STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Joe M. Crosby, Master-in-Equity

APPELLATE CASE NO. 2015-002484

TD Bank, N.A., Successor by merger to
Carolina First Bank, N.A., ...Respondent,

vs.

Sunil V. Lalla and Sharon W. Lalla, ...Appellants.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

This is the second appeal presenting pending before this Court arising out of Summons and Complaint filed against the Appellants Sunil V. Lalla and Sharon W. Lalla ("The Lallas") by Respondent TD Bank, Successor by merger to Carolina First Bank, N.A. ("TD Bank"). (Summons and Complaint; R. ___). The Respondent's initial Complaint seeks judgment against Appellants based upon the existence of an alleged note and based upon an allegation the note is owned by the Respondent. (Summons and Complaint; R. ____).

The Appellants filed an Answer on or about April 11, 2011. In the Answer, the Appellants denied the existence of a note. (Answer; R. ___). On December 10, 2012, Judge Joe Crosby, Master-in-Equity for Georgetown County, held a foreclosure hearing. After the hearing Judge Crosby issued an Order dated April 22, 2013, in which he held that Respondent had not proven any entitlement to a deficiency judgment. (Order dated April 22, 2013, R. ___). Respondent moved to Alter or Amend the Court's April 22, 2013, Order. (Motion to Alter or Amend; R. ___). On February 4, 2014, Judge Crosby filed an Order granting Respondent's Motion to Alter or Amend. (Order Granting Motion to Alter or Amend; R. ___). Judge Crosby's Order also provided for a deficiency judgment and for attorneys fees. Appellants timely filed a Notice of Appeal of Judge Crosby's February 4, 2014, Order. (Notice of Appeal dated ___; R. ___). The February 4, 2014, Order is presently on appeal to this Court (Case Number 2015-000295) and will be decided during the March term of Court without oral argument. (Letter from Claire Allen, Deputy Clerk, dated March 2016; R. _____).

Subsequently, while that appeal was pending before this Court, Respondent moved for an Order for Leases, Rents and Appointment of Receiver. (Motion for Leases, Rents and Appointment of Receiver; R ____). Notwithstanding the fact that the Order upon which the relief sought by Respondent was based was on appeal before this Court, Judge Crosby held a hearing and issued an Order dated November 12, 2015, in which he granted Respondent's Motion and appointed a receiver. (Order dated November 12, 2015; R. ____). The Appellants timely filed a Notice of Appeal with respect to the Court's November 12, 2015, Order. (Notice of Appeal dated November 25, 2015; R. ___).

STATEMENT OF THE FACTS

In 2006, Appellant Sunil Lalla entered into a mortgage with Carolina First Bank for property located in Garden City, South Carolina. (Complaint; R. ___). The mortgage was filed in Georgetown County, South Carolina. At the time of the lawsuit, there had been no additional mortgages on the property, and no assignments of the mortgage had been filed with the Register of Deeds Office in Georgetown County, South Carolina. (Complaint, Exhibit B; R. ___).

Due to the downturn in the economy, Dr. Lalla began to experience worsening financial issues. He attempted to work out a solution with the Respondent TD Bank, who claimed to have been assigned the mortgage. (Complaint; R. ___). Respondent, however, instituted an action against Appellants, despite the property being residential and perhaps subject to the Homeowner's Affordable Modification program under the Federal Government. (Complaint, Exhibit B; R. ___).

The first cause of action in the Complaint is based upon the alleged note. This note was allegedly signed on November 13, 2006. It is alleged the note is secured by a mortgage from the property located in Garden City. The second cause of action seeks foreclosure upon a mortgage as described above. (Complaint; R. ___). In the second cause of action, Respondent claims its note is secured by the mortgage. The note referred to in the second cause of action is the note alleged to exist in the first cause of action. Thus, the right to foreclose on the mortgage is tied to the proof and existence of the note described in the first cause of action. Pursuant to the Complaint, the right claimed by Respondent to a monetary judgment is based upon the note. The right Respondent claims to foreclose is based upon the mortgage described in the second cause of action. The second cause of action does not seek any monetary judgment. (Complaint; R. ___.) The third cause of action seeks attorneys fees and costs pursuant to the note. The fourth cause of action sought the appointment of a receiver to collect rents to preserve the property during the pendency of the action. (Complaint; R. ___).

In paragraph seven (7) of the Appellants' Answer, they deny they have given Plaintiff the note that is the subject of the first cause of action. (Answer; R. ___). Thus, the validity of the note is in question in this action as is the issue of ownership of the note.

ARGUMENT

1. THE APPELLANTS' NOTICE OF APPEAL SHOULD HAVE STAYED THE APPOINTMENT OF A RECEIVER

The Appellants' Notice of Appeal as to Judge Crosby's first Order should have stayed the appointment of a receiver in this case. (Notice of Appeal; R. ___). Rule 241(a) SCAR provides in part that:

(a) General Rule. As a general rule, the service of an appeal in a civil matter acts to automatically stay matters decided in the order on appeal, and to automatically stay the relief ordered in the appealed order, judgment or decree. The automatic stay continues in effect for the duration of the appeal unless lifted by Order of lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court.

SCAR 241(b) provides for a number of exceptions to this general rule. The Appellants submit that none of these exceptions are applicable to a Motion for Rents, Leases and/or the Appointment of a Receiver to collect them.

Therefore, Respondent's Motion for Leases, Rents and Appointment of Receiver should have been stayed by the Appellants' appeal of Judge Crosby's February 4, 2014, Order. The Respondent's entitlement to any leases, rents or any income or money that would be collected by a receiver in this case are completely dependent upon the relief granted to them in Judge Crosby's February 4, 2014, Order which is presently before this Court on appeal. (Order filed February 4, 2014; R. ___). The proceedings to appoint a receiver and the Respondent's entitlement to a receiver should have been stayed by the Appellants' appeal of the February 4, 2014, Order. Judge Crosby's Order granting a receiver is clearly erroneous and based upon a misapplication of South Carolina Law and should be reversed by this Court.

2. THE RELIEF GRANTED BY THE MASTER IS GROUNDED UPON AN ORDER THAT FAILS AS A MATTER OF LAW.

The Master's Order granting the relief requested by Respondent is predicated on an erroneous prior Order of the Master that should be reversed by this Court. The reversal of the Master's prior Order to Alter and/or Amend eliminates the basis/foundation of the relief sought by Respondent in this appeal. The Court's November 2015 Order, which is based upon that prior Order should therefore be reversed by this Court.

a. The Trial Court should have denied the Motion since it raised issues not brought before the Court.

Our Courts have made it clear that "[a] party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not." *Tallent v. South Carolina Dept. of Transp.,* 363 S.C. 160, 165, 609 S.E.2d 544, 546 (Ct. App. 2005) (citing *Kiawah Prop. Owners Group v. Public Serv. Comm'n,* 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004)); *see also MailSource, LLC v. M.A. Bailey & Assoc.,* 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003)

In its Motion to Alter or Amend Judgment, the Respondent introduced the issue of presumption for the first time. The Motion stated: "The Master failed to apply the presumption that Defendants (Appellants) (had executed a note in favor of Plaintiff (Respondent)." (Motion to Alter or Amend, p. 4; R. ___). Since the issue of presumption was not brought before the Court, it is improper. In addition, the code section cited by Respondent was misleading to the Court. The Respondent cited S.C. Code Ann § 36-3-307 to claim that the Court should have presumed that Appellants signed the note. However, this section applies only when the authenticity of a signature is questioned, not when the authenticity of the document itself is questioned. The Court cited S.C. Code Ann § 36-3-307, but this is a definitional section only. It does not contain instructions on its application to authenticating a *document.*

The Respondent also introduced the issue of estoppel for the first time in the Motion. The Respondent stated: "Because Defendants (Appellants) made payments to the bank under the note, the Defendants (Appellants) are estopped from denying the existence of the note." (Motion to Alter or Amend Judgment, p. 13). Since the issue of estoppel was not brought before the Trial Court, this is improper.

The Respondent also for the first time introduced the issue of standing. Although the Appellants' Answer to the Complaint stated that they denied the existence of the note and counterclaims were asserted, the Respondent did not assert that the Defendants lacked standing as one of its defenses. (Answer p. 7; R. ___) (Answer to Counterclaims; R. ___). The Judge improperly considered this issue in his Order, stating: "Defendants (Appellants) lack standing." (Order Granting Motion to Alter or Amend; p. 2). Appellants did not have an opportunity to examine this assertion. It was not raised in the pleadings, nor was it raised at the hearing. This was an error of law.

These improper issues, raised for the first time in the Motion to Alter or Amend, should not have been considered by the Trial Court and the Motion should have been denied. Therefore the Court's Order granting the Respondent's motion for the appointment of a receiver which is before this Court also fails as a matter of law.

b. The Trial Court erred in considering evidence submitted to the Court in the Motion to Alter or Amend Judgment.

The Respondent also failed to honor the Court's instructions and attached evidence not presented to the Court, denying Appellants the opportunity to cross-examine on the evidence. (Transcript of Hearing, Page 18, Line 5 - Page 21, Line 22; R. ___). This is improper and should have led the Trial Court to deny the Motion. SCRCP Rule 59(e); *see Spreeuw v. Barker* (S.C. App. 2009) 385 S.C. 45, 682 S.E.2d 843 (Appellate Court considering father's challenge to child support award could not consider financial document appearing only as an attachment to father's post judgment motion to alter or amend judgment).

"A judge may not, after all testimony has been taken, receive additional contested evidence without reopening the case." *Johnson v. Johnson,* 288 S.C. 270, 274, 341

S.E.2d 811, 814 (Ct. App. 1986). The only exception to this rule is if the evidence is newly discovered and meets the following criteria: the evidence (1) is of such magnitude that had the court known of it earlier, the outcome would likely have been different; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; **and** (5) is not merely cumulative or impeaching. S. C. Rules of Civ. Proc., Rules 59(b), 60(b) (emphasis added).

The evidence in this case failed to meet prong number three. It was discoverable before the trial. Therefore, the additional evidence should have been submitted and considered by the Court, and the Motion should have been denied.

3. THE RESPONDENT HAS THE BURDEN OF PROOF TO ESTABLISH THE EXISTENCE OF THE NOTE AND ASSIGNMENT OF THE MORTGAGE, WHICH IT FAILED TO DO.

The Order upon which the appointment of a receiver is based upon a note and assignment of mortgage which the Respondent failed to prove. "[W]here the defendant pleads special matter that denies an element of the plaintiff's cause of action, the defense is not affirmative and the burden of proof remains on the plaintiff to establish his case." *O'Neal v. Carolina Farm Supply of Johnston, Inc.,* 279 S.C. 490, 494, 309 S.E.2d 776, 779 (Ct. App. 1983). It is an elementary rule of civil practice that a Plaintiff must prove the allegations of the Complaint by a preponderance of the evidence. *Brucke v. Howard,* 74 S.C. 144, 54 S.E. 249 (1906); *Smith v. Smith,* 194 S.C. 247, 9 S.E.2d 584 (1940). In any suit on a note, a Plaintiff must prove the existence of the note. Plaintiff must prove his ownership of the note. Plaintiff must prove the terms of the note. Further, Plaintiff must prove a breach of the note as a condition precedent to suit. 12 Am. Jur. 2d. Bills and Notes, Section 650, et. seq.

a. The Trial Court erred in ignoring the best evidence rule.

The Order states that the Court considered a copy of a note as properly admitted evidence. This was an error of law. "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Rule 1003, SCRE. The Appellants raised the issue as to the authenticity of this copy in the hearing, therefore the original was required. The only exceptions to an original are:

> (1) Originals Lost or Destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
> (2) Original Not Obtainable. No original can be obtained by any available judicial process or procedure; or
> (3) Original in Possession of Opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or
> (4) Collateral Matters. The writing, recording, or photograph is not closely related to a controlling issue.

Rule 1004, SCRE. The Respondent's witness testified that the alleged note was in the Respondent's possession, and had not been lost or destroyed. He also testified that it was obtainable. (Transcript of Hearing, Page 22, Line 17 - Page 31, Line 17; R. ___). The Respondent was put on notice that the note's contents would be a subject of proof at the hearing by the Answer of the Appellants, and the Respondent did not produce the original at the hearing. In addition, the existence of a note would be closely related to the claim by Respondent. Since all of the elements are met, the Court was in error to consider a copy of the alleged note. South Carolina Courts hold the admission of secondary

evidence is not a favored practice. *Wynn v. Coney,* 232 S.C. 346, 102 S.E.2d 209 (1958); *Drayton v. Industrial Life & Health Ins. Co.,* 205 S.C. 98, 31 S.E.2d 148 (1944).

The Respondent is a national banking institution. Respondent claims to be the holder of the note described in the first cause of action. The Respondent did not bring the original note to the trial and it was not received into evidence. (Order, dated April 22, 2013; R. ___) (Transcript of Hearing, Pages 22 - 31; R. ___). Respondent did attempt to introduce a copy of the note but counsel for the Appellants properly objected to the alleged note on the basis of the best evidence rule. (Tr. 22- 28). *Penton v. J.F. Cleckley and Company,* 326 S.C. 275, 486 S.E.2d 742 (1997); *Shirer v. O.W.S. and Associates*, 253 S.C. 232, 169 S.E.2d 621 (1969). The copy of the note should have been excluded from evidence, and the Court should not have considered the terms or conditions of the alleged note. 12 Am. Jur. 2d. Bills and Notes, Section 668.

Respondent did bring an official from the bank to trial. He testified the note is in existence. He testified the original is still in possession of the bank. (Transcript of Record, Page. 23; R. ___). There was no legitimate reason advanced which would justify the requirement of the original document being placed into evidence. *Penton v. J.F. Cleckley and Company,* 326 S.C. 275, 486 S.E.2d 742 (1997); *Shirer v. O.W.S. and Associates,* 253 S.C. 232, 169 S.E.2d 621 (1969); (12 Am. Jur. 2d. Bills and Notes, Section 668).

b. Since there was no merger between TD Bank and Carolina First, S.C. Code Ann. § 34-3-850 does not apply.

The Respondent's Exhibit 1 is an Order Approving the Acquisition of a Bank Holding Company (Respondent's Exhibit 1; R. ___). It is not a merger agreement. However, the Order states that there was testimony sufficient to establish a merger.

(Order filed February 4, 2014; R. ____). When questioned, Respondent's representative testified that there was not a merger, only a stock acquisition. (Transcript of Record, Page 48, Lines 9-12; R. ___).

Because the Respondent's representative testified that there was no merger, the Court was in error to apply S.C. Code Ann. § 34-3-850. Since there was no documentation showing that TD bank had merged or had acquired Carolina First, this statute cannot be used to provide that Respondent is the holder of the note and mortgage. This was an error of law.

c. Respondent failed to offer proof of assignment of the note or the mortgage.

Respondent claims to be an assignee of the rights of Carolina First Bank. On the other hand, no assignment of any note was placed into evidence and no assignment of any mortgage was placed into evidence. Respondent did introduce some securities records wherein Respondent acquired the "parent company" of Carolina First Bank. These documents do not establish that Respondent is the holder upon which suit has now been brought.

Carolina First Bank is a separate entity from its parent corporation. There simply is nothing in evidence from which the Court can conclude that Respondent is now the holder of the alleged note. The Respondent's witness testified that there was an acquisition of the South Financial Group by TD Bank, but not that there was an acquisition of Carolina First, the holder of the note, by TD Bank. (Tr. 13, Line 15-24; R. ____) (Plaintiff's Exhibit 1; R. ___). The subsidiary company of the parent company is a separate legal entity. There is nothing in the record from which this Court can conclude that Respondent ever acquired the note.

A mortgage is a security instrument. *Brockington v. Lynch,* 119 S.C. 273, 112 S.E. 94 (1922). In order to foreclose, a Plaintiff must prove it is owed money secured by the instrument and the terms of the negotiable instrument have been breached. *Paramount Fund Inc. v. Cusaac,* 282 S.C. 497, 319 S.E. 2d 354 (S.C. App. 1984); *Blackwell v. Blackwell,* 289 S.C. 470, 346 S.E. 2d 731 (S.C. App. 1986); 12 Am. Jur. 2d. Mortgages, Section 658, et. seq. In the present case, there is simply no proof of the essential elements of the causes of action. The witness for the Respondent testified that Plaintiff's Exhibits 1 and 2 establish an assignment of mortgage. However, those exhibits refer only to TD Bank and the Southern Financial group. There are no documents that refer to TD Bank and Carolina First. (Tr. Pages 44- 52).

In order for an assignee to collect on a negotiable instrument, he must first prove a valid assignment of the instrument. *Moore v. Weinberg,* 373 S.C. 209, 644 S.E.2d 740 (S.C. App. 2007). There was no such proof in this case. The public record of Georgetown County shows the record holder of the mortgage to be Carolina First Bank and not the Plaintiff. In short, there is nothing on the public record to indicate the mortgage or the note was ever assigned to the Respondent. (Tr. Pages 52 - 54).

The mortgage clearly gives Carolina First the right to foreclose upon proof of default in the note or debts of the Appellants. According to the public record, Respondent is not the holder of the mortgage. On the other hand, the right to foreclose according to the mortgage belongs to Carolina First Bank and not to the Respondent.

Respondent claims it now owns the mortgage that it seeks to foreclose. Again, Respondent does not and has not explained exactly how it claims to hold title to the

mortgage. Further, Respondent has not proven it is the holder of any debts secured by the claimed mortgage.

In this case, Respondent has failed to prove ownership of the note and mortgage. It is admitted the note was never given to the Respondent or any of its representatives. The note was given in favor of Carolina First Bank and there is no proof the note was ever assigned by Carolina First Bank to anyone.

d. Even if the mortgage was assigned, any note associated it does not follow.

"[T]he assignment of a note secured by a mortgage carries with it an assignment of the mortgage, but ... the assignment of the mortgage alone does not carry with it an assignment of the note." *Hahn v. Smith,* 157 S.C. 157, 167, 154 S.E. 112, 115 (1930).

Therefore, even if Appellants admitted to the existence of the mortgage, the note does not follow. In addition, the Appellants have not admitted the assignment of the mortgage. The Respondent failed to established its ownership of the note and mortgage. The Court was in error to hold otherwise.

4. THE COURT ERRED IN ADMITTING THE TESTIMONY OF THE BANK EMPLOYEE REGARDING INFORMATION OUTSIDE HIS KNOWLEDGE OR CONTROL.

The testimony of the bank employee was not sufficient to establish the alleged assignment or merger of the banks. Therefore, it was an error of law to admit his testimony in this area. It was also an error of law to admit the Plaintiff's (Respondent's) Exhibit 5, which were copies of printouts from a computer. "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Rule 602, SCRE. The Court itself stated that it was "not exactly sure" of the witness' area of knowledge. (Transcript of Hearing, Page 36,

Lines 15-20; R. ___). Since the Court itself was not sure of the knowledge that the witness had, the Court should not have relied on the testimony of the witness to establish assignment, merger, payments, the note, or the mortgage.

The witness testified:

> Q: Do you know of any document where that was assigned from Carolina First Bank to its current company?
> A: I don't have anything in my possession, no.
>
> ....
>
> Q: So we know of no document anywhere where Carolina First ever assigned its claim to this mortgage to South Financial, correct?
> A: I'm not sure I know how to answer that.

(Transcript of Hearing, Page 43, Lines 12-22; R. ___). The witness also stated that he was not a party to the master agreement of acquisition, and has never seen the original agreement. He then stated he has never seen the document at all. (Transcript of Hearing, Page 49, Lines 17- Page 51, Line 1; R. ___). He then testified:

> Q: And since you've never seen the document and have no firsthand knowledge, you can't tell us firsthand what TD Bank got from Carolina First or South Financial, can you?
> A: I can – no I can only refer to what I've seen.
>
> ....
>
> Q: Since you don't actually know what TD Bank acquired, you don't know what TD Bank acquired; correct?
>
> ....
>
> A: I don't think however I answer that it's going to come out right.

(Transcript of Hearing, Page 50, Lines 9-21; R ___). The witness testified to knowledge he did not have. (Transcript of Hearing, Page 56, Line 14 - Page 63, Line 3; R. ___). In addition, the testimony of the bank employee was not corroborated. To stretch the rules of evidence to admit this testimony, without corroborating evidence, could result in duplicate payments and may create a windfall for parties that may not have a legitimate claim in foreclosure proceedings.

5. THE TRIAL COURT FAILED TO CONSIDER THAT THE RESPONDENT OR ITS PREDECESSOR IN INTEREST RECEIVED TARP MONEY FROM THE UNITED STATES GOVERNMENT AND WAS REQUIRED TO FOLLOW CERTAIN PROCEDURES UNDER HAMP.

The Respondent's representative testified that he was unsure as to whether or not the home was the residence of the Appellants. First, he testified that it was not a residence. However, he then stated that it was residential. (Transcript of Hearing; Page 57, Line 2 - Page 59, Line 3; R. ___) (Transcript of Hearing Page 60, Line 14 - Page 63, Line 2; R. ___). The Answer to the Complaint states "The property in question is residential and the Plaintiff has not complied with the regulations in regard to negotiating a modification of the note and mortgage." (Answer, R. ___).

The Respondent's witness was also unsure as to whether or not the home was the Defendants' primary residence. However, the witness could not reconcile his testimony with the allegations of the Complaint:

> Q: I asked you just a moment ago was it a residential mortgage and you said yes. In the complaint you say it is not a residential mortgage.
> A: I think you're semantics at this point. That's all this is.
> Q: And I appreciate your thoughts. I just would like you to provide an explanation as to how in one breath you can tell me it's a residential mortgage

and then on the other hand you can tell me that it's not. It either is or it isn't. You've testified to both. Now, which of what you have said is the truth.

A: (No audible response.)

Q: Which is true? You've given us two separate answers. Which one of those answers is true?

A: It is a mortgage on a residence.

(Transcript of Record, Page 62, Line 2 - Page 63, Line 1; R. ___). As a primary residence, the home was protected under the Home Affordable Modification Program. (Transcript of Hearing, Page 59, Line 5 - Page 60, Line 5; R. ___). As such, the bank was required to comply with the HAMP prior to filing the suit.[1] The Plaintiff presented no evidence that it had complied with the law.

6. THE TRIAL COURT IMPROPERLY CONSIDERED THE ABSENCE OF THE APPELLANTS IN ITS ORDER.

The Order stated: "Defendants (Appellants) failed to attend the hearing before this Court and did not refute executing the note and mortgage via testimony or other competent evidence." (Order Granting Plaintiff's Motion to Amend or Alter Judgment, R ___).

The Respondent had the burden of proof to establish all elements of their claim. In this case, they failed to do so. The attendance or non-attendance of the Appellants should not have been included in the Court's analysis. The Court should only have

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[1] HAMP applies to homeowners who (1) received their mortgage on or before January 1, 2009; (2) owe up to $729,750 on their primary residence; (3) acknowledge that the property is not condemned; (4) experience financial hardship and are either delinquent or in danger of falling behind on mortgage payments; (5) have evidence of income to support a modified payment; and (6) have not been convicted within the last ten years of specific crimes generally connected to mortgage or real estate transactions. The program also applies to those who own rental property and owe up to a specific monetary amount. The homeowner must meet all criteria in order to be considered for a HAMP loan modification.

Cushla E. Talbut, Hampered Hopes for Homeowners: An Analysis of How Litigation Trends Have Exposed the Home Affordable Modification Program's Weaknesses, 68 U. Miami L. Rev. 295, 298 (2013) (internal citations omitted)

considered properly admitted evidence. In addition, the Appellants did not receive a subpoena from the Respondent.

7. THE TRIAL COURT ERRED IN PROUNOUNCING JUDGMENT THAT THE RESPONDENT DID NOT SEEK.

a. The Trial Court improperly judged against Sharon Lalla, who was not a party to the alleged note.

The Respondent stated in the hearing that they were not seeking a judgment against Sharon Lalla. However, in the Court's Order, she is listed as a Defendant and has a judgment against her. This was an error of law.

The Respondent's witness stated:

> Q: You don't contend that the debt that you're attempting to foreclose is a debt of Sharon Lalla, do you?
> A: No.
> Q: Okay. Now – so the persons against whom you claim to be seeking this deficiency judgment is Dr. Sunil Lalla, correct?
> A: Yes.

(Transcript of Hearing, Page 42, Lines 2-13; R. ___). Therefore, Sharon Lalla should not have been named in the Order.

b. The Trial Court erred in finding that deficiency had not been waived and in awarding a deficiency judgment.

The Trial Court was also in error by awarding a deficiency judgment. (Order Granting Plaintiff's Motion to Amend or Alter, p. 8). At the hearing, the Respondent's representative was unsure of what TD Bank asked for in the Complaint. He then stated that TD Bank wanted the property sold immediately. The Respondent did not want the bidding to remain open for any period of time. The witness stated he had reviewed the Complaint prior to trial, and it contained everything that TD Bank wanted. (Tr. 64-66).

The Respondent did not ask for a deficiency judgment Complaint, which requires the bidding to remain open. The Court, however, found that deficiency had not been waived. (Tr. 82-86). This was an error of law.

CONCLUSION

The Appellants' appeal from the Master stayed the matter with respect to the Respondent's Motion for Leases, Rents and the Appointment of a Receiver. Further, that relief was predicated on a prior Order of the Court that was clearly erroneous (and which is on appeal before this Court). Therefore, based on the foregoing, the Appellants ask this Court to reverse the Order of the Master-In-Equity appointing a receiver in this case.

Respectfully submitted,

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