THE 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

Case No. 2011-CP-22-00342

Appellate Case No. 2015-002484

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

v.

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

INITIAL BRIEF OF RESPONDENT TD BANK, N.A., SUCCESSOR BY MERGER TO CAROLINA FIRST BANK, N.A.

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I. **Did the Master-in-Equity properly appoint a receiver under S.C. Code Ann. § 15-65-10(3) to preserve the real property collateral during the pendency of a still-pending, related appeal in this foreclosure matter?**

COUNTER-STATEMENT OF THE CASE

This is the second appeal now pending before this Court in this foreclosure action. This appeal concerns the Master-in-Equity's Order appointing a receiver to preserve the real property collateral and collect the rents therefrom during the appeal of the Order of Foreclosure Judgment and Sale bearing Appellate Case No. 2015-000295.

On March 15, 2011, TD Bank, N.A., successor by merger to Carolina First Bank, N.A. ("TD Bank"), commenced the underlying action by filing and serving a complaint seeking foreclosure and sale of the mortgaged property and a deficiency judgment against Dr. Sunil V. Lalla ("Dr. Lalla"). [Complaint; R. ___]. TD Bank alleged that:

- On November 13, 2006, Dr. Lalla executed a Commercial Promissory Note in favor of Carolina First Bank in the original principal amount of $680,000 with interest thereon ("Note"). [Complaint ¶ 7; R. ___];
- Also on November 13, 2006, Dr. Lalla and Sharon W. Lalla ("Mrs. Lalla") executed a mortgage ("Mortgage") in favor of Carolina First Bank on property they own at 744 S. Waccamaw Drive, Garden City, SC 29731 ("Property") to secure the Note. [Complaint ¶ 8; R. ___];
- Dr. Lalla subsequently failed to make the required monthly payments. [Complaint ¶ 17; R. ___]; and
- Carolina First Bank subsequently merged into TD Bank, making TD Bank the successor-in-interest to the Note and Mortgage. [Complaint p. 1; R. ___].

Appellants answered and asserted affirmative defenses to the foreclosure and counterclaims. [Answer and Counterclaim; R. ___]. In Appellants' Answer and

Counterclaim, they denied Dr. Lalla's execution of the Note but admitted they executed the Mortgage to secure the Note. [Answer and Counterclaim ¶¶ 5-6; R. ___]. Appellants also denied that TD Bank is the owner and holder of the Mortgage and that Dr. Lalla defaulted on the loan. [Complaint ¶¶ 17, 25; R. ___; Answer and Counterclaim ¶¶ 7, 9; R. ___]. Appellants asserted a counterclaim, alleging that TD Bank had not complied with regulations regarding loan modification. [Answer and Counterclaim ¶¶ 13-16; R. ___].[1]

Dr. Lalla subsequently submitted an Affidavit in this matter. [Affidavit of Lalla; R. ___]. Contrary to the denials in the Appellants' Answer and Counterclaim, Dr. Lalla's Affidavit confirms the existence of the Note, his liability thereon, and TD Bank's role as owner and holder of the Note. [Affidavit of Lalla; R. ___]. Specifically, Dr. Lalla's Affidavit provides as follows:

> 4. The property serves as a second residence for my family, and when we are not residing there we rent the property out to third parties to assist in paying the bank.
>
> 5. Due to the current economic downturn, my income level has decreased. When I became aware of this issue I contacted the Plaintiff, T.D. Bank, in an attempt to speak to them about the promissory note on the property beginning in 2009.
>
> 6. I have always been forthcoming and cooperative in attempting to resolve this matter with the Plaintiff. . . .

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[1] Appellants asserted a counterclaim based on South Carolina's appraisal statutes but Appellants did not raise any issue as to this counterclaim in the prior, pending appeal and, therefore, waived any ability to challenge the issue.

7. . . . As late as last week I attempted to contact the Plaintiff to resolve this matter.

8. The Plaintiff has refused to modify the interest rate on the loan, refused to amortize the note and reduce the amount of the loan payments, and has refused to assist in short sales.

9. While the Plaintiff has refused to cooperate, I have always complied with the Plaintiff's requests in turning over tax documents and taking the property off the market at the Plaintiff's request.

10. Based on my current economic situation, my family and I may be forced to move into the home and use it as our primary residence on a full-time basis.

[Affidavit of Lalla ¶¶ 4-10; R. ___].

Three Affidavits were also submitted by Jason Bristol ("Bristol"), an employee of TD Bank, prior to the initial hearing on the matter on appeal before the Master-in-Equity. [Affidavit of Bristol; R. ___; Supplemental Affidavit of Bristol; R. ___; Second Supplemental Affidavit of Bristol; R. ___]. Bristol's Affidavits set forth his former role as a vice president and commercial loan officer with Carolina First Bank, his current role as Vice-President and manager of the subject loan with TD Bank, Dr. Lalla's execution of the Note, the Appellants' execution of the Mortgage, the default on the loan, and TD Bank's status as owner and holder of the Note and Mortgage as successor by merger with Carolina First Bank. [Affidavit of Bristol ¶¶ 1-2 and 5-8; R. ___; Supplemental Affidavit of Bristol ¶¶ 1 and 3; R. ___; Second Supplemental Affidavit of Bristol ¶¶ 1 and 3; R. ___].

On December 10, 2012, a foreclosure hearing was held before The Honorable Joe M. Crosby, as Master-in-Equity for Georgetown County, without a jury. [Transcript; R. ___]. Bristol testified on TD Bank's behalf. Specifically, Bristol testified that:

- He is a vice-president and regional workout officer for TD Bank. [Transcript 4:25-5:4 and 13:2-3; R. ___]. As part of his role with TD Bank, he has overseen and managed the Lalla loan since June 2011. [Transcript 4:25-5:15 and 70:21-23; R. ___];
- Dr. Lalla executed the Note in favor of Carolina First Bank on November 13, 2006. [Transcript 21:24-22:12; R. ___]. The loan was in the amount of $680,000 and had an interest rate of 6.94%. [Transcript 31:21-32:2, 37:3-7, and 37:14-16; R. ___];
- TD Bank is in possession of the original Note. [Transcript 22:10-16; R. ___]. TD Bank moved to introduce a copy of the Note into evidence but it was excluded on Appellants' objection based on the best evidence rule because the original is in existence but was not placed into evidence. [Transcript 22:17-30:8; R. ___]. The copy of the Note was admitted as a court's exhibit for identification purposes. [Transcript 30:20-24; R. ___];
- Dr. and Mrs. Lalla executed the Mortgage in favor of Carolina First Bank for the Property to secure the Note. [Transcript 30:10-15, 31:19-25, 33:12-14, and 42:14-18; R. ___]. A copy of the Mortgage was admitted into evidence without objection. [Transcript 30:16-31:17; R. ___];
- Dr. Lalla made regular monthly payments in the amount of $5,250 on the loan for approximately four years with his last monthly payment being

made July 9, 2010. [Transcript 37:8-25 and 39:11-13; R. ___]. A copy of Dr. Lalla's payment history was admitted into evidence over Appellants' objection. [Transcript 33:18-36:25; R. ___];

- Carolina First Bank merged with TD Bank in September 2010, at which time Carolina First ceased to exist and TD Bank became the owner and holder of the Note and Mortgage. [Transcript 7:7-14, 13:4-5, 19:16-18, 20:10-13, and 75:18-20; R. ___]. Bristol has dealt with Dr. Lalla concerning this loan, and Dr. Lalla has never expressed any concern to him about TD Bank being the owner and holder of the Note and Mortgage. [Transcript 70:24-71:18; R. ___]. The Master-in-Equity was asked to take judicial notice of the effect of the merger pursuant to S.C. Code § 34-3-850(D). [Transcript 69:21-70:7; R. ___];
- The loan subsequently matured November 13, 2011, and would have been due and payable in full at that time. [Transcript 32:3-13 and 38:12-15; R. ___];
- Because Dr. Lalla has not made any payment since July 9, 2010, and the loan matured November 13, 2011, the loan is in default. [Transcript 37:23-38:2 and 39:5-13; R. ___];
- As of December 10, 2012, Dr. Lalla owed $740,267.44 in principal, interest, late fees, and appraisal fees, as well as $25,584.40 in attorneys' fees and costs. [Transcript 39:14-40:13; R. ___]; and
- TD Bank sought a judgment for the full amount of the debt and attorneys' fees and costs, the foreclosure sale of the Property, and the

entry of a deficiency judgment in the event the foreclosure sale did not satisfy the indebtedness. [Transcript 40:14-41:21; R. ___]. Appellants' counsel admitted that a deficiency judgment "has in fact been requested." [Transcript 40:24-41:6; R. ___].

Appellants did not personally appear at the hearing, and Appellants' counsel did not present any witnesses, introduce any exhibits, or present any evidence at all. [Transcript 77:25-78:2; R. ___].

At the conclusion of the hearing, the Master-in-Equity asked the parties to submit additional information on the authority of TD Bank to proceed on the Note. [Transcript 78:14-21, 79:8-11, and 85:20-88:14; R. ___]. TD Bank's post-hearing Memorandum noted TD Bank had presented sufficient testimony to establish its claim for relief and Appellants had not put forward any witnesses or evidence to contradict that testimony. [Post-Trial Memorandum; R. ___]. The post-hearing Memorandum noted that the introduction of a promissory note is not required to enforce the note; that a borrower's signature on a note is presumed to be genuine; and that a borrower lacks standing to challenge the assignment of a loan. [Post-Trial Memorandum; R. ___].

On May 10, 2013, the Master-in-Equity issued a Final Order. [Final Order; R. ___]. The Master-in-Equity found that because the copy of the Note had been excluded based on the best evidence rule, he could not consider the terms of the Note or determine Appellants' liability on the Note. [Final Order pp. 3-4; R. ___].[2] The Master-in-Equity further found that TD Bank had not established that it is the owner and holder of the

[2] Although the Note was not admitted into evidence, the Master-in-Equity noted it had reviewed the Note and it was placed in the record. [Final Order p. 4; R. ___].

Note. [Final Order pp. 4-7; R. ___]. Specifically, the Master-in-Equity noted that "there is nothing to indicate there has been a lawful merger of [TD] and the entity known as Carolina First Bank." [Final Order p. 5; R. ___]. However, Appellants, through counsel, advised the Master-in-Equity that they consented to the foreclosure of the Mortgage "in satisfaction of all claims of [TD Bank] and in satisfaction of any claims of any of its affiliated companies such as Carolina First Bank" but "object to any deficiency judgment." [Final Order pp. 7-8; R. ___]. As a result, the Master-in-Equity ordered the foreclosure sale of the Property but refused to enter any deficiency judgment against Dr. Lalla. [Final Order pp. 7-8; R. ___].

On June 7, 2013, TD Bank timely filed a Motion to Alter or Amend the Final Order, submitting that the Master-in-Equity had failed to appropriately consider certain facts before him and also misapplied the governing law. [Motion to Alter or Amend; R. ___]. TD Bank again noted it had presented sufficient testimony to establish its claim for relief and Appellants had not put forward any witnesses or evidence to contradict that testimony. [Motion to Alter or Amend; R. ___]. TD Bank noted that the introduction of a promissory note is not required to enforce the note; that a borrower's signature on a note is presumed to be genuine; and that a borrower lacks standing to challenge the assignment of a loan. [Motion to Alter or Amend; R. ___]. Finally, TD Bank noted that in addition to Bristol's testimony, the Master-in-Equity could take judicial notice of the public records available at the Secretary of State's Office demonstrating that Carolina First Bank merged into TD Bank and attached the documentation of same. [Motion to Alter or Amend; R. ___].

An additional hearing was held on the Motion to Alter or Amend on October 13, 2014. On February 4, 2015, the Master-in-Equity granted TD Bank's Motion to Alter or Amend and vacated his Final Order entirely ("Amended Order"). [Amended Order; R. ___]. The Amended Order held that a copy of the Note was admissible and Dr. Lalla's signature was presumed to be genuine, which was not contradicted. [Amended Order p. 3; R. ___]. The Amended Order also held that TD Bank established it is the holder of the Note by introducing a copy of the Note and Bristol's testimony which was not contradicted. [Amended Order p. 2; R. ___]. The Master-in-Equity noted the additional supporting public records from the Secretary of State's office regarding the merger of Carolina First Bank into TD Bank. [Amended Order p. 2; R. ___]. The Amended Order also found that TD Bank established Dr. Lalla had defaulted on the Note. [Amended Order pp. 4-5; R. ___]. Accordingly, the Master-in-Equity ruled that TD Bank is entitled to a judgment for foreclosure and sale of the mortgaged property and the entry of a judgment against Dr. Lalla. [Amended Order pp. 4-7; R. ___].

On February 19, 2015, the Master-in-Equity signed a Form 4 Judgment entering judgment in the amount of $765,851.84 against Dr. Lalla. [Form 4; R. ___].[3]

Appellants filed their Notice of Appeal from the Amended Foreclosure Judgment and Sale Order on February 17, 2015. The Appellate Case No. for that appeal is 2015-000295 ("Foreclosure Appeal"). The Foreclosure Appeal was submitted to the Court on

[3] The Form 4 also mistakenly entered judgment against Mrs. Lalla. This was a clerical error. The judgment is only against Dr. Lalla per the Amended Order. Accordingly, a corrected Form 4 was submitted to remedy this clerical error, and the judgment against Mrs. Lalla was vacated. [Amended Form 4 filed July 15, 2015; R. ___].

the record and briefs during the March 2016 term without oral argument and remains pending.

On June 23, 2015, TD Bank filed a Motion for Leases, Rents, and Appointment of Receiver, seeking the appointment of a receiver to protect TD Bank's interests in the property and the rents derived therefrom during the pendency of the Foreclosure Appeal. [Motion for Leases, Rents, and Appointment of Receiver; R. ___]. A hearing was held on this Motion on September 14, 2015. Neither Appellants nor their counsel attended the hearing.

On November 12, 2015, the trial court entered its Order Appointing Receiver ("Receiver Order"). [Motion for Leases, Rents, and Appointment of Receiver; R. ___]. On November 24, 2015, TD Bank requested that Appellants comply with the requirements of the Receiver Order by noon on November 25, 2015. After Appellants failed to respond, TD Bank filed a Motion for Appellants to Show Cause Why They Have Refused to Comply with Court's Order Appointing Receiver on November 25, 2015. [Motion to Show Cause; R. ___]. Also on November 25, 2015, Appellants filed their Notice of Appeal from the Receiver Order, which is the subject of this appeal bearing Appellate Case No. 2015-002484 ("Receivership Appeal").

On March 11, 2016, Appellants filed their initial brief. This brief follows.

ARGUMENT

The Master-in-Equity correctly ruled that TD Bank is entitled to a receiver to preserve the real property collateral during the pendency of the Foreclosure Appeal in this matter. Such relief is ancillary to the proceeding before the Master. Appellants first incorrectly assert that their Notice of the Appeal for the previous Foreclosure Appeal

should have stayed any ruling on TD Bank's entitlement to a receiver. (Appellants' Brief at pp. 4-5.) Next, Appellants erroneously assert that the appointment of a receiver is based on the Amended Order. (Appellants' Brief at pp. 5-18.) Importantly, Appellants did not preserve ***any*** issues for appellate review, and the Foreclosure Appeal does not stay the appointment of a receiver in any event. Although the Amended Order properly determined Dr. Lalla's default on the subject loan, the appointment of a receiver to preserve the subject property during the pendency of the Foreclosure Appeal pursuant to S.C. Code Ann. § 15-65-10(3) provides an alternative ground for affirmance of the Receiver Order. Therefore, this Court should affirm the Master-in-Equity's order granting TD Bank's request for the appointment of a receiver for the subject property.

I. Appellants did not preserve any issues for appellate review.

Appellants did not raise arguments offered on appeal before the trial court. Instead, Appellants failed to appear at the hearing at which TD Bank asked for the appointment of a receiver. Appellants did not oppose the receivership motion in any way and made no arguments to the trial court on the receivership motion whatsoever. The law is clear that an appellate court may not consider an issue for the first time on appeal. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.") (citations omitted). Therefore, no issues have been preserved for appellate review, and this Court summarily should affirm the Receiver Order on this basis pursuant to Rule 220, SCACR.

II. The appointment of a receiver is not stayed by the Foreclosure Appeal.

Appellants first argue on appeal that their Notice of Appeal in the previous Foreclosure Appeal stayed the subsequent appointment of a receiver in the underlying foreclosure action. (Appellants' Brief at pp. 4-5.) To the extent this Court finds that this issue has been preserved for appellate review, Appellants' argument nevertheless fails. Rule 241(a) of the South Carolina Appellate Court Rules provides that service of a notice of appeal stays the matters decided and relief ordered in the appealed order. Rule 241(a), SCACR. However, "[t]he lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal." *Id.* Additionally, Rule 241(b) provides that there are exceptions to the general rule imposing an automatic stay "found in statutes, court rules, and case law." Rule 241(b), SCACR. Although Appellants are correct that Rule 241(b) lists a number of exceptions, Appellants fail to recognize that this list is not exhaustive. *See* Rule 241(b), SCACR ("A list of ***some, but not all,*** of the exceptions to the general rule is . . . ") (emphasis added). This is an instance where the Master-in-Equity retains jurisdiction.

The appealed order Appellants rely on is the Amended Order allowing TD Bank to foreclose the subject property and entering a judgment against Dr. Lalla. [Amended Order; R. ___]. Appellants allege TD Bank's entitlement to any funds that would be collected by a receiver is completely dependent on the relief granted in the Amended Order—presumably, that Dr. Lalla is liable on the subject promissory note and has defaulted thereon. (Appellants' Brief at p. 5.) Although these underlying matters were decided in the Amended Order, TD Bank's entitlement to a receiver was not decided in the Amended Order, and the Amended Order did not order any such relief. [Amended

Order; R. ___]. The appointment of a receiver is wholly separate from the issue of whether a party is entitled to foreclose and whether a deficiency judgment remains. A receiver could be appointed at any time to prevent waste concerning the real property regardless of any prior appeal. The prior appeal here only confirms, by statute, that a receiver can be appointed and the prior appeal does not stay such appointment.

Moreover, Appellants ignore that TD Bank moved for the appointment of a receiver on grounds other than Dr. Lalla's default on his promissory note. Specifically, TD Bank's receivership motion was based in part on S.C. Code Ann. § 15-65-10(3), which expressly provides for the appointment of a receiver after judgment while an appeal of that judgment is pending: "A receiver may be appointed by a judge of the circuit court, either in or out of court: . . . (3) After judgment, to dispose of the property according to the judgment or to preserve it during the pendency of an appeal . . . " S.C. Code Ann. § 15-65-10(3). Because this statute specifically contemplates the appointment of a receiver during the pendency of an appeal, Appellants' appeal of the Amended Order would not stay the appointment of a receiver to preserve the subject property while that appeal is pending. Additionally, because this ground for the appointment of a receiver is separate and distinct from the liability issues decided in the Amended Order, this Court may rely solely on this separate ground to find that the appointment of a receiver was not stayed by the Foreclosure Appeal. Rule 220(c), SCACR.

Further, the Notice of Appeal does not even stay the Foreclosure Action and, therefore, a receiver was properly appointed. A foreclosure action may proceed even when the order of foreclosure is appealed. Pursuant to Section 18-9-170 of the South Carolina Code, an order that directs the sale or delivery of possession of real property is

not be stayed by a notice of appeal unless the party against whom judgment is entered obtains a bond with two sureties guaranteeing the property will not be wasted during the pendency of the appeal. S.C. Code Ann. § 18-9-170; *see also* Rule 241(b)(4),SCACR (excluding judgments directing the sale or delivery of possession of real property as provided in Section 18-9-170 of the South Carolina Code from automatic stays pending appeal). A "foreclosure decree [is] the type of order covered by section 18–9–170[.]" *C-Sculptures, LLC, No. 3 v. Brown*, 393 S.C. 27, 32, 709 S.E.2d 705, 708 (Ct. App. 2011); *see also See Gerald v. Gerald,* 31 S.C. 171, 182, 9 S.E. 792, 796 (1889) ("This language [found in the predecessor to section 18–9–170] shows that the intention was to embrace appeals from ***judgments of foreclosure***, for that is a judgment directing the sale of real property . . . .") (emphasis added). Accordingly, the failure to post the bond required in Section 18-9-170 "permits the foreclosure sale to proceed during the appeal[.]" *Wachesaw Plantation E. Cmty. Servs. Ass'n, Inc. v. Alexander*, 414 S.C. 355, 362 n.6, 778 S.E.2d 898, 902 n.6 (2015). Indeed, if an appellant "fail[s] to take advantage" of the provisions in Section 18-9-170, then it is "the duty of the master to proceed with the [foreclosure] sale." *Ex parte Andrews*, 152 S.C. 325, 150 S.E. 313, 314 (1929).

Moreover, the appointment of a receiver is "ancillary to a foreclosure action." 27 S.C. Jur. Mortgages § 116. Thus, a "***receiver may be appointed*** after the foreclosure hearing and before the sale, or ***while an appeal is pending***." *Id.* (emphasis added); *see also* S.C. Code Ann. § 15-65-10(3) (A receiver may be appointed . . . [a]fter judgment . . . to preserve [property] during the pendency of an appeal"); Rule 241(a), SCACR ("The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal."). An

appeal of an order of foreclosure, therefore, does not prevent a court for appointing a receiver after the notice of appeal is filed.

Likewise, the Notice of Appeal from the Receiver Order does not stay the Receiver Order. *See Harman v. Wagner*, 33 S.C. 487, __, 12 S.E. 98, 101 (1890) (holding appeal by executor of order appointing a receiver of the personal property of the estate, without posting a bond, does not operate to stay the execution of the order); *see also* S.C. Code Ann. § 18-9-150. Thus, parties are obligated to comply with an order appointing a receiver unless the appeal is accompanied by the posting of a bond or a supersedeas order is obtained. When a party refuses to comply with the court's order appointing a receiver, the court can hold that party in contempt of court. *Fagan v. Timmons*, 224 S.C. 286, 289, 78 S.E.2d 628, 629 (1953) (upholding finding that defendant was in contempt of court when defendant refused to turn over books and records to receiver appointed by trial court).

Finally, if this Court affirms the order of foreclosure, then the issue of whether the proceedings in the lower court were stayed depriving the lower court of jurisdiction to appoint a receiver is moot. "A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy," as "when some event occurs making it impossible for [the reviewing court] to grant effectual relief." *Mathis v. South Carolina State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). If there is no actual controversy, a court will not decide moot or academic questions. *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006). When a judgment in another matter or appeal makes it impossible for a court to grant the relief sought, then the case becomes moot. *See Hewell v. Hampton Enterprises, Inc.*, 272 S.C. 431, 432, 248

S.E.2d 583, 584 (1978) ("Since the relief sought in this action concerns the amendments of pleadings in the prior actions, which have now been reduced to judgment, the issues in this appeal are moot. All issues in the prior action have been resolved and it would avail nothing to now issue an order to have the pleadings amended as respondent seeks in this action."); *Gambrell v. S. Carolina Nat. Bank of Charleston*, 250 S.C. 380, 382, 158 S.E.2d 200, 200 (1967) ("The plaintiff has appealed on the sole ground that the Court erred in sustaining the alternative plea, leaving unchallenged the Court's finding that the defendant was not indebted to plaintiff under the contract. Therefore, there is no debt against which an offset could be allowed, and the question sought to be raised by the appeal has become moot.").

In this instance, Appellant asserts the lower court could not issue an order appointing a receiver after the notice of appeal because the notice of appeal stayed the matter below. However, if the first appeal is decided in favor of TD Bank, that ruling becomes the law of the case in any subsequent appeal. *See e.g. Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) ("Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court."). Thus, the foreclosure action can move forward and the lower court can now appoint a receiver, even if the lower court improperly appointed a receiver earlier in the matter. A decision in Appellants' favor in this appeal, therefore, would be moot as it would have no practical effect. TD Bank could still obtain an order appointing a receiver.

Accordingly, the Foreclosure Appeal did not stay the receivership issue, and this Court should affirm the Receiver Order.

III. Although the Amended Order properly determined Dr. Lalla's default on the subject loan, the appointment of a receiver to preserve the subject property during the pendency of the Foreclosure Appeal pursuant to S.C. Code Ann. § 15-65-10(3) provides an alternative ground for affirmance of the Receiver Order.

Appellants next incorrectly assert that the appointment of a receiver is entirely based on the allegedly erroneous Amended Order. (Appellants' Brief at pp. 5-18.) To the extent this Court finds that this issue has been preserved for appellate review, Appellants' argument fails. The merits of the Amended Order is the subject of the Foreclosure Appeal, and Appellants' Brief on this point restates verbatim their arguments in their Appellants' Brief in the Foreclosure Appeal. (*See* Appellants' Brief in Appellate Case No. 2015-000295 at pp. 3-15.) Because each of these issues was fully briefed in the Foreclosure Appeal, TD Bank fully incorporates by reference each of its arguments in its Respondents' Brief in the Foreclosure Appeal. (*See* TD Bank's Brief in Appellate Case No. 2015-000295.) Specifically, the grounds are as follows:

1) The Master-in-Equity properly found that TD Bank met its burden of proof on its claim for relief; (*See* TD Bank's Brief in Appellate Case No. 2015-000295 at pp. 10-18);

a) The Master-in-Equity properly admitted a copy of the Note; (*See* TD Bank's Brief in Appellate Case No. 2015-000295 at pp. 10-12);

b) TD Bank sufficiently established the existence of Dr. Lalla's Note; (*See* TD Bank's Brief in Appellate Case No. 2015-000295 at pp. 12-13);

c) TD Bank sufficiently established that it is the owner and holder of the Note; (*See* TD Bank's Brief in Appellate Case No. 2015-000295 at pp. 13-15);

d) TD Bank sufficiently established Dr. Lalla's payment history on the Note; (*See* TD Bank's Brief in Appellate Case No. 2015-000295 at p. 16);

e) TD Bank did not waive its claim for a deficiency judgment; (*See* TD Bank's Brief in Appellate Case No. 2015-000295 at pp. 17-18);

2) The Master-in-Equity properly found that Appellants failed to meet their burden of proving their counterclaim; (*See* TD Bank's Brief in Appellate Case No. 2015-000295 at pp. 18-19);

3) The Master-in-Equity properly considered matters of public record submitted before the issuance of a final order in this foreclosure action; (*See* TD Bank's Brief in Appellate Case No. 2015-000295 at pp. 19-21);

a) The Motion to Alter or Amend did not present new issues to the Master-in-Equity; (*See* TD Bank's Brief in Appellate Case No. 2015-000295 at p. 19);

b) The Motion to Alter or Amend did not present new evidence to the Master-in-Equity; (*See* TD Bank's Brief in Appellate Case No. 2015-000295 at pp. 19-21).

Thus, as set forth in TD Bank's briefing in the Foreclosure Appeal, the Amended Order properly determined that Dr. Lalla defaulted on his loan and TD Bank is entitled to foreclosure and judgment against him as a result.

Moreover, Appellants are incorrect that the Amended Order was the sole basis for the Receiver Order. As explained above, TD Bank's receivership motion was also based on S.C. Code Ann. § 15-65-10(3), which expressly provides for the appointment of a receiver after judgment while an appeal of that judgment is pending. Because this statute specifically contemplates the appointment of a receiver during the pendency of an appeal, the merits of the Amended Order would be irrelevant. TD Bank is statutorily entitled to a receiver while the appeal of the Amended Order is decided. This Court should affirm the Receiver Order on this basis.

CONCLUSION

For the foregoing reasons, TD Bank respectfully requests this Court affirm the Master-in-Equity's ruling that TD Bank is entitled to a receiver during the pendency of the Foreclosure Appeal.

Signature Page Attached

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