyandyoung.com
Attorney for Defendants/Respondents Eugene J. Zurlo; Charlotte R. Zurlo and Eugene J. Zurlo, as Co-Trustees of The Nicklaus Realty Trust No. 1 under Declaration of Trust dated May 22, 1998 and Attorney for Third-Party Defendant/Respondent The Eugene J. Zurlo Living Trust, Dated December 11, 1997

John A. Massalon, Esquire
Christy F. Allen, Esquire
Wills Massalon & Allen LLC
P.O. Box 859
Charleston, SC 29402
jmassalon@wmalawfirm.net
callen@wmalawfirm.net
Attorneys for Third-Party Defendant/Respondent Paul Zurlo

**Attorney for Defendants/Respondents
Fenwick Hall Plantation Property
Owners Assn., Inc. a/k/a Fenwick Hall
Property Owners Association, Inc. a/k/a
The Preserve at Fenwick Hall Property
Owners' Association, Inc. and The
Grove at Fenwick Plantation
Condominium Association, Inc.**

Dated: August 12, 2015


Erin Magera