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STATE OF SOUTH CAROLINA)
COUNTY OF CHESTERFIELD)

IN THE COURT OF COMMON PLEAS

American Community Bank, a division of Yadkin)
Valley Bank & Trust,)

2016 JUL 26 PM 2 52

Plaintiff,

FAYE L. SELLERS,
CLERK OF COURT

vs.

CHESTERFIELD COUNTY, S.C.

C:A. No.: 10-CP-13-164

Michael R. Brown; C. W. Horne; Shortt Auction)
& Realty Co., Inc.; Bank of America, N.A.; and)
Jaguar Portfolio, LLC,)

Defendants.)

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SC Court of Appeals

**SPECIAL REFEREE'S ORDER FOR
JUDGMENT, INCLUDING OF FORECLOSURE**

PURSUANT to Rules 53 and 71, SCRCP, and the Order of Reference of the Honorable Roger E. Henderson, Presiding Circuit Court Judge, Chesterfield County, filed June 24, 2016, the above captioned matter was referred with finality to the undersigned as Special Referee to take testimony and to report his findings of fact and conclusions of law, with authority to enter final judgment in the matter, the same as if the case had been tried by the circuit court, with any appeal from his decision to be made to the Court of Appeals or the Supreme Court as provided by the SCACR.

In accordance with the aforementioned Order, a hearing was held on July 22, 2016, attended by counsel for Plaintiff (Bank), Danny Hunter, Assistant Vice President of Bank, counsel for defendant Michael R. Brown and defendant Michael R. Brown (Borrower), counsel for defendant C.W. Horne and defendant C.W. Horne (Guarantor). Notice of the hearing date, time and place was afforded to all answering Defendants.

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A True Copy, Attest
Faye L. Sellers
CLERK OF COURT C.P. & G.S.
CHESTERFIELD COUNTY, SC

Testimony was taken, which is reported herein; and from the testimony and evidence, I find and conclude as follows.

Background

- A. Bank filed its Summons, Lis Pendens and Complaint on May 4, 2010.
- B. Service was obtained on Borrower through personal service by private process server on July 14, 2010; the Affidavit of Personal Service was filed with the Court on July 22, 2010. Service was obtained on Guarantor through personal service by the Sheriff of Union County, North Carolina on May 10, 2010; the Affidavit of Service was filed with the Court on May 17, 2010. Service was obtained on Jaguar Portfolio, LLC and Shortt Auction & Realty Co., Inc. through certified mail, return receipt requested on May 10, 2010; the Affidavits of Service were filed on May 14, 2010. Service was obtained on Bank of America, N.A. through certified mail, return receipt requested on May 12, 2010; the Affidavit of Service was filed on May 25, 2010. Defendants Shortt Auction & Realty Co., Inc., Bank of America, N.A., and Jaguar Portfolio, LLC are all in default; Affidavits of Default for each have been filed with the Court.
- C. On August 16, 2010, Borrower filed an Answer, Counterclaims and Cross-Claim. Bank filed a Reply to the Counterclaim against it on September 14, 2010. On September 16, 2010, Guarantor filed an Answer and Counterclaims to the Cross-Claims of Borrower. On October 19, 2010, Borrower filed a Reply and Answer to Counterclaims of Guarantor.
- D. By electronic mail on June 16, 2011, the Honorable J. Michael Baxley requested briefs from Borrower and Bank setting forth their requisite positions on the applicability of Administrative Order 2011-05-02-01 to the above referenced matter. Bank submitted its Memorandum to the Court on July 18, 2011. On August 22, 2011, Judge Baxley issued a ruling requiring Bank to provide Borrower with a Notice of Right to Foreclosure Intervention. Bank



provided Borrower with the requisite Notice on October 21, 2011. On March 9, 2012, Bank filed the Notice of Denial of Loan Modification or other Means of Loss Mitigation, which outlined Borrower's failure to respond to Bank's repeated requests for information as to Borrower's source of funds for repayment of the indebtedness. Borrower's failure to participate in the foreclosure intervention process resulted Bank proceeding forward with the above captioned foreclosure action.

E. On August 6, 2012, the Honorable J. Michael Baxley granted summary judgment in favor of Bank as to all of Borrower's affirmative defenses and counterclaims against Bank, with the exception of Borrower's set-off claim under the Truth in Lending Act (TILA). In the Order Granting Summary Judgment, Judge Baxley allowed Bank to proceed with its equitable foreclosure action and ruled that Borrower's legal TILA claim did not have to be heard prior to the foreclosure. (Order Granting Summary Judgment on Borrower's Affirmative Defenses and Counterclaims (SJ Order), p. 10.) On August 21, 2012, Borrower filed a Rule 59(e) motion seeking reconsideration of the SJ Order. On November 7, 2012, the Honorable J. Michael Baxley denied Borrower's Rule 59(e) motion. Borrower filed a Notice of Appeal on December 12, 2012. On July 1, 2015, the South Carolina Court of Appeals entered an opinion affirming the grant of summary judgment in favor of Bank. On July 15, 2015, Borrower filed a Petition for Rehearing, which was denied on September 18, 2015. On October 15, 2015, Borrower filed a Petition for Writ of Certiorari, which was denied by the Supreme Court on May 5, 2016. Borrower filed a Petition for Reconsideration, which was denied by the Supreme Court in accordance with Rule 221(a) of the South Carolina Appellate Rules, which prevents any petition for rehearing from an order denying a petition for writ of certiorari under Rule 242, SCACR. A Remittitur was issued on May 11, 2016.

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F. On October 25, 2012, the Cross-Claims between Borrower and Guarantor were dismissed pursuant to a Stipulation of Dismissal filed with the Court.

G. As of the date of the hearing, the only matter before the undersigned Special Referee was the cause of action by Bank against Borrower for judgment and foreclosure. The TILA claim is to be heard by the circuit court. At the hearing, counsel for Borrower argued that this Court did not have the ability to proceed to enter a final judgment on the foreclosure action, because of the pending TILA claim. That argument is without merit, because of the language in both the Order Granting Summary Judgment and the Form 4 Order denying Borrower's Rule 59(e) motion. In each of those Orders, Judge Baxley made it clear that the TILA counterclaim would be heard separately from the foreclosure action. By virtue of Judge Baxley's Orders, this Court has the requisite power to hear the foreclosure action and to enter a final judgment therein; however, this Order shall have no impact on Borrower's TILA counterclaim, which shall remain unaffected by this Court's ruling in the foreclosure action.

H. A Notice of Hearing was served on June 28, 2016 on all answering Defendants. Parties in default did not receive notice of hearing because this case involves a liquidated claim for attorneys' fees in accordance with North Carolina law. Rule 55(b)(1), SCRCF. A Certificate of Service of the Notice of Hearing was filed with the Court on June 30, 2016. After serving the Notice of Hearing, counsel for Bank learned that counsel for Guarantor, Harry Easterling, was no longer practicing and his files had been transferred to Peyre T. Lumpkin as Receiver. The Receiver gave the Notice of Hearing to Guarantor. Bank is not seeking any relief against Guarantor. Guarantor appeared at the hearing with his new counsel, Harry Easterling, Jr.

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Findings of Fact

1. On December 29, 2000, Borrower signed in favor of Bank a commercial promissory note in the amount of \$150,000, as extended, renewed and modified by nine (9) agreements that ultimately changed the maturity date to May 10, 2008 (collectively, the Note).
2. The Note obligated Borrower to make monthly interest payments beginning January 30, 2001, with one final payment of all principal and accrued, unpaid interest on May 10, 2008.
3. The Note shall bear interest at the rate of 7.25% per annum.
4. The Note defines default to include, among other things, Borrower's failure to make any payments when due, failure to perform any term, obligation, covenant or condition thereof, insolvency, or a material adverse change in Borrower's financial condition.
5. Upon default, Bank may declare the entire unpaid principal balance of the Note and all accrued, unpaid interest immediately due and payable.
6. Should Bank have to hire an attorney to collect the amount due on the Note, it is entitled to add attorneys' fees and costs to the amount due thereunder.
7. The Note states that it is secured by a mortgage lien against 106.85 acres in Chesterfield County, South Carolina.
8. The Note provides that no changes in its terms, including maturity date, shall operate to release or relieve any guarantor from liability on the Note, nor shall any modification thereof require the consent of anyone other than Borrower.
9. The Note is governed by and to be construed in accordance with the laws of the state of North Carolina.



10. The Note is given under seal and it is intended that the Note is and shall constitute and have the effect of a sealed instrument according to North Carolina law.

11. As security for the Note, including any renewals, extensions, modifications, future advances and re-advances thereto, including, but not limited to, reasonable protective advances for taxes, insurance, public assessments, repairs, court costs and attorneys' fees, Borrower executed in favor of Bank a mortgage dated December 29, 2000, recorded January 2, 2001 in Book 346 at Page 431, with the Clerk of Court, Chesterfield County, South Carolina, (Mortgage) encumbering real property there, together with appurtenances and other property located thereon, along with other rights and interests as set forth therein (collectively, the "Subject Property"), more particularly described as follows:

All that certain piece, parcel, or lot of land, with the improvements thereon, situate, lying, and being on the west side of Highway S-13-29, approximately 8 miles south of the Town of Chesterfield, in the County of Chesterfield, State of South Carolina, and bounded as follows: beginning at an iron on the centerline of Highway S-13-29 and running thence S 26° - 28' - 03" E along the centerline of Highway S-13-29 for a distance of 621.46 feet to its intersection with the centerline of Highway S-13-657; thence S 26° - 52' - 05" E along the centerline of Highway S-13-29 for a distance of 881.13 feet to a point; thence S 26° - 50' - 01" E along the centerline of Highway S-13-29 for a distance of 494.02 feet to a point; thence S 25° - 45' - 54" E along the centerline of Highway S-13-29 for a distance of 201.77 feet to a point; thence S 21° - 42' - 37" E along the centerline of Highway S-13-29 for a distance of 122.05 feet to an iron; thence S 73° - 28' - 41" W for a distance of 241.14 feet to a point; thence S 16° - 35' - 21" E for a distance of 209.82 feet to a point; thence S 73° - 28' - 41" W for a distance of 1528.15 feet to an iron; thence N 09° - 37' - 22" W for a distance of 87.31 feet to a steel fence post; thence N 25° - 03' - 16" W for a distance of 1292.09 feet to a steel fence post; thence S 55° - 13' - 40" W along the northern side of an abandoned county road for a distance of 430.16 feet to a point; thence N 02° - 52' - 37" W for a distance of 208.38 feet to a point; thence N 02° - 49' - 25" W for a distance of 468.20 feet to a concrete post; thence N 44° - 48' - 28" E for a distance of 275.74 feet to a point; thence N 12° - 24' - 36" W for a distance of 764.63 feet to an iron; thence N 84° - 15' - 47" E for a



distance of 1531.58 feet to the point of beginning. Said property is more particularly shown and described as 106.85 ACRES according to a plat of survey prepared by William G. Martin, P.L.S., on the 5th day of July, 1998, which plat, recorded in Plat Book C, at page 7-I, in the Office of the Clerk of Court for Chesterfield County, is by reference incorporated herein as a part of this description.

This conveyance is expressly made subject to any existing rights-of-way for the state and county roads shown on the aforesaid plat.


Derivation: This is the identical property conveyed to the Mortgagor by deed of C.W. Horne Sawmill & Chip Company, Inc. dated September 25, 1998, and recorded in Deed Book 368, at page 829, in the Office of the Clerk of Court for Chesterfield County.

Tax Map Number 157-16

12. Borrower agreed to maintain the Subject Property in good condition and make all repairs that are reasonably necessary; to pay promptly all taxes, assessments or other charges which may be secured by a lien on the Subject Property; and to insure the Subject Property in an amount not less than the original principal amount of the Note and assign such policy of insurance to Bank, so that if Borrower does not pay the premiums, Bank may pay them and add such amounts to the debt evidenced by the Note secured by the Mortgage.

13. In the event Borrower fails to pay as agreed the Note secured by the Mortgage or perform any of his duties under the Mortgage, Bank has the right to declare Borrower in default, declare all sums immediately due and payable, and proceed with the exercise of legal remedies, including foreclosure, in which event Bank shall be entitled to recover its costs and a reasonable attorneys' fee.

14. In the Mortgage, Borrower granted to Bank a security interest in all the rents and profits from the Subject Property, which Bank is entitled to collect upon default of the Note secured by the Mortgage.



15. On February 23, 2010, Bank sent a demand letter to Borrower requesting payment of \$150,000 within 15 days of the date thereof, after which, if payment in full had not been made, Bank stated it would charge interest at the per diem rate of \$41.67 plus attorneys' fees and costs.

16. There is now due and owing on the Note the following sums:

Principal	\$150,000.00
Interest through 7/22/2016	\$ 96,924.42
Attorneys' Fees	\$ 22,918.78
Total	\$269,843.20

Interest at the rate of \$41.67 per diem from 07/22/16 through the date of payment in full.

17. Bank has included its costs of collection, including, but not limited to, attorneys' fees as allowed under North Carolina law, in the amount of its above request for judgment against Borrower.

18. The Mortgage is legally owned and held by Bank; the conditions of it have been breached; the amount due and owing on the Note was not paid by Borrower upon demand by Bank; and the Mortgage constitutes a valid lien upon the Subject Property and should be foreclosed to provide for payment of monies due under the Note.

19. Bank is requesting entry of a deficiency judgment against Borrower to the extent the proceeds from judicial sale of the real property encumbered by the Mortgage are not sufficient to satisfy in full the debt owed by Borrower to Bank arising under the Note.

20. In accordance with the August 22, 2011 order of Judge Baxley, Bank provided Borrower with a Notice of Right to Foreclosure Intervention; however, Borrower failed to

respond to Bank's repeated requests for information as to Borrower's source of funds for repayment of the indebtedness.

21. Shortt Auction & Realty Co., Inc. owns and holds a mortgage against the Subject Property, which is junior and inferior to the mortgage lien of Bank.

22. Bank of America, N.A. owns and holds a mortgage against the Subject Property, which is junior and inferior to the mortgage lien of Bank.

23. Jaguar Portfolio, LLC owns and holds a judgment against Subject Property, which is junior and inferior to the mortgage lien of Bank.

Conclusions of Law

As Special Referee, based upon the foregoing Findings of Fact I hereby enter the following Conclusions of Law.

1. All parties are properly before this Court and this Court has personal and subject matter jurisdiction over all the parties hereto and the real and personal property at issue in this action.

2. By order of the Honorable J. Michael Baxley, this action is subject to the Home Affordable Modification Program (HMP) for residential loans owned, securitized or guaranteed by the Federal National Mortgage Association (Fannie Mae) or the Federal Home Loan Mortgage Corporation (Freddie Mac) or any other section of the Making Home Affordable Program, or any federal law(s) pertaining to tenants in residential property or foreclosure intervention under the Administrative Order.

3. Bank complied with South Carolina Supreme Court Order No. 2011-05-02-01 by providing Borrower with a Notice of Right to Foreclosure Intervention; however, Borrower failed to respond to Bank's repeated requests for information as to Borrower's source of funds



for repayment of the indebtedness and forfeited his right to participate in any foreclosure intervention process.

4. Borrower has fee simple title to the real property described in the Mortgage.

5. The Mortgage is owned and held by Bank, and constitutes a valid first lien upon the property described therein.

6. Bank is entitled to foreclosure of the Mortgage and the judicial sale of the real property described therein.

7. Pursuant to and in accordance with Rule 71(c), SCRPC, in the event there is a surplus after the judicial sale of the Subject Property and application of the net sale proceeds to the Note, the Court will re-convene the reference to determine a disposition of the surplus.

8. Pursuant to the terms of the Note, an award of attorneys' fees and costs is granted to Bank in the sum of \$22,918.78 against Borrower, which represents fifteen percent of the total amount due and owing on the Note as of the date this action was filed, as allowed under North Carolina law. The Note is governed by North Carolina law. Under N.C. Gen. Stat. § 6-21.2(2), if a note "provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the 'outstanding balance' owing" on the note. "Outstanding balance" means the "principal and interest owing at the time suit is instituted to enforce" the note. *Id.* At the time suit was brought, there was due and owing on the Note the sum of \$152,791.89, fifteen percent of which is \$22,918.78. As a result of the multiple appeals in this case, Bank actually incurred \$63,680.44. An award of \$22,918.78 is proper under the circumstances.

9. This Court's award of attorneys' fees is based on the North Carolina statutory law and the Affidavit of Susan E. Driscoll. There is no contrary evidence in the record. Bank has



reserved all of its rights to seek an additional or supplemental award of attorneys' fees in the event this case is not expeditiously concluded, there is any further appeal of this case, this case results in a bankruptcy filing or there are further proceedings to evict any occupant from the Subject Property.

10. Because the reference in this case provides that I, as Special Referee, shall enter judgment with finality and without further order of the Court, the same as if this case had been tried by the Court, I am hereby acting in accordance therewith and Rule 53(e), SCRCF, and am entering final judgment in the matter.

NOW, THEREFORE, it is hereby

ORDERED, ADJUDGED AND DECREED THAT:

1. Bank be awarded judgment of foreclosure against Borrower on the Note secured by the Mortgage, in the amount of \$269,843.20, plus per diem interest at the rate of \$41.67 from July 22, 2016, until the date of payment in full, which shall be satisfied through judicial sale of the Subject Property described in the Mortgage.

2. Bank be granted an award of attorneys' fees and costs in the sum of \$22,918.78 against Borrower on the Note, which attorneys' fee award has been included in the above judgment amount.

3. C.W. Horne be dismissed with prejudice from this action, no judgment be entered against him and he be released as a guarantor of the Note.

4. The Mortgage be foreclosed, and the Subject Property be sold under the direction of the Master-in-Equity pursuant to Rule 71(b), SCRCF.

5. The Subject Property be duly advertised for sale at public auction to the highest bidder for cash in the Courtroom or such other place as designated by me or the Clerk of Court,



Chesterfield County, by publication of a Notice of Sale once a week for three consecutive weeks in a newspaper published and circulated in the county of Chesterfield, SC; the terms of sale be for cash; the successful bidder being the person or entity who offers to pay the most for the Subject Property; the purchaser be required to pay for the preparation of the deed and the revenue stamps thereon, and for any property taxes or assessments due and payable; the purchaser, unless it is Bank, be required to deposit immediately with the Clerk of Court the sum of five percent (5%) of the bid as earnest money and comply with such bid thirty (30) days after the date of final sale, failing which the Subject Property shall be re-sold at the next succeeding sales date without further advertisement and at the risk of the former successful bidder.

6. Since Bank has requested a deficiency judgment in this proceeding, all bidding shall be complete and final within thirty (30) days from the date of initial sale.

7. Upon compliance with the terms of sale and delivery of the deed by the Special Referee to the successful purchaser, the purchaser be put into possession of the Subject Property upon presentation of such deed and be free from any equity of redemption of Borrower, or other person or entity claiming by, under or through him, which shall henceforth and forever be completely barred and discharged.

8. In the event the successful bidder at the sale shall be other than Borrower, upon the presentation of a Writ of Assistance, the Sheriff of Chesterfield County is hereby directed to eject and remove from the Subject Property any occupant(s), together with any personal property located thereon; to put the successful purchaser or any assigns in the full, quiet and peaceable possession of the Subject Property without delay; and to keep the successful purchaser or any assigns in such possession. This Court shall retain jurisdiction over this proceeding for the

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purpose of resolving any Writ of Assistance which Plaintiff or the successful purchaser may file in order to obtain possession of the Subject Property.

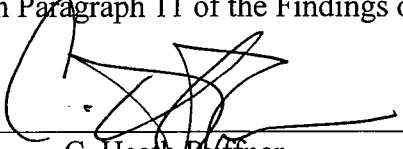
9. The proceeds from the sale of the Subject Property shall be distributed first to the payment of the costs of this action, including the fees of the Special Referee, usual commissions of any selling officer, and any costs of advertisement; next, to the payment of the judgment of Bank, including its attorneys' fees; and then, if there is any excess, it shall be distributed as described below.

10. If there are any surplus proceeds remaining after the payment of the costs of this action and the judgment debt of Bank, such proceeds shall be paid to and held by the Clerk of Court pending further reference hearing to be held subsequent to the date of sale in order to determine priority as to distribution of any surplus, in accordance with the Order of Reference and Rule 71(c), SCRPC.

11. The Subject Property to be sold pursuant to this Order for Judgment of Foreclosure and Sale is specifically described in Paragraph 11 of the Findings of Fact above.

Cheraw, S.C.

Date: July 25, 2016



C. Heath Ruffner
Special Referee
Chesterfield County