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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

SC Court of Appeals

Kristi Lea Harrington, Circuit Court Judge

Case No. 2009-CP-10-4475

Preservation Capital Consultants, LLC, ... Respondent,

v.

First American Title Insurance Company, ... Appellant.

RECORD ON APPEAL

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Case No. 2009-CP-10-4475

Preservation Capital Consultants, LLC, ... Respondent,

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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

Preservation Capital Consultants, LLC,)
)
Plaintiff,)
)
vs.)
)
First American Title Insurance Company,)
)
Defendant.)
_____)

C.A. No.: 09-CP-10-4475

ORDER

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2011 JAN 28 PM 3:02
CLERK OF COURT
JULIE M. HARRINGTON

This matter came before this Court on Plaintiff and Defendant's Motions for Summary Judgment, Defendant's Motion for Leave to Amend its Answer, and Plaintiff's Motion to Amend its Complaint. Present at the hearing were James W. Sheedy and Susan E. Driscoll, attorneys for Plaintiff, and W. Cliff Moore, III, attorney for Defendant.

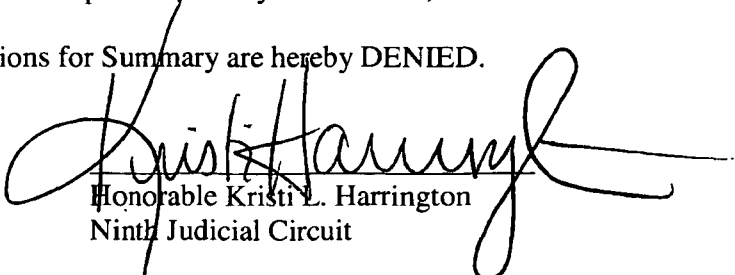
After hearing arguments of counsel and reviewing the submitted documents, this Court hereby Grants Defendant's Motion to Amend its Answer and Plaintiff's Motion to Amend its Complaint. Further, this Court finds that the Title Insurance Policy at issue is ambiguous when applied to the instant facts, and thus Summary Judgment is not appropriate at this time.

NOW, THEREFORE, based upon the foregoing,

IT IS HEREBY ORDERED THAT:

1. Defendant's Motion to Amend its Answer is hereby GRANTED;
2. Plaintiff's Motion to Amend its Complaint is hereby GRANTED; and
3. Plaintiff and Defendant's Motions for Summary are hereby DENIED.

January 27, 2011
Charleston, S.C.


Honorable Kristi L. Harrington
Ninth Judicial Circuit

20
10

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON) IN THE COURT OF COMMON PLEAS

Preservation Capital Consultants, LLC,)
Plaintiff,)
vs.) C.A. No.: 09-CP-10-4475
First American Title Insurance Company,)
Defendant.)

FILED
2011 OCT -6 AM 11:45
JULIE J. ARMSTRONG
CLERK OF COURT
BY

ORDER GRANTING SUMMARY JUDGMENT FOR PLAINTIFF

This matter came before me on Plaintiff and Defendant's Motion to Reconsider this Court's January 28, 2011 Order, wherein the Court denied both parties motions for denial Summary Judgment. Based upon the evidence, Motion, Memoranda and arguments of counsel, this Court makes the following factual findings, which were undisputed by the parties at the hearing.

Findings of Fact

1. Defendant issued a lender's policy of title insurance (Title Policy) in the amount of \$3,075,000 insuring the mortgage owned and held by Plaintiff as a lien against 635 King Street (the "King Street Parcel"). (Motion, Tab C; Plaintiff's Memorandum, Tab A).

2. The Title Policy insured title to the estate or interest in the King Street Parcel was vested in Monarch Development, LLC (Borrower). (*Id.*) Title was actually vested in Monarch Holdings, LLC.

3. The mortgage owned and held by Plaintiff operated as a lien against three parcels. In addition to the King Street Parcel, Plaintiff held a lien against properties

known as the St. Phillips Street Parcel and the Shopping Center Parcel. (*Id.* at Exhibit A). The St. Phillips Street Parcel sold in 2008 and Borrower paid Plaintiff \$250,000 to release the lien of the mortgage against that Parcel.

4. Plaintiff foreclosed the lien of the mortgage against the Shopping Center Parcel submitting a credit bid at judicial sale in the amount of \$3,250,000. (Master's Deed).

5. Plaintiff had an adjudicated debt as of the date of the foreclosure sale (i.e., March 1, 2010) in the amount of \$3,641,190 plus interest thereon at 18% to the date of payment in full. (Master's Order).

6. After the credit bid of \$3,250,000, Plaintiff was owed \$391,190 plus interest from March 1, 2010 to the date of payment in full at \$192.92 per diem. (Master's Deed and Order). As of the date of the hearing, January 14, 2011, Plaintiff was owed \$452,731.48. (Aff. Hanley, ¶15).

7. The King Street Parcel was sold on August 9, 2006, without payment to Plaintiff. (Aff. Hanley, ¶17). The Parcel had a value at the time of sale in the amount of \$590,000 based on an appraisal dated December 27, 2006, obtained by Plaintiff. (*Id.*).

8. The payoff of the first mortgage against the King Street Parcel was \$244,665 according to Defendant, which Plaintiff did not dispute for purposes of the Motion. (Aff. Hanley, ¶18).

9. The loss of Plaintiff due to its not having a lien on the King Street Parcel amounts to \$345,335. (Aff. Hanley, ¶19).

10. The relevant provisions of the Title Policy are:

Paragraph 2(c)

Amount of Insurance. The amount of insurance after the acquisition or after the conveyance shall in neither event exceed the least of: (i) the amount of insurance stated in Schedule A; [or] (ii) the amount of the principal of the indebtedness secured by the insured mortgage as of the Date of Policy, interest thereon, expenses of foreclosure, amounts advanced pursuant to the insured mortgage to assure compliance with laws or to protect the lien of the insured mortgage prior to the time of acquisition of the estate or interest in the land and secured thereby and reasonable amounts expended to prevent deterioration of improvements, but reduced by the amount of payments made.

Paragraph 9(b)

Payment in part by any person of the principal of the indebtedness, or any other obligation secured by the insured mortgage, or any voluntary partial satisfaction or release of the insured mortgage, to the extent of the payment, satisfaction or release, shall reduce the amount of insurance pro tanto. The amount of insurance may thereafter be increased by accruing interest and advances made to protect the lien of the insured mortgage and secured thereby, with interest thereon, provided in no event shall the amount of insurance be greater than the amount of insurance stated in Schedule A.

Paragraph 9(c)

Payment in full by any person or the voluntary satisfaction or release of the insured mortgage shall terminate all liability of the Company except as provided in Section 2(a) of these Conditions and Stipulations.

10. Both Plaintiff and Defendant contended the Title Policy was plain and unambiguous, and resort to extrinsic evidence to interpret its meaning and effect in this case was unnecessary.

Conclusions of Law

The foregoing Findings of Fact are denominated Conclusions of Law to the extent any constitute the same. Based on the foregoing Findings of Fact, the Court reaches the following Conclusions of Law.

I. Legal Standard

A. Summary Judgment

Under Rule 56(a), SCRCP, the plaintiff in an action may move, with supporting evidence for entry of an order in its favor. If the motion is supported as provided in the rule, summary judgment will be granted unless the adverse party offers into evidence specific facts showing that there is a genuine issue for trial. *Id.* at (e). The failure of the adverse party to do so results in the entry of judgment in favor of the moving party. *Id.* at (c). Although the South Carolina Supreme Court introduced the concept of a “scintilla” of evidence in *Hancock v. Mid-South Management Co, Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009), cases after *Hancock* demonstrate clearly that the standard has not changed and any scintilla of evidence must have probative value that would defeat the claims of the moving party.¹

B. Contract Interpretation

“An insurance policy is a contract between the insured and the insurance company, and the terms of the policy are to be construed according to contract law.” *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 606, 663 S.E.2d 484, 487 (2008). Under contract law, “[t]o ascertain the intention of an instrument resort is first to be had to its language, and if such is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument.” *Superior Auto. Ins. Co. v. Maners*,

¹ See *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 701 S.E.2d 742 (2010) (Court upheld grant of summary judgment in favor of law firm when plaintiff relied on deposition testimony which did not support a finding of breach of the standard of care.); *Lanier Construction Co., Inc. v. Bailey & Yobs, Inc.*, 384 S.C. 275, 681 S.E.2d 909 (Ct. App. 2009) (homeowner had no duty to warn a subcontractor of location of septic tank); *Bass v. Gopal, Inc.*, 384 S.C. 238, 680 S.E.2d 917 (Ct. App. 2009) (any scintilla must be probative; motel provided adequate exterior lightning and other exterior safety measures, so guest should have stayed in his room rather than answering the door after which he was shot by a stranger); *Weston v. Kim's Dollar Store*, 385 S.C. 520, 684 S.E.2d 769 (Ct. App. 2009) (in cases applying federal law, the nonmovant must show more than a mere scintilla); *Carolina Renewal, Inc. v. South Carolina Dept. Transp.*, 385 S.C. 550, 684 S.E.2d 779 (Ct. App. 2009) (collateral estoppel barred contractor's subsequent breach of contract claim asserting same damages adjudicated by its sole shareholder and officer in a prior slander action); and *Shirley's Iron Works, Inc. v. City of Union*, 2010 WL 530195 (Ct. App. 2010)(unpublished) (city had no liability to subcontractors and suppliers beyond balance of contract amount; only a scintilla is required if the burden is preponderance of the evidence).

261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973), cited in *Super Duper Inc. v. Pennsylvania Nat. Mut. Cas. Ins. Co.*, 385 S.C. 201, 683 S.E.2d 792 (2009). “Whether the language of a contract is ambiguous is a question of law to be determined by the court from the terms of the contract as a whole.” *State Acc. Fund v. South Carolina Second Injury Fund*, 388 S.C. 67, 75, 693 S.E.2d 441, 445 (Ct. App. 2010).

Extrinsic evidence will only be admitted after a finding that the written terms of the contract are ambiguous. See *Harris v. Ideal Solutions, Inc.*, 385 S.C. 74, 682 S.E.2d 523 (Ct. App. 2009). “Further, provisions in a policy which extend coverage to the insured must be construed liberally so as to afford coverage whenever possible by reasonable construction.” *State Auto Property & Casualty Insurance Co. v. Travelers Indemnity Co. of America*, 343 F.3d 249, 254 (4th Cir. 2003), cited in *Super Duper*, 385 S.C. at 208, 683 S.E.2d at 796 (Justice Kittredge referred to *State Auto* as well-reasoned and sound, and footnoted the language from *State Auto* that insurance policies should be construed liberally to afford coverage whenever possible). “Ambiguous terms must be construed in favor of the insured.” *Super Duper*, 385 S.C. at 210, 683 S.E.2d at 796.

The amount of the loss of Plaintiff (i.e., \$345,335) is not in issue. At issue here are the plain and unambiguous terms of the Title Policy, which this Court is asked to examine and determine the amount of insurance, if any, that still exists under the Policy. If the amount of insurance equals or exceeds the amount of loss, Plaintiff is entitled to entry of judgment against Defendant for the amount of the loss.

II. Resolution of Defense of Impairment of Subrogation Rights

Defendant lodged two defenses to the First Cause of Action of Plaintiff, i) impairment of subrogation rights and ii) no remaining amount of insurance under the

Title Policy. At the hearing on the Motion, counsel for Defendant informed the Court that, after the depositions of Jilich and Price, Defendant concluded it was not impaired by Plaintiff's waiver of deficiency against Borrower and release of guarantors Jilich and Price. Neither Borrower, nor Jilich nor Price had any assets from which Defendant could seek to recoup any payments made to Plaintiff under the Title Policy. The deposition transcripts on file with the Court support defense counsel's comments. (Depos. Tr. Price, J., pp. 37-38, 40, 75, 84, 100-105, 119; Depos. Tr. Jilich, J., pp. 22, 29-30, 33-34, 40-41.) As a result, Defendant consented to entry of summary judgment against it as to the defense of impairment of subrogation.

III. Amount of Insurance

Defendant's argument is that Plaintiff's credit bid of \$3,250,000 should be subtracted from the face amount of the insurance, i.e., \$3,075,000, resulting in a remaining amount of \$0.00. This Court disagrees, based on the language in the Title Policy and its legal effect as interpreted by many courts.

A. The Policy Language

Paragraph 2(c) of the Title Policy sets forth the amount of insurance under the Title Policy after Plaintiff acquires title to a portion of the insured property through foreclosure. Specifically, that paragraph states that after acquisition, the amount of insurance shall be the lesser of "(i) the amount of insurance stated in Schedule A or (ii) the amount of principal of the indebtedness secured by the insured mortgage as of the Date of the Policy, interest thereon, expenses of foreclosure, amounts advanced pursuant to the insured mortgage to assure compliance with laws or protect the lien of the insured mortgage prior to the time of acquisition of the estate or interest in land and secured

thereby and reasonable amounts expended to prevent deterioration of improvements, but reduced by the amount of all payments made.” (Title Policy, ¶ 2(c)(i) and (ii).) Plaintiff agrees that ¶2(c)(ii) applies here, viz., its remaining unpaid debt or the sum of \$452,731.48 as of January 14, 2011,² which is obviously less than \$3,075,000, the amount of insurance stated in Schedule A. So, the amount of insurance after the foreclosure with interest to January 14th is \$452,731.48.

Rather than challenge the plain meaning of ¶2(c)(ii), Defendant says it is inapplicable. Defendant asserts that paragraph 2(a) converts the Policy into an owner’s policy after Plaintiff acquires title through foreclosure. This does not appear to be correct under the case law. See *CMEI, Inc. v. American Title Insurance Company*, 447 So.2d 427, 428 (Fl. App. 5 Dist. 1984) (“[C]ontrary to appellant’s contentions, this language is inadequate to convert this mortgagee title policy into a standard owner’s title policy when the insured mortgagee becomes the owner of the land by foreclosure. In substance, the policy continues to provide the same coverage as before subject to all policy conditions and stipulations.”³) See also *Blackhawk Production Credit Association v. Chicago Title Insurance Company*, 144 Wis. 2d 68, 79, 423 N.W. 2d 521, 525 (1988) (“A mortgagee’s policy of title insurance does not covert to an owner’s policy upon purchase of the insured land at foreclosure sale.”). But even if the Policy were converted, in part, as to

² A more mathematical explanation of the remaining amount of insurance under paragraph 2(c)(ii) is as follows.

\$3,641,190	[adjudicated debt on 3.1.10]
<u>\$(3,250,000)</u>	[credit bid, or reduced by payment]
\$391,190.00	[remaining indebtedness]
<u>\$ 61,541.48</u>	[accrued interest from 3.1 to 1.14.11) @ \$192.92 (per diem in judgment)]
\$452,731.48	[remaining amount of insurance]

³ In *CMEI*, the Court denied coverage because the value of the property exceeded “the amount of indebtedness secured by the insured mortgage interest,” which is not the case here. *CMEI*, 447 So. 2d at 428.

Plaintiff's acquisition of the Shopping Center Parcel, Plaintiff did not acquire the King Street Parcel and has a loss resulting from the invalid lien of its mortgage on the King Street Parcel. It is illogical to suggest the entire Policy converts to an owner's policy when just one insured parcel is acquired, thereby affording no coverage for the remaining parcels described in the mortgage, the lien of which is insured by the Policy. Instead, the amount of insurance remaining after acquisition of title through foreclosure should be determined consistently with the language elsewhere in the Title Policy.

The Title Policy further provides in paragraph 9(b):

Payment in part by any person of the principal of the indebtedness, or any other obligation secured by the insured mortgage, or any voluntary partial satisfaction or release of the insured mortgage, to the extent of the payment, satisfaction or release, shall reduce the amount of insurance pro tanto. **The amount of insurance may thereafter be increased by accruing interest and advances made to protect the lien of the insured mortgage and secured thereby, with interest thereon,** provided in no event shall the amount of insurance be greater than the amount of insurance stated in Schedule A.

(Title Policy, ¶9(b).) (Emphasis added.) This language yields the same amount of insurance, \$452,731.48, as the language in paragraph 2(c) of the Title Policy.⁴

At the hearing Defendant countered that the second sentence in paragraph 9(b) just refers to accrued interest and protective advances to the date of foreclosure sale, but does not mean interest and such advances continue after the date of sale. This argument ignores that the words in paragraph 9(b) are "accruing" and "with interest thereon," both

⁴ A more mathematical explanation of the remaining amount of insurance under paragraph 9(b) is as follows.

\$3,075,000	[amount of insurance stated in Schedule A]
~~\$(3,250,000)~~	[credit bid, or reduced by payment]
(\$175,000)	
\$566,190	[Difference between judgment (\$3,641,190) and principal (\$3,075,000), since paragraph allows non-principal to be added]
\$391,190	
<u>\$61,541.48</u>	[accrued interest from 3.1.10 to 1.14.11) @ \$192.92 (per diem in judgment)]
<u>\$452,731.48</u>	[remaining amount of insurance]

of which plainly denote that the amount of insurance is not static but increasing. Further, even if this Court agreed with Defendant, which the Court does not, Defendant's reading still results in \$391,190 as the amount of insurance, which is greater than Plaintiff's claimed loss of \$345,335.

Finally, paragraph 9(c) of the Title Policy provides that payment in full of the indebtedness "shall terminate all liability of the Company." There is no dispute that Plaintiff has not been paid in full. Plaintiff entered a credit bid of \$3,250,000 at the March 1, 2010 foreclosure sale of one of the properties insured under the Title Policy. At the time Plaintiff submitted its credit bid, it was owed an adjudicated debt of \$3,641,190. So the credit bid submitted by Plaintiff did not result in a satisfaction of the debt owed to Plaintiff. After the credit bid, Plaintiff was still owed \$391,190, with interest accruing thereon at \$192.92 per diem until the date of judgment in this case, or \$452,731.48 as of January 14, 2011, with interest continuing to accrue at \$192.92 per diem. For this Court to read the Title Policy as Defendant advocates, the Court would have to ignore paragraphs 2(c), 9(b) and (c) of the Title Policy.

B. The Applicable Law

Although South Carolina courts have not yet examined this issue, the Supreme Court of Maine ruled on a factual scenario almost identical to the case at bar against the very same defendant in this case. In *Hodas v. First American Title Insurance Co.*, 696 A.2d 1095, 1096 (Me. 1997), a lender purchased title insurance for his \$71,000 mortgage. The borrower defaulted on the mortgage and a foreclosure sale was held, at which the lender bid \$80,000 for the insured property. *Id.* After the foreclosure sale, the total debt owed was \$108,348.87. *Id.* While marketing the property, the lender discovered an

ownership interest of the spouse of the borrower and, upon such discovery, filed a claim with First American. *Id.* First American denied coverage and the lender brought suit. The court, interpreting a paragraph 2(a) that is identical to paragraph 2(c) at issue in this matter, ruled as follows.

The effect of this section is clear. After an insured mortgagee purchases the mortgaged premises at foreclosure, coverage continues provided there remains unpaid principal indebtedness. Coverage is limited, however, to the lesser of the outstanding indebtedness or the stated policy limit. In the case at bar, after [Lender] purchased the [] property at foreclosure for \$80,000, there remained a loan deficiency of \$28,348.87. That amount, since it was less than the stated policy limit of \$71,000, comprised the maximum limit of [Lender's] recovery provided by the continued coverage.

Hodas, 696 A.2d at 1097-98. See also *Trico Mortgage Company, Inc. v. Penn Title Insurance Company*, 281 N.J. Super. 341, 353, 657 A.2d 890, 896 (N.J. Super. A.D. 1995) (“‘Indebtedness’ includes both principal and interest. If Penn Title wanted to limit the insured’s coverage merely to principal, it should have chosen more precise language in its policy.”).

These exact facts exist in the case at bar. Plaintiff bid an amount greater than the face amount of the Policy, but less than its total debt. As in *Hodas*, “the continued coverage would indemnify [Plaintiff] for any loss caused by undisclosed defects in the title of the formerly mortgaged premises, but only to the extent of any unpaid indebtedness.” *Id.* at 1098. The correct reading of the Title Policy is after Plaintiff took title to the Shopping Center Parcel, the remaining amount of insurance was the lesser of \$3,075,000 or the remaining indebtedness. Because \$452,731.48 is less than \$3,075,000, the indebtedness is the amount of insurance remaining under the Title Policy.

At least one other court has examined language substantially similar to that contained in paragraph 9 of the Title Policy. In *Paramount Properties Co. v. Transamerica Title Ins. Co.*, 1 Cal 3d 562, 463 P.2d 746 (1970), a court reviewed what was intended by the words "payment in full by any person . . . of a mortgage covered by this policy shall terminate all liability of the Company to the insured." The court reasoned:

In procuring title insurance, a lender seeks to insure himself against the risk that a defect in the underlying title may invalidate his lien and leave him in the status of an unsecured creditor. That risk continues so long as the lender does not receive final and unconditional payment of the loan proceeds. The termination clause of paragraph 7(d) gives no indication of any intention to cut short coverage while the insured's primary risk survived; more reasonably, the provision should be interpreted as designed to reflect the conditions which represent a curtailment of this risk. Once the insured no longer has any interest in the validity of the title, paragraph 7(d) provides that the liability of the insurer ceases. If 'full payment' is interpreted to apply to a payment which does not eliminate the insured's risk, then the provision irrationally ties the termination of the policy to an arbitrary and fortuitous occurrence. We do not think such an interpretation is in accord with the reasonable expectations of the parties."

Id. at 568. "Thus, even under generally applicable rules of contract interpretation, we conclude that in light of the reasonable expectations of the parties the term 'payment' must reasonably be construed to encompass only final or unconditional payments, i.e., payments which in fact terminate the insured's risk connected with the validity of title."

Id. at 569.

The language of paragraph 9, read consistently with paragraph 2(c), yields the same amount of insurance, \$452,731.48. There is no dispute that Plaintiff has not been paid in full. Plaintiff entered a credit bid of \$3,250,000 at the March 1, 2010 foreclosure sale of one of the properties insured under the Policy. At the time Plaintiff submitted its credit bid, it was owed an adjudicated debt of \$3,641,190. So the credit bid submitted by

Plaintiff reduced, but did not result in a satisfaction of the debt owed to Plaintiff. It also reduced, but did not eliminate, the amount of insurance available under the Title Policy. After the credit bid, Plaintiff was still owed \$391,190, with interest accruing thereon until the date of judgment in this case, or \$452,731.48 as of January 14, 2011. Therefore, under either paragraph 2(c) or paragraph 9 of the Title Policy, Plaintiff is entitled to insurance in the lesser amount of \$452,731.48, not the full \$3,075,000 set forth under the Policy. Defendant is not being asked to insure an amount in excess of \$3,075,000, but is instead providing a mere fifteen percent (15%) of that amount, while retaining the premium paid for insurance of \$3,075,000.

IV. Amount of Loss

Plaintiff and Defendant agree that Plaintiff is not entitled to judgment against Defendant for the full amount of the remaining indebtedness. Plaintiff is entitled to be compensated by Defendant to the extent the title defect in the King Street Parcel caused a loss to Plaintiff in the collection of its remaining adjudicated unpaid debt. *See Lewis v. First American Title Ins. Co.*, 265 F.R.D. 536, 548-49 (D. Idaho 2010) (“Generally speaking, a policy of title insurance is a contract which, in exchange for a one-time premium payment, insures a lender against actual loss resulting from defects, liens or encumbrances against title existing as of the date the policy goes into effect”); *Cale*, 225 Cal. App. 3d 422, 426 *quoting CMEI, Inc.*, 447 So. 2d 427, 428 (Emphasis added.) (“A mortgagee’s loss is measured by the extent to which *the insured debt is not repaid* because the value of security property is diminished or impaired by outstanding lien encumbrances or title defects covered by the title insurance.”); *Hodas*, 696 A.2d at 1097 (The “holder of a loan policy incurs a loss only if the security for the loan proves

inadequate to pay off the underlying insured debt due to the presence of undisclosed defects.”); *Focus Inv. Associates, Inc. v. American Title Ins. Co.*, 992 F.2d 1231, 1237 (1st Cir. 1993)(“[W]hat is insured is the loss resulting from a defect in the security.”); *Blackhawk*, 144 Wis. 2d at 79, 423 N.W.2d at 525 (“[M]ost of the cases in which the question has arisen have deemed a mortgagee’s loss to be the difference between the value of the mortgage subject to the defect and what its value would have been had the defect not existed, in other words, the extent to which his security has been impaired.”).

It is undisputed that the value of the King Street Parcel was \$590,000. Nor does either party dispute that the value of the prior lien on the King Street Parcel was satisfied by payment of \$244,665. The deduction from the value of the King Street Parcel of the prior lien resulted in remaining equity of \$345,335 against which Plaintiff’s mortgage would have attached but for the title defect. This \$345,335 would have been available to pay down Plaintiff’s remaining indebtedness. Plaintiff’s loss due to the title defect is \$345,335. Defendant is required to pay Plaintiff on its First Cause of Action the sum of \$345,335.

NOW, THEREFORE, based upon the foregoing,

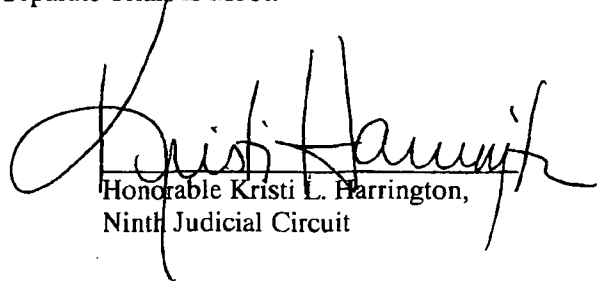
IT IS HEREBY ORDERED:

1. The Motion is granted in favor of Plaintiff; and
2. The Defendant’s Motion for Separate Trials is Moot.

AND IT IS SO ORDERED.

Date: 10-4-11

Charleston, S.C.


Honorable Kristi L. Harrington,
Ninth Judicial Circuit

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP-10-4475

Preservation Capital Consultants, LLC

First Title Insurance Company

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT TRIAL CLERK, ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Defendant's Motion to Reconsider is respectfully Denied.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
NA	NA	\$NA
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Preservation Capital Consultants, LLC

Plaintiff(s)

vs.

First American Title Insurance Company

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

09 - CP - 10 - 4475

(Please Print)

Submitted By: James W. Sheedy

Driscoll Sheedy, P.A.

Address: 11520 North Community House Road

Suite 200

Charlotte, N.C. 28277

SC Bar #: 5052

Telephone #: 704 341 2101

Fax #: 704 341 2105

Other:

E-mail: jimsheedy@driscollsheedy.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

- Contracts**
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☒ Breach of Contract (140)
☐ Other (199)

- Torts - Professional Malpractice**
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
☐ Other (299)

- Torts - Personal Injury**
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Other (399)

- Real Property**
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499)

- Inmate Petitions**
☐ PCR (500)
☐ Sexual Predator (510)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599)

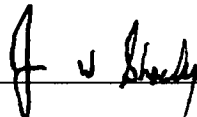
- Judgments/Settlements**
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Other (799)

- Administrative Law/Relief**
☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture (840)
☐ Other (899)

- Appeals**
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Administrative Law Judge (980)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999)

- Special/Complex /Other**
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699)
☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)

Submitting Party Signature:



Date: 07/17/2009

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Florence, Horry, Lexington, Richland, Greenville**, and Anderson**

** Contact Respective County Clerk of Court for modified ADR Program Rules

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral within 210 days of filing of this action, and the Plaintiff shall file a "Stipulation of Neutral Selection" on or before the 224th day after the filing of the action. If the parties cannot agree upon the selection of the neutral within 210 days, the Plaintiff shall notify the Court by filing a written "Request for the Appointment of a Neutral" on or before the 224th day after the filing of this action. The Court shall then appoint a neutral from the Court-approved mediator/arbitrator list.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Case are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Cases which are appellate in nature such as appeals or writs of certiorari;
 - c. Post Conviction relief matters;
 - d. Contempt of Court proceedings;
 - e. Forfeiture proceedings brought by the State;
 - f. Cases involving mortgage foreclosures; and
 - g. Cases that have been submitted to mediation with a certified mediator prior to the filing of this action.
4. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference had been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

09-CP-10-4475

Preservation Capital Consultants, LLC,)

Plaintiff,)

vs.)

First American Title Insurance Company,)

Defendant.)

SUMMONS

09-CP-10-4475

FILED
2009 JUL 20 PM 2:21
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

TO: DEFENDANT

YOU ARE HEREBY SUMMONED and required to answer the Complaint herewith served upon you, and to serve a copy of your answer to such Complaint upon the subscribers at their offices at 11520 North Community House Road, Suite 200, Charlotte, N.C. 28277, within thirty (30) days after the date of service hereof, exclusive of the day of such service, and if you fail to answer such Complaint within the time aforesaid, Plaintiff will apply to the Court for the relief demanded in the Complaint.

Charlotte, NC

Date: 7/17/09

DRISCOLL SHEEDY, P.A.

By: James W. Sheedy
James W. Sheedy
Susan E. Driscoll
11520 N. Community House Road
Suite 200
Charlotte, N.C. 28277
(704) 341-2101 - Telephone
(704) 341-2105 - Facsimile
jimsheedy@driscollsheedy.com
sdriscoll@driscollsheedy.com

ATTORNEYS FOR LENDER

Driscoll Sheedy, P.A.
Attorneys at Law

00092157.

- 1 -

09-11863

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

Preservation Capital Consultants, LLC,)

Plaintiff,)

vs.)

First American Title Insurance Company,)

Defendant.)

COMPLAINT

(Jury Trial Demanded)

09-CP-10- 4475

FILED
2009 JUL 20 PM 2:28
JULIE J. ARMSTRONG
CLERK OF COURT

Plaintiff, complaining against Defendant, respectfully alleges:

1. Plaintiff (Lender) is a limited liability company organized pursuant to the laws of the state of Delaware that owns and holds a mortgage recorded in Charleston County, South Carolina, as further described below.

2. Defendant (Insurer) is a corporation organized pursuant to the laws of the state of California, which is authorized to issue title insurance policies in the state of South Carolina, including in Charleston County, and did issue a lender's title policy to Lender insuring the lien of the above mentioned mortgage.

3. On December 31, 2004, Monarch Development, LLC (Borrower) executed a Mortgage in favor of Atlantic Carolina Retail, LLC (Atlantic) which was recorded February 10, 2005 in Mortgage Book L525 at Page 414, in the RMC Office for Charleston County, South Carolina (Mortgage).

4. The Mortgage operated as security for a loan from Atlantic to Borrower in the original principal amount of \$3,075,000.

5. The Mortgage granted Atlantic a lien against a tract of land further described as follows (Subject Property):

All that lot, piece or parcel of land with the buildings thereon situate, lying and being on the West side of King Street, near line Street, in the City of Charleston, State aforesaid, and known and designated as numbers 635 and 637 King Street;

Measuring and containing in front on King Street Fifty (50) Feet, more or less, and in depth Two Hundred (200) Feet, more or less;

Butting and boundings to the North on Land now or late of the Estate of Sarah Hunt, to the East on King Street aforesaid, to the south on lands of I.D. Rubin, and to the West on lands of Myers Bros.

Tax Map No. 460-08-02-012

6. On February 10, 2005, Insurer issued a lender's title insurance policy number FA-31-678957 naming Atlantic, its successors and assigns, as the insured, the Mortgage as encumbering the Subject Property, and the title to the Subject Property as vested in Borrower (Title Policy). A copy of the Title Policy is attached hereto as **Exhibit A**.

7. The Mortgage was assigned to Lender through assignments recorded October 18, 2005 in Book M558 at Page 596 and January 21, 2009 in Book 30 at Page 658, both in the RMC Office for Charleston County, South Carolina, thereby effectively substituting Lender as the insured on the Title Policy.

8. On the Date of Policy as defined in the Title Policy, Borrower was not the owner of the Subject Property.

9. The Mortgage, therefore, did not encumber the Subject Property.

10. The Subject Property was sold free and clear of the lien of the Mortgage to Evening

Post Publishing Company which is the current owner.

11. Borrower has not paid Lender as agreed, Lender has demanded payment from Borrower which Borrower has failed to remit, and Lender has to foreclose the Mortgage in order to recover in full, which Lender is not able to do since the Subject Property has been conveyed free and clear of the lien of the Mortgage.

12. As a result of being unable to foreclose the Mortgage and judicially sell the Subject Property in order to recover in full on its defaulted loan, Lender has sustained a loss to the extent of the value of the lien purportedly granted by the Mortgage against the Subject Property.

13. Lender has submitted a claim to Insurer for damages under the Title Policy which Insurer has not paid.

14. Insurer has breached the Title Policy by not paying Lender for its loss of the lien purportedly granted by the Mortgage against the Subject Property, which Insurer insured by issuance of the Title Policy.

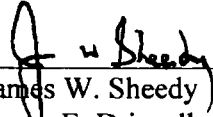
15. As a result of Insurer's breach of the Title Policy, Lender is entitled to recover actual damages from Insurer in the amount of the value of the lien purportedly granted by the Mortgage against the Subject Property, as well as attorneys' fees and costs.

WHEREFORE, Lender prays for entry of judgment against Insurer in the amount of the value of the lien purportedly granted by the Mortgage against the Subject Property, as well as attorneys' fees and costs; and such other and further relief as the Court deems proper.

Charlotte, NC

Date: 7/17/09

DRISCOLL SHEEDY, P.A.

By: 

James W. Sheedy

Susan E. Driscoll

11520 N. Community House Road

Suite 200

Charlotte, N.C. 28277

(704) 341-2101 - Telephone

(704) 341-2105 - Facsimile

jimsheedy@driscollsheedy.com

sdriscoll@driscollsheedy.com

ATTORNEYS FOR LENDER

EXHIBIT A

COMMERCIAL ☒ RESIDENTIAL ☐ NEW HOME SALE ☐
RESALE ☐ 2nd MORTGAGE ☐ REFINANCE ☐
TIMESHARE ☐ OTHER ☐

FIRST AMERICAN TITLE INSURANCE COMPANY
SCHEDULE A

Issuing Office File No.: 04-416MONARCH

Attached to Policy No.: FA-31-678957

Date of Policy: February 10, 2005 at 02:13 PM

Amount of Insurance: \$ 3,075,000.00

1. Name of Insured:
Atlantic Carolina Retail, LLC, its successors and/or assigns as their respective interests may appear.
2. The estate or interest in the land which is encumbered by the Insured mortgage is:
Fee Simple
3. Title to the estate or interest in the land is vested in:
Monarch Development, LLC
4. The insured mortgage and assignments thereof, if any, are described as follows:
Mortgage from Monarch Development, LLC to Atlantic Carolina Retail, LLC, dated December 27, 2004, filed for record on February 10, 2005 at 02:13 PM in the Office of the Register of Deeds for Charleston County, in Mortgage Book L525 at page 414, in the principal sum of \$3,075,000.00.
5. The land referred to in this policy is described as follows:
See attached Exhibit "A" for Legal Description.

THE EVANS LAW FIRM, L.L.C.

By:

KELLY C. EVANS

FIRST AMERICAN TITLE INSURANCE COMPANY
SCHEDULE B - PART I

Issuing Office File No.: 04-416MONARCH

Attached to Policy No.: FA-31-678957

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) which arise by reason of:

1. Any rights, interests or claims or parties in possession of the land not shown by the public records.
2. Any rights, interests, or claims affecting the land which a correct survey would disclose and which are not shown by the public records.
3. Any lien for services, labor, or materials in connection with improvements, repairs or renovations provided before, on, or after Date of Policy, not shown by the public records.
4. Any dispute as to the boundaries caused by a change in the location of any water body within or adjacent to the land prior to Date of Policy, and any adverse claim to all or part of the land that is, at Date of Policy, or was previously, under water.
5. Taxes or special assessments not shown as liens in the public records or in the records of the local tax collecting authority, at Date of Policy
6. Taxes and assessments for the year 2004 and subsequent years, not yet due and payable.

NOTE: Exceptions Numbered Above are Hereby Deleted.

- a. Covenants and agreements as contained in instrument executed by Pinehaven Shopping Center dated January 15, 1957, recorded in Book X-62, Page 87 and 92 in the RMC Office for Charleston County, Supplemental Agreement relating thereto dated December 17, 1958, and recorded at Book K-66, Page 369, and Supplemental Agreement relating thereto dated January 12, 1966, in Book A-85, Page 34 and Amendment to Declaration of Covenants, Conditions, restrictions, limitations and Conditions of Pinehaven Shopping Center dated August 10, 1987, and recorded in Book J-168, Page 866 in the RMC Office of Charleston County.
- b. Easement set forth in agreement between Charleston County and Pinehaven Shopping Center dated January 12, 1966, recorded in the RMC Office for Charleston County in Book A-85, Page 34.
- c. Reciprocal Parking Easements, Access Easement and Maintenance Agreement appearing of record in the Office of the RMC for Charleston County in Book Z392 at Page 090.
- d. Easement granted to South Carolina Power Company by Instrument dated November 3, 1949, and recorded in Book H-52, Page 439 in the RMC Office for Charleston County
- e. Easement granted to Southern Bell Telephone and Telegraph Company by instrument dated June 6, 1957, and recorded in Book J-64, Page 526 in the RMC Office for Charleston County.
- f. Terms and conditions of any existing unrecorded lease(s) and all rights of lessee(s) and any parties claiming through the lessee(s) under said lease(s).
- g. Title to that portion of the property within the bounds of the graveyard together with the right of ingress and egress thereto as shown on plat of survey of J.O'Hear Sanders, Jr., dated December 17, 1959, and on plat of survey by Cummings and McGrady, Inc., dated June 1973.
- h. Such matters as are shown on the survey by George A.Z. Johnson, Jr., Inc., dated August 28, 1987, 1985, including the power poles located near U.S. Highway 52
- i. The discrepancy in the length of certain property lines between the survey by George A.Z. Johnson, Jr., dated August 29, 1987, and the survey by Cummings and McGrady, Inc., dated June 1973, and recorded in Plat Book AC, Page 136. This policy will insure only the lesser dimensions.
- j. Right of Way Easement from FSE Shipwatch Square Associates to South Carolina Department of Highways and Public Transportation dated March 12, 1990, and recorded in Book J-197, Page 315 in the RMC Office

(04-416MONARCH.PFD/04-416MONARCH/16)

FIRST AMERICAN TITLE INSURANCE COMPANY
SCHEDULE B - PART I
(Continued)

Issuing Office File No.: 04-416MONARCH

Attached to Policy No.: FA-31-678957

for Charleston County.

- k. The Company insures the Insured as to the location of the boundary lines of the land, but does not insure the engineering calculations in computing the amount of acreage contained therein
- l. As to Tract A - Mortgage from Monatch Holding, LLC to First Palmetto Savings Bank, dated November 11, 2004 and recorded in the RMC Office for Charleston County in Book W518, Page 395, aforesaid records.
- m. As to Tract B - Mortgage from Monatch Development, LLC to Atlantic Savings Bank dated December 5, 2002 and recorded in the RMC Office for Charleston County in Book Y429, Page 277, aforesaid records.

FIRST AMERICAN TITLE INSURANCE COMPANY
SCHEDULE B - PART II

Issuing Office File No.: 04-416MONARCH

Attached to Policy No.: FA-31-678957

In addition to the matters set forth in Part I of this Schedule B, the title to the estate or interest in the land described or referred to in Schedule "A" is subject to the following matters, if any be shown, but the Company insures that these matters are subordinate to the lien or charge of the insured mortgage upon the estate or interest:

NONE

FIRST AMERICAN TITLE INSURANCE COMPANY

EXHIBIT A

Issuing Office File No.: 04-418MONARCH

Commitment: 04-416MONARCH

Policy No.: FA-31-678957

LEGAL DESCRIPTION: Shopping center tract

All that piece, parcel or tract of land lying and being in Charleston County, South Carolina being more particularly designated as Residual Tract and more fully described as Residual Tract (17.62 Acres) as shown on a plat entitled "Plat Showing the Subdivision of TMS No. 469-06-00-001 (containing 19.08 acres into Tract "A" (1.46 acres) and Residual Tract (17.62 acres) and showing a Parking Easement (containing 1.23 acres) owned by Atlantic Carolina Retail, LLC" prepared by Hoffman Lester Associates, Inc., dated November 2, 2001, and recorded December 19, 2001 in Plat Book EF, Page 247 in the RMC office for Charleston County, reference to aforesaid plat being craved for a more complete description.

Tract A

All that lot, piece or parcel of land with the buildings thereon, situate, lying and being on the West side of King Street, near line Street, in the City of Charleston, State aforesaid, and known and designated as numbers 635 and 637 King Street;

Measuring and containing in front on King Street, Fifty (50) Feet, more or less, and in depth Two Hundred (200) Feet, more or less;

Butting and boundings to the North on Land now or late of the Estate of Sarah Hunt, to the East on King Street aforesaid, to the south on lands of I.D. Rubin, and to the West on lands of Myers Bros.

Tract B

All that certain lot, piece, or parcel of land, with the buildings and improvements thereon, situate, lying and being in the City of Charleston, State of South Carolina, on the West side of St. Phillips Street, known in the present numbering system for the City of Charleston as NO. 141 ST. PHILLIPS STREET, CITY OF CHARLESTON; Said lot measuring and containing on the East Side, sixty-eight (68') feet and on the North Side two hundred four (204') feet and seven (7'') inches; on the West Side sixty-three (63') feet and one (1'') inch, and on the South Side two hundred five (205') feet and six (6'') inches; all the measurements being more or less. BUTTING AND bounding on the North on land on or formerly of Jones, on the South on land now or formerly of SC Blum, on the West on land now of formerly of A. Wilson, and on East on St. Phillips Street.

FATIC 412
ALTA Loan Policy (10/17/92)

Policy No. **FA-31- 678957**

POLICY OF TITLE INSURANCE



ISSUED BY

First American Title Insurance Company

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, FIRST AMERICAN TITLE INSURANCE COMPANY, a California corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested other than as stated therein;
2. Any defect in or lien or encumbrance on the title;
3. Unmarketability of the title;
4. Lack of a right of access to and from the land;
5. The invalidity or unenforceability of the lien of the insured mortgage upon the title;
6. The priority of any lien or encumbrance over the lien of the insured mortgage;
7. Lack of priority of the lien of the insured mortgage over any statutory lien for services, labor or material:
 - (a) arising from an improvement or work related to the land which is contracted for or commenced prior to Date of Policy; or
 - (b) arising from an improvement or work related to the land which is contracted for or commenced subsequent to Date of Policy and which is financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance;
8. The invalidity or unenforceability of any assignment of the insured mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the insured mortgage in the named insured assignee free and clear of all liens.

The Company will also pay the costs, attorneys' fees and expenses incurred in defense of the title or the lien of the insured mortgage, as insured, but only to the extent provided in the Conditions and Stipulations.

First American Title Insurance Company

BY

Gary L. Keruett

PRESIDENT

ATTEST

Mark R. Amerson

SECRETARY

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

1. (a) Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use, or enjoyment of the land; (ii) the character, dimensions or location of any improvement now or hereafter erected on the land; (iii) a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part; or (iv) environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.
- (b) Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.
2. Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge.
3. Defects, liens, encumbrances, adverse claims or other matters:
 - (a) created, suffered, assumed or agreed to by the insured claimant;
 - (b) not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy;
 - (c) resulting in no loss or damage to the insured claimant;
 - (d) attaching or created subsequent to Date of Policy (except to the extent that this policy insures the priority of the lien of the insured mortgage over any statutory lien for services, labor or material or the extent insurance is afforded herein as to assessments for street improvements under construction or completed at Date of Policy); or

(e) resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the insured mortgage.

4. Unenforceability of the lien of the insured mortgage because of the inability or failure of the insured at Date of Policy, or the inability or failure of any subsequent owner of the indebtedness, to comply with applicable doing business laws of the state in which the land is situated.
5. Invalidity or unenforceability of the lien of the insured mortgage, or claim thereof, which arises out of the transaction evidenced by the insured mortgage and is based upon usury or any consumer or credit protection or truth in lending law.
6. Any statutory lien for services, labor or materials (or the claim of priority of any statutory lien for services, labor or materials over the lien of the insured mortgage) arising from an improvement or work related to the land which is contracted for and commenced subsequent to Date of Policy and is not financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance.
7. Any claim, which arises out of the transaction creating the interest of the mortgagee insured by this policy, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that is based on:
 - (i) the transaction creating the interest of the insured mortgagee being deemed a fraudulent conveyance or fraudulent transfer; or
 - (ii) the subordination of the interest of the insured mortgagee as a result of the application of the doctrine of equitable subordination; or
 - (iii) the transaction creating the interest of the insured mortgagee being deemed a preferential transfer except where the preferential transfer results from the failure:
 - (a) to timely record the instrument of transfer; or
 - (b) of such recordation to impart notice to a purchaser for value or a judgment or lien creditor.

CONDITIONS AND STIPULATIONS

1. DEFINITION OF TERMS.

The following terms when used in this policy mean:

- (a) "insured": the insured named in Schedule A. The term "insured" also includes:
 - (i) the owner of the indebtedness secured by the insured mortgage and each successor in ownership of the indebtedness except a successor who is an obligor under the provisions of Section 12(c) of these Conditions and Stipulations (reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor insured, unless the successor acquired the indebtedness as a purchaser for value without knowledge of the asserted defect, lien, encumbrance, adverse claim or other matter insured against by this policy as affecting title to the estate or interest in the land);
 - (ii) any governmental agency or governmental instrumentality which is an insurer or guarantor under an insurance contract or guaranty insuring or guaranteeing the indebtedness secured by the insured mortgage, or any part thereof, whether named as an insured herein or not;
 - (iii) the parties designated in Section 2(a) of these Conditions and Stipulations.
- (b) "insured claimant": an insured claiming loss or damage.
- (c) "knowledge" or "known": actual knowledge, not constructive knowledge or notice which may be imputed to an insured by reason of the public records as defined in this policy or any other records which impart constructive notice of matters affecting the land.
- (d) "land": the land described or referred to in Schedule (A), and improvements affixed thereto which by law constitute real property. The term "land" does not include any property beyond the lines of the area described or referred to in Schedule (A), nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.
- (e) "mortgage": mortgage, deed of trust, trust deed, or other security instrument.
- (f) "public records": records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge. With respect to Section 1(a)(iv) of the Exclusions From Coverage, "public records" shall also include environmental protection liens filed in the records of the clerk of the United States district court for the district in which the land is located.
- (g) "unmarketability of the title": an alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A or the insured mortgage to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title.

2. CONTINUATION OF INSURANCE.

(a) After Acquisition of Title. The coverage of this policy shall continue in force as of Date of Policy in favor of (i) an insured who acquires all or any part of the estate or interest in the land by foreclosure, trustee's sale, conveyance in lieu of foreclosure, or other legal manner which discharges the lien of the insured mortgage; (ii) a transferee of the estate or interest so acquired from an insured corporation, provided the transferee is the parent or wholly-owned subsidiary of the insured corporation, and their

obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act which in the opinion of the Company may be necessary or desirable to establish the title to the estate or interest or the lien of the insured mortgage, as insured. If the Company is prejudiced by the failure of the insured to furnish the required cooperation, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

5. PROOF OF LOSS OR DAMAGE.

In addition to and after the notices required under Section 3 of these Conditions and Stipulations have been provided the Company, a proof of loss or damage signed and sworn to by the insured claimant shall be furnished to the Company within 90 days after the insured claimant shall ascertain the facts giving rise to the loss or damage. The proof of loss or damage shall describe the defect in, or lien or encumbrance on the title, or other matter insured against by this policy which constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage. If the Company is prejudiced by the failure of the insured claimant to provide the required proof of loss or damage, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such proof of loss or damage.

In addition, the insured claimant may reasonably be required to submit to examination under oath by any authorized representative of the Company and shall produce for examination, inspection and copying, at such reasonable times and places as may be designated by any authorized representative of the Company, all records, books, ledgers, checks, correspondence and memoranda, whether bearing a date before or after Date of Policy, which reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the insured claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect and copy all records, books, ledgers, checks, correspondence and memoranda in the custody or control of a third party, which reasonably pertain to the loss or damage. All information designated as confidential by the insured claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the insured claimant to submit for examination under oath, produce other reasonably requested information or grant permission to secure reasonably necessary information from third parties as required in this paragraph, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim.

6. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY.

In case of a claim under this policy, the Company shall have the following options:

- (a) To Pay or Tender Payment of the Amount of Insurance or to Purchase the Indebtedness.
- (i) to pay or tender payment of the amount of insurance under this policy together with any costs, attorneys' fees, and expenses incurred by the insured claimant, which were authorized by the Company, up to the time of payment or tender of payment and

9. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY.

(a) All payments under this policy, except payments made for costs, attorneys' fees, and expenses, shall reduce the amount of the insurance pro tanto. However, any payments made prior to the acquisition of title to the estate or interest as provided in Section 2(a) of these Conditions and Stipulations shall not reduce pro tanto the amount of the insurance afforded under this policy except to the extent that the payments reduce the amount of the indebtedness secured by the insured mortgage.

(b) Payment in part by any person of the principal of the indebtedness, or any other obligation secured by the insured mortgage, or any voluntary partial satisfaction or release of the insured mortgage, to the extent of the payment, satisfaction or release, shall reduce the amount of insurance pro tanto. The amount of insurance may thereafter be increased by accruing interest and advances made to protect the lien of the insured mortgage and secured thereby, with interest thereon, provided in no event shall the amount of insurance be greater than the amount of insurance stated in Schedule A.

(c) Payment in full by any person or the voluntary satisfaction or release of the insured mortgage shall terminate all liability of the Company except as provided in Section 2(a) of these Conditions and Stipulations.

10. LIABILITY NONCUMULATIVE.

If the insured acquires title to the estate or interest in satisfaction of the indebtedness secured by the insured mortgage, or any part thereof, it is expressly understood that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring a mortgage to which exception is taken in Schedule B or to which the insured has agreed, assumed, or taken subject, or which is hereafter executed by an insured and which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy.

11. PAYMENT OF LOSS.

(a) No payment shall be made without producing this policy for endorsement of the payment unless the policy has been lost or destroyed, in which case proof of loss or destruction shall be furnished to the satisfaction of the Company.

(b) When liability and the extent of loss or damage has been definitely fixed in accordance with these Conditions and Stipulations, the loss or damage shall be payable within 30 days thereafter.

12. SUBROGATION UPON PAYMENT OR SETTLEMENT.

(a) The Company's Right of Subrogation.

Whenever the Company shall have settled and paid a claim under this policy, all right of subrogation shall vest in the Company unaffected by any act of the insured claimant.

The Company shall be subrogated to and be entitled to all rights and remedies which the insured claimant would have had against any person or property in respect to the claim had this policy not been issued. If requested by the Company, the insured claimant shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect this right of subrogation. The insured claimant shall permit the Company to sue, compromise or settle in the name of the insured claimant and to use the name of the insured claimant in any transaction or litigation

corporate successors by operation of law and not by purchase, subject to any rights or defenses the Company may have against any predecessor insureds; and (iii) any governmental agency or governmental instrumentality which acquires all or any part of the estate or interest pursuant to a contract of insurance or guaranty insuring or guaranteeing the indebtedness secured by the insured mortgage.

(b) **After Conveyance of Title.** The coverage of this policy shall continue in force as of Date of Policy in favor of an insured only so long as the insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from the insured, or only so long as the insured shall have liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest. This policy shall not continue in force in favor of any purchaser from the insured of either (i) an estate or interest in the land, or (ii) an indebtedness secured by a purchase money mortgage given to the insured.

(c) **Amount of Insurance.** The amount of insurance after the acquisition or after the conveyance shall in neither event exceed the least of:

- (i) the amount of insurance stated in Schedule A;
- (ii) the amount of principal of the indebtedness secured by the insured mortgage as of Date of Policy, interest thereon, expenses of foreclosure, amounts advanced pursuant to the insured mortgage to assure compliance with laws or to protect the lien of the insured mortgage prior to the time of acquisition of the estate or interest in the land and secured thereby and reasonable amounts expended to prevent deterioration of improvements, but reduced by the amount of all payments made; or
- (iii) the amount paid by any governmental agency or governmental instrumentality, if the agency or instrumentality is the insured claimant, in the acquisition of the estate or interest in satisfaction of its insurance contract or guaranty.

3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT.

The insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 4(a) below, (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest or the lien of the insured mortgage, as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if title to the estate or interest or the lien of the insured mortgage, as insured, is rejected as unmarketable. If prompt notice shall not be given to the Company, then as to the insured all liability of the Company shall terminate with regard to the matter or matters for which prompt notice is required; provided, however, that failure to notify the Company shall in no case prejudice the rights of any insured under this policy unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice.

4. DEFENSE AND PROSECUTION OF ACTIONS; DUTY OF INSURED CLAIMANT TO COOPERATE.

(a) Upon written request by the insured and subject to the options contained in Section 6 of these Conditions and Stipulations, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the insured to object for reasonable cause) to represent the insured as to those stated causes of action and shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs or expenses incurred by the insured in the defense of those causes of action which allege matters not insured against by this policy.

(b) The Company shall have the right, at its own cost, to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest or the lien of the insured mortgage, as insured, or to prevent or reduce loss or damage to the insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable hereunder, and shall not thereby concede liability or waive any provision of this policy. If the Company shall exercise its rights under this paragraph, it shall do so diligently.

(c) Whenever the Company shall have brought an action or interposed a defense as required or permitted by the provisions of this policy, the Company may pursue any litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order.

(d) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, the insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, and all appeals therein, and permit the Company to use, at its option, the name of the insured for this purpose. Whenever requested by the Company, the insured, at the Company's expense, shall give the Company all reasonable aid (i) in any action or proceeding, securing evidence,

which the Company is obligated to pay; or

(ii) to purchase the indebtedness secured by the insured mortgage for the amount owing thereon together with any costs, attorneys' fees, and expenses incurred by the insured claimant which were authorized by the Company up to the time of purchase and which the Company is obligated to pay.

If the Company offers to purchase the indebtedness as herein provided, the owner of the indebtedness shall transfer, assign, and convey the indebtedness and the insured mortgage, together with any collateral security, to the Company upon payment therefor.

Upon the exercise by the Company of either of the options provided for in paragraphs a (i) or (ii), all liability and obligations to the insured under this policy, other than to make the payment required in those paragraphs, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, and the policy shall be surrendered to the Company for cancellation.

(b) **To Pay or Otherwise Settle With Parties Other Than the Insured or With the Insured Claimant.**

(i) to pay or otherwise settle with other parties for or in the name of an insured claimant any claim insured against under this policy, together with any costs, attorneys' fees, and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay; or

(ii) to pay or otherwise settle with the insured claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees, and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in paragraphs b(i) or (ii), the Company's obligations to the insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute or continue any litigation.

7. DETERMINATION AND EXTENT OF LIABILITY.

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.

(a) The liability of the Company under this policy shall not exceed the least of:

(i) the amount of insurance stated in Schedule A, or, if applicable, the amount of insurance as defined in Section 2 (c) of these Conditions and Stipulations;

(ii) the amount of the unpaid principal indebtedness secured by the insured mortgage as limited or provided under Section 8 of these Conditions and Stipulations or as reduced under Section 9 of these Conditions and Stipulations, at the time the loss or damage insured against by this policy occurs, together with interest thereon; or

(iii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

(b) In the event the insured has acquired the estate or interest in the manner described in Section 2(a) of these Conditions and Stipulations or has conveyed the title, then the liability of the Company shall continue as set forth in Section 7(a) of these Conditions and Stipulations.

(c) The Company will pay only those costs, attorneys' fees, and expenses incurred in accordance with Section 4 of these Conditions and Stipulations.

8. LIMITATION OF LIABILITY.

(a) If the Company establishes the title, or removes the alleged defect, lien or encumbrance, or cures the lack of a right of access to or from the land, or cures the claim of unmarketability of title, or otherwise establishes the lien of the insured mortgage, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals therefrom, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused thereby.

(b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals therefrom, adverse to the title or to the lien of the insured mortgage, as insured.

(c) The Company shall not be liable for loss or damage to any insured for liability voluntarily assumed by the insured in settling any claim or suit without the prior written consent of the Company.

(d) The Company shall not be liable for:

(i) any indebtedness created subsequent to Date of Policy except for advances made to protect the lien of the insured mortgage and secured thereby and reasonable amounts expended to prevent deterioration of improvements; or

(ii) construction loan advances made subsequent to Date of Policy, except construction loan advances made subsequent to Date of Policy for the purpose of financing in whole or in part the construction of an improvement to the land which at Date of Policy were secured by the insured mortgage and which the insured was and continued to be obligated to advance at and after Date of Policy.

involving these rights or remedies.

If a payment on account of a claim does not fully cover the loss of the insured claimant, the Company shall be subrogated to all rights and remedies of the insured claimant after the insured claimant shall have recovered its principal, interest, and costs of collection.

(b) The Insured's Rights and Limitations.

Notwithstanding the foregoing, the owner of the indebtedness secured by the insured mortgage, provided the priority of the lien of the insured mortgage or its enforceability is not affected, may release or substitute the personal liability of any debtor or guarantor, or extend or otherwise modify the terms of payment, or release a portion of the estate or interest from the lien of the insured mortgage, or release any collateral security for the indebtedness.

When the permitted acts of the insured claimant occur and the insured has knowledge of any claim of title or interest adverse to the title to the estate or interest or the priority or enforceability of the lien of the insured mortgage, as insured, the Company shall be required to pay only that part of any losses insured against by this policy which shall exceed the amount, if any, lost to the Company by reason of the impairment by the insured claimant of the Company's right of subrogation.

(c) The Company's Rights Against Non-Insured Obligors.

The Company's right of subrogation against non-insured obligors shall exist and shall include, without limitation, the rights of the insured to indemnities, guaranties, other policies of insurance or bonds, notwithstanding any terms or conditions contained in those instruments which provide for subrogation rights by reason of this policy.

The Company's right of subrogation shall not be avoided by acquisition of the insured mortgage by an obligor (except an obligor described in Section 1(a) (ii) of these Conditions and Stipulations) who acquires the insured mortgage as a result of an indemnity, guarantee, other policy of insurance, or bond and the obligor will not be an insured under this policy, notwithstanding Section 1(a) (i) of these Conditions and Stipulations.

13. ARBITRATION.

Unless prohibited by applicable law, either the Company or the insured may demand arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the insured arising out of or relating to this policy, any service of the Company in connection with its issuance or the breach of a policy provision or other obligation. All arbitrable matters when the Amount of Insurance is \$1,000,000 or less shall be arbitrated at the option of either the Company or the insured. All arbitrable matters when the Amount of Insurance is in excess of \$1,000,000 shall be arbitrated only when agreed to by both the Company and the insured. Arbitration pursuant to this policy and under the Rules in effect on the date the demand for arbitration is made or, at the option of the insured, the Rules in effect at Date of Policy shall be binding upon the parties. The award may include attorneys' fees only if the laws of the state in which the land is located permit a court to award attorneys' fees to a prevailing party. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof. The law of the situs of the land shall apply to an arbitration under the Title Insurance Arbitration Rules.

A copy of the Rules may be obtained from the Company upon request.

14. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT.

(a) This policy together with all endorsements, if any, attached hereto by the Company is the entire policy and contract between the insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

(b) Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the lien of the insured mortgage or of the title to the estate or interest covered hereby or by any action asserting such claim, shall be restricted to this policy.

(c) No amendment of or endorsement to this policy can be made except by a writing endorsed hereon or attached hereto signed by either the President, a Vice President, the Secretary, an Assistant Secretary, or validating officer or authorized signatory of the Company.

15. SEVERABILITY.

In the event any provision of this policy is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision and all other provisions shall remain in full force and effect.

16. NOTICES, WHERE SENT.

All notices required to be given the Company and any statement in writing required to be furnished the Company shall include the number of this policy and shall be addressed to the Company, Attention: Claims Department, 1 First American Way, Santa Ana, California 92707, or to the office which issued this policy.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
Preservation Capital Consultants, LLC,
Plaintiff,
v.
First American Title Insurance Company,
Defendant.

) IN THE COURT OF COMMON PLEAS
)
) Case No: 2009-CP-10-4475
)
)

) ANSWER OF DEFENDANT FIRST
) AMERICAN TITLE INSURANCE
) COMPANY
)

FILED
NOV 30 PM 2:33
CLERK OF COURT
J. ARMSTRONG

The Defendant, First American Title Insurance Company, answering the Complaint of the Plaintiff would show this Honorable Court the following:

FOR FIRST DEFENSE TO ALL CAUSES OF ACTION

1. Defendant is without sufficient information or knowledge to form an opinion or belief as to the truth of allegations contained in Paragraph 1 of the Complaint and therefore denies them.

2. Defendant admits the allegations contained in Paragraphs 2, 3, 4 and 5 of the Complaint. Further responding to the allegations contained in Paragraphs 2, 3, 4 and 5, the Defendant alleges that the Subject Property is only a portion of the property secured by the Mortgage.

3. As to the allegations contained in Paragraph 6 of the Complaint, Defendant craves reference to the terms and conditions of the Title Policy and denies any allegations inconsistent with those terms and conditions.

4. Defendant admits the allegations contained in Paragraphs 7 and 8 of the Complaint.

5. Defendant is without sufficient information or knowledge to form an opinion or belief as to the truth of allegations contained in Paragraph 9 of the Complaint and therefore denies them.

6. As to the allegations contained in Paragraph 10 of the Complaint, Defendant admits that at some point in time following the issuance of the Title Policy, The Evening Post Publishing Company owned the Subject Property, but denies any allegations that suggests that The Evening Post Publishing Company purchased the Subject Property from the entity that owned it at the time of the issuance of the Title Policy. The Defendant is without sufficient information or knowledge to form an opinion or belief as to the truth of the remaining allegations contained in Paragraph 10 and therefore, denies them.

7. As to the allegations contained in Paragraph 11 of the Complaint, the Defendant is without sufficient information or knowledge to form an opinion or belief as to the truth of the allegations and therefore denies them. Further responding to the allegations contained in Paragraph 11, the Defendant alleges that the Plaintiff does not know if the failure of the Mortgage to encumber the Subject Property will prevent it from recovery in full on the Note secured by the Mortgage and that the Plaintiff will not know the affect of the failure of the Mortgage to encumber the Subject Property until the Plaintiff has completed foreclosure of all real property secured by the Mortgage.

8. Defendant denies the allegations contained in Paragraph 12 of the Complaint.

9. As to the allegations contained in Paragraph 13 of the Complaint, the Defendant admits that the Plaintiff has submitted a claim to it on the Title Policy for damages, and that it has not paid the claim. Further responding to the allegations of

Paragraph 13, the Defendant specifically provides that it denied the Plaintiff's claim by letter attached to this Answer as Exhibit A.

10. Defendant denies the allegations contained in Paragraphs 14 and 15 of the Complaint.

FOR A SECOND DEFENSE TO ALL CAUSES OF ACTION

11. Defendant reiterates its responses to all preceding paragraphs and incorporates them herein as if fully set forth verbatim.

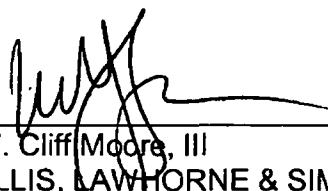
12. The Plaintiff fails to state facts sufficient to constitute a cause of action.

FOR A THIRD DEFENSE TO ALL CAUSES OF ACTION

13. Defendant reiterates its responses to all preceding paragraphs and incorporates them herein as if fully set forth verbatim.

14. The Plaintiff has failed to comply with conditions precedent to the recovery requested on the Title Policy.

WHEREFORE, having fully responded to the Plaintiff's Complaint, the Defendant prays that the Court inquire into the matters alleged and deny the Plaintiff's Complaint with costs taxed to the Plaintiff.



W. Cliff Moore, III
ELLIS, LAWHORNE & SIMS, P.A.
1501 Main Street, 5th Floor
Columbia, SC 29201
(803) 254-4190
cmoore@ellislawhorne.com

Attorneys for First American Title
Insurance Company

November 25, 2009
Columbia, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	Case No: 2009-CP-10-4475
	)	
Preservation Capital Consultants, LLC,	)	
	)	
Plaintiff,	)	CERTIFICATE OF SERVICE
	)	
v.	)	
	)	
First American Title Insurance Company,	)	
	)	
Defendant.	)	

The undersigned does certify that on November 25, 2009, that she did cause to have served by U.S. Postal Service, first class, postage prepaid, a copy of the Defendant First American Title Insurance Company's Answer, to the following:

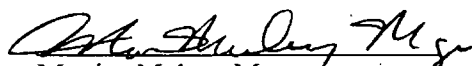
James W. Sheedy
 Driscoll Sheedy, P.A.
 222 E Main St
 Rock Hill, SC 29730-4542

BY _____

JULIE J. ARMSTRONG
 CLERK OF COURT

2009 NOV 30 PM 2:35

FILED


 Monica Mulvey Mcgee
 Paralegal

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Preservation Capital Consultants, LLC.,

Plaintiff,

v.

First American Title Insurance Company,

Defendant.

IN THE COURT OF COMMONS PLEAS

CASE NO: 2009-CP-10-4475

AMENDED ANSWER OF FIRST
AMERICAN TITLE INSURANCE
COMPANY

2011 JAN 11 PM 2:20
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

RECEIVED
JAN 13 2011
168-00104

The Defendant, First American Title Insurance Company, answering the Complaint of the Plaintiff would show this Honorable Court the following:

FOR FIRST DEFENSE TO ALL CAUSES OF ACTION

1. Defendant is without sufficient information or knowledge to form an opinion or belief as to the truth of allegations contained in Paragraph 1 of the Complaint and therefore denies them.

2. Defendant admits the allegations contained in Paragraphs 2, 3, 4 and 5 of the Complaint. Further responding to the allegations contained in Paragraphs 2, 3, 4 and 5, the Defendant alleges that the Subject Property is only a portion of the property secured by the Mortgage.

3. As to the allegations contained in Paragraph 6 of the Complaint, Defendant craves reference to the terms and conditions of the Title Policy and denies any allegations inconsistent with those terms and conditions.

4. Defendant admits the allegations contained in Paragraphs 7 and 8 of the Complaint.

5. Defendant is without sufficient information or knowledge to form an opinion or belief as to the truth of allegations contained in Paragraph 9 of the Complaint and therefore denies them.

6. As to the allegations contained in Paragraph 10 of the Complaint, Defendant admits that at some point in time following the issuance of the Title Policy, The Evening Post Publishing Company owned the Subject Property, but denies any

allegations that suggests that The Evening Post Publishing Company purchased the Subject Property from the entity that owned it at the time of the issuance of the Title Policy. The Defendant is without sufficient information or knowledge to form an opinion or belief as to the truth of the remaining allegations contained in Paragraph 10 and therefore, denies them.

7. As to the allegations contained in Paragraph 11 of the Complaint, the Defendant is without sufficient information or knowledge to form an opinion or belief as to the truth of the allegations and therefore denies them. Further responding to the allegations contained in Paragraph 11, the Defendant alleges that the Plaintiff does not know if the failure of the Mortgage to encumber the Subject Property will prevent it from recovery in full on the Note secured by the Mortgage and that the Plaintiff will not know the affect of the failure of the Mortgage to encumber the Subject Property until the Plaintiff has completed foreclosure of all real property secured by the Mortgage.

8. Defendant denies the allegations contained in Paragraph 12 of the Complaint.

9. As to the allegations contained in Paragraph 13 of the Complaint, the Defendant admits that the Plaintiff has submitted a claim to it on the Title Policy for damages, and that it has not paid the claim. Further responding to the allegations of Paragraph 13, the Defendant specifically provides that it denied the Plaintiff's claim by letter attached to this Answer as Exhibit A.

10. Defendant denies the allegations contained in Paragraphs 14 and 15 of the Complaint.

FOR A SECOND DEFENSE TO ALL CAUSES OF ACTION

11. Defendant reiterates its responses contained in all preceding paragraphs and incorporates them herein as if fully set forth verbatim.

12. The Plaintiff fails to state facts sufficient to constitute a cause of action.

FOR A THIRD DEFENSE TO ALL CAUSES OF ACTION

13. Defendant reiterates its responses contained in all preceding paragraphs and incorporates them herein as if fully set forth verbatim.

14. The Plaintiff has filed to comply with conditions precedent to the recovery requested on the Title Policy.

FOR A FOURTH DEFENSE TO ALL CAUSES OF ACTION

15. Defendant reiterates its responses contained in all preceding paragraphs and incorporates them herein as if fully set forth verbatim.

16. The Plaintiff has released the guarantors and debtors that were obligated on the debt secured by the insured Mortgage ("Release").

17. At the time of the Release the Plaintiff had knowledge of a claim or interest adverse to the title encumbered by the insured Mortgage.

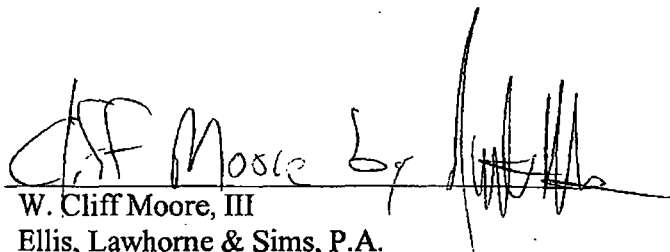
18. The Release was given without any notice to the Defendant.

19. The Release was given without the Defendant's consent.

20. The Plaintiff's conduct has impaired the Defendant's right of subrogation under the Title Policy.

21. The Plaintiff has violated the Conditions and Stipulations of the Title Policy and is therefore not entitled to recovery under the Title Policy.

WHEREFORE, having fully responded to the Plaintiff's Complaint, the Defendant prays that the Court inquire into the matters alleged and deny the Plaintiff's Complaint with costs taxed to the Plaintiff.



W. Cliff Moore, III
Ellis, Lawhorne & Sims, P.A.
1501 Main Street, Fifth Floor
Post Office Box 2285
Columbia, SC 29202
Phone: (803) 254-4190
Fax: (803) 779-4749
cmoore@ellislawhorne.com
*Attorney for Defendant, First American
Title Insurance Company*

January 7, 2011
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Preservation Capital Consultants, LLC.,

Plaintiff,

v.

First American Title Insurance Company,

Defendant.

IN THE COURT OF COMMONS PLEAS

CASE NO: 2009-CP-10-4475

JULIE J. ARMSTRONG
CLERK OF COURT

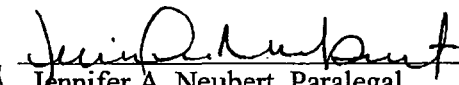
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FILED

CERTIFICATE OF SERVICE

The undersigned, of the law office of Ellis Lawhorne & Sims, P.A., does certify that on January 7, 2011, she did cause to have served by U.S. Postal Service, regular mail with postage prepaid and return address clearly indicated, and by electronic mail, copies of the Amended Answer of First American Title Insurance Company and this Certificate of Service to the following:

James W. Sheedy
Driscoll Sheedy, P.A.
22 E. Main Street, Suite 204
Rock Hill, SC 29730
jimsheedy@driscollsheedy.com
Attorney for the Plaintiff


Jennifer A. Neubert, Paralegal
Ellis, Lawhorne & Sims, P.A.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Preservation Capital Consultants, LLC,

☒ Plaintiff

v.

First American Title Insurance Company,

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

09-CP-10-4475

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:
James W. Sheedy, Esq., Bar No. 5052
Address:
Driscoll Sheedy, P.A.
11520 N. Community House Rd., Ste 200
Charlotte, NC 28277
phone: 704-341-2102 fax: 704-341-2105
e-mail: jimsheedy@driscollsheedy.com other:

Defendant's Attorney:
, Ba r No.
Address:

phone: fax:
e-mail: other:

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion for Summary Judgment

Estimated Time Needed: 30 mins Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

January 11, 2011

Date submitted

SECTION III: Motion Fee

- ☒ PAID - AMOUNT: 25.00
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON) IN THE COURT OF COMMON PLEAS

Preservation Capital Consultants, LLC,)
)
 Plaintiff,)
)
 vs.) C.A. No.: 09-CP-10-4475
)
First American Title Insurance Company,)
)
 Defendant.)
_____)

NOTICE OF AND MOTION FOR SUMMARY JUDGMENT

To: Defendant and its attorney, W. Cliff Moore, III, Esq.

PLEASE TAKE NOTICE that Plaintiff, through its undersigned counsel, hereby moves, pursuant to Rule 56(a), SCRCP, at such time and place as is convenient to the Court and counsel, but no later than prior to trial if this case proceeds to trial the week of January 10, 2011, otherwise no sooner than ten (10) days from the date of service of this Motion, for entry of an order granting it summary judgment against Defendant and awarding Plaintiff the relief requested in the Complaint, viz., title insurance coverage for its loss due to the incorrect title holder being set forth in the policy.

Plaintiff's predecessor made a loan to Monarch Development, LLC (Borrower) which was secured by a mortgage against, among other property, 635 King Street, Tax Map No. 460-08-02-012 (Property). Defendant issued a title policy insuring that the mortgage was a first lien against the Property. Plaintiff bought the loan. Afterwards, it was discovered that because Borrower did not own the Property, Plaintiff did not have an enforceable mortgage lien. Plaintiff foreclosed its mortgage against other property but the indebtedness has not been paid in full. This lawsuit is for

00095197.2

Plaintiff to recover its actual damages in the amount of the value of the lien purportedly granted against 635 King Street which Defendant insured.

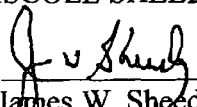
At first, Defendant denied coverage alleging Plaintiff had no loss until the foreclosure was complete. (§7, Answer). The foreclosure has been completed for ten months now and Plaintiff did not recover its debt in full from the foreclosure. Next, Defendant alleged that Plaintiff's release of loan guarantors and waiver of deficiency from Borrower impaired Defendant's subrogation rights under the title policy. (§§16-21, Amended Answer). It is indisputable from the depositions of guarantors (who were also members of Borrower) that Borrower and guarantors had nothing and plan to file for bankruptcy, so any judgments against them will be discharged. Then, Defendant has tried to say, by late second motion to amend its answer, that Plaintiff's credit bid at the foreclosure sale constituted payment eliminating the amount of insurance under the title policy. (§§ 23-25, proposed Second Amended Answer). This defense too is unavailing, in that the title policy does not say what Defendant asserts, the policy insures for Plaintiff's loss until the indebtedness has been paid or the mortgage is satisfied, and no payment has been made to Plaintiff which terminates its risk in connection with the validity of title.

In support of this Motion, Plaintiff hereby provides for filing the foreclosure order and master's deed (**Tab A**), the transcripts of depositions of guarantors (**Tab B**), and the title policy which has been admitted for purposes of this case. (**Tab C**).

WHEREFORE, Plaintiff seeks entry of an order granting it summary judgment against Defendant awarding Plaintiff the relief requested in the Complaint, i.e., a judgment against Defendant in the amount of \$345,335.

Date: 1/11/11

DRISCOLL SHEEDY, P.A.

By: 

James W. Sheedy

Susan E. Driscoll

11520 N. Community House Road

Suite 200

Charlotte, N.C. 28277

Telephone - (704) 341-2101

Facsimile - (704) 341-2105

jimsheedy@driscollsheedy.com

sdriscoll@driscollsheedy.com

ATTORNEYS FOR PLAINTIFF

TAB A

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

PRESERVATION CAPITAL
CONSULTANTS, LLC,

Plaintiff,

vs.

MONARCH DEVELOPMENT, LLC,
ECKERD CORPORATION, CHARLES HUFF,
as Personal Representative of the Estate of
Richard C. Huff, Jr., MIDEAN, INC.,
CHARLESTON COUNTY, SECURITY BANK
OF NORTH FULTON, and COASTAL
MORTGAGE CO. OF SC,

Defendants.

IN THE COURT OF COMMON PLEAS

Case No. 2009-CP-10-406

**MASTER-IN-EQUITY'S ORDER AND
JUDGMENT OF FORECLOSURE AND
SALE**

FILED
2010 JAN 26 AM 8:59
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Pursuant to Rules 53 and 71, SCRPC, the above-entitled matter was referred to the undersigned to make appropriate findings of fact and conclusions or law with authority to enter a final judgment in the cause.

Pursuant to the said reference, a hearing was held and attended by the following persons:

Bruce Wallace – Attorney for Plaintiff

Keating Simons – Attorney for Defendant Charles Huff

Testimony was taken, which is reported herewith, and from the testimony and evidence, I hereby find, conclude and order as follows:

FINDINGS OF FACT

1. The Summons and Complaint were filed on January 23, 2009.
2. Service was made upon the Defendants in this action, as is shown by the proofs of service filed herein.

PCC-83

3. Answers were filed on behalf of Defendants Monarch Development, LLC, Charles Huff, as Personal Representative of the Estate of Richard C. Huff, Jr. and Security Bank of North Fulton. The remaining Defendants have failed to answer the Complaint herein, and their defaults are a matter of record.

4. The Defendants and all attorneys of record were notified of the date, time and place of the hearing in this matter.

5. Atlantic Carolina Retail, LLC loaned the sum of Three Million Seventy-Five Thousand and no/100 Dollars (\$3,075,000.00) to the Defendant Monarch Development, LLC ("Borrower") to purchase the subject property.

6. In consideration of the loan from Atlantic Carolina Retail, LLC, Borrower executed that certain Promissory Note dated December 30, 2004, in the principal amount of Three Million Seventy-Five Thousand and no/100 Dollars (\$3,075,000.00) in favor of Atlantic Carolina Retail, LLC. The terms and conditions of the Promissory Note are incorporated herein by reference (hereafter, the "Promissory Note").

7. To secure the indebtedness evidenced by the Promissory Note, Borrower, on or about December 31, 2004, made, executed and delivered to Atlantic Carolina Retail, LLC, that certain written mortgage whereby Borrower mortgaged the subject property. The Mortgage was recorded on February 10, 2005 with the RMC Office for Charleston County in Book L 525 at Page 414.

8. Thereafter, on or about January 1, 2005, the Promissory Note, Mortgage, and all other related loan documents were assigned for valuable consideration unto Plaintiff, by written Assignment of Mortgage dated as of January 1, 2005, and recorded in the RMC Office for Charleston County on October 18, 2005, in Book M558 at Page 596.

9. Thereafter, on or about December 11, 2006, the Promissory Note, Mortgage, and all other related loan documents were assigned for valuable consideration unto Textron Financial Corporation by written Assignment of Commercial Mortgage of Real Property and Security Agreement recorded in the RMC Office for Charleston County on October 1, 2007, in Book D-640, Page 713.

10. Thereafter, on or about July 24, 2007, the Promissory Note, Mortgage, and all other related loan documents were assigned for valuable consideration unto Plaintiff by written Assignment of Commercial Mortgage of Real Property and Security Agreement recorded in the RMC Office for Charleston County on October 1, 2007 in Book D-640, Page 717.

11. Thereafter, on or about July 26, 2007, the Promissory Note, Mortgage, and all other related loan documents were assigned for valuable consideration unto Gorham Savings Bank by written Assignment of Commercial Mortgage of Real Property and Security Agreement recorded in the RMC Office for Charleston County on October 1, 2007 in Book D-640, Page 721.

12. Thereafter, on or about November 10, 2008, the Promissory Note, Mortgage, and all other related loan documents were assigned for valuable consideration unto Plaintiff by written Assignment of Commercial Mortgage of Real Property and Security Agreement recorded in the RMC Office for Charleston County on January 21, 2009 in Book O-030, Page 658.

13. Plaintiff herein is the sole owner and holder of the Promissory Notes, Mortgage, and all other related loan documents pertaining to the subject loan.

14. The Promissory Note provided for a maturity date of December 30, 2006.

15. Prior to December 6, 2006, Borrower defaulted on the Promissory Note and Mortgage.

16. On or about December 6, 2006, Plaintiff and Borrower and James K. Price, John H. Paulson and Jiri Jilich entered into that certain written Allonge and Note Modification

Agreement which, in part, affirmed and ratified the indebtedness evidenced by the Promissory Note and Mortgage.

17. Pursuant to the Allonge and Note Modification Agreement, Borrower executed two amended Promissory Notes (the "Amended Promissory Notes").

18. Pursuant to the Allonge and Note Modification Agreement, Plaintiff extended the Maturity date of the indebtedness, as evidenced by the Promissory Note and Amended Promissory Notes and Mortgage, to February 1, 2008.

19. Borrower defaulted under the terms of the Promissory Note, Amended Promissory Notes, Allonge and Note Modification Agreement and Mortgage, by among other things, failing to pay the entire outstanding balance of the loan upon maturity on February 1, 2008.

20. Pursuant to a further written modification dated February 22, 2008, Plaintiff Borrower, and James K. Price, John H. Paulson and Jiri Jilich again extended the loan maturity date until September 15, 2008.

21. The obligations under the terms and conditions of the Promissory Note and Mortgage are in now default for, among other reasons, Borrower's failure to make monthly payments as required thereunder and Borrower's failure to pay the entire indebtedness upon maturity on September 15, 2008.

22. Borrower has been duly notified, in writing, of the outstanding defaults and given the right to cure said defaults.

23. Borrower has failed and refused to cure said defaults under the subject loan documents.

24. Defendant Charles Huff argued before the Court that the assignment of the Note and Mortgage to Preservation Capital Consultants, LLC was void as a conveyance to a fictitious entity. I have considered all of Mr. Huff's arguments and do not find them persuasive. I further

find that Preservation Capital Consulting, LLC is the sole holder of the Note and Mortgage and all related loan documents.

25. I hereby find and conclude that Plaintiff is entitled to foreclosure of its Mortgage.

26. In the loan documents, the Borrower agreed to pay all reasonable costs and expenses of collection including, but not limited to reasonable attorney fees. I find and conclude that the sum of Fifty-Seven Thousand Four Hundred Twenty-Nine and No/100 Dollars (\$57,429.00) is a reasonable amount to award Plaintiff's attorneys fees for services performed and anticipated to be performed until final adjudication of the within action, and that the sum of Two Thousand Two Hundred Fifty-Seven and 91/100 Dollars (\$2,257.91) is a reasonable amount to award as legal costs. In reaching this conclusion, I have carefully considered the nature, extent and difficulty of the legal services provided by Plaintiff's counsel in this commercial foreclosure action, the time and labor necessarily devoted by Plaintiff's counsel to the case, the professional standing of Plaintiff's counsel and his firm, the fees customarily charged in Charleston County for similar legal services, and the beneficial results obtained by Plaintiff's counsel in this matter.

27. The amount due and owing to Plaintiff on the aforesaid loan, with interest and other costs and expenses of collection, including attorney's fees, is as follows:

a. Principal as of December 16, 2009	\$2,701,077.40
b. Accrued Interest at the rate of 18% per annum as of December 16, 2009 (per diem of \$1,350.54)	\$622,287.07
c. Late Fees	\$26,688.17
d. Other (advancement of <i>ad valorem</i> taxes)	\$88,442.90
e. Other (advancement of appraisal fees)	\$9,000.00
e. Other	\$4,136.85
e. Attorney's Fees and Costs	\$59,686.91

PCC-87

TOTAL DEBT AS OF December 16, 2009

\$3,511,319.30

Interest for the period from December 16, 2009, through the date of this judgment at the rate of 18% per annum shall be added to the above stated Total Debt Secured by Mortgage to comprise the amount of the judgment debt entered herein, and interest after the date of judgment at the same rate shall be added to such judgment debt to comprise the amount of the debt through the date to which such interest is computed.

28. The Plaintiff has waived a deficiency judgment, such that the bidding shall close on the date of the sale.

CONCLUSIONS OF LAW

- A. Plaintiff should have judgment of foreclosure of its Mortgage.
- B. The subject property should be ordered sold at public auction after due advertisement.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That there is due to Plaintiff on the loan secured by the Mortgage set forth in the Complaint the sum of Three Million Five Hundred Eleven Thousand Three Hundred Nineteen and 30/100 Dollars (\$3,511,319.30) representing the "Total Debt Secured by Mortgage" due Plaintiff as set out in paragraph 27 hereinabove, together with interest at the rate of 18% per annum on the balance of principal from the aforesaid date to the date hereof.
2. The said amount due Plaintiff shall bear interest hereafter at the rate of 18% per annum.
3. That the party or parties liable for the aforesaid mortgage debt, shall, on or before the date of sale of the property hereinafter described, pay to Plaintiff or its attorneys the amount of the debt owed as aforesaid, together with the costs and disbursements of this action.

PCC-88

4. That on default of payment at or before the time herein indicated, the subject property described herein be sold by the undersigned Master-in-Equity, or his designee at public auction, at the Charleston County Courthouse, in the City of Charleston, County and State aforesaid, on some convenient sales day hereafter as set by the Court, on the following terms, that is to say:

- (a) FOR CASH: The undersigned Master-in-Equity will require a deposit of five percent (5%) on the amount of the bid, in cash or its equivalent, same to be applied on the purchase price only upon compliance with the bid, but in case of non-compliance within twenty (20) days same to be forfeited and applied to the costs and plaintiff's debt.
- (b) Interest on the balance of the bid shall be paid through the day of compliance at the rate of 18% per annum.
- (c) The sale shall be subject to taxes, assessments, existing easements, and easements and restrictions of record.
- (d) Purchaser to pay for deed stamps and cost of recording the deed.
- (e) That if Plaintiff is the successful bidder at said sale for a sum not exceeding the amount of costs, expenses and the indebtedness of Plaintiff in full, Plaintiff may pay to the undersigned Master-in-Equity only the amount of the costs and expenses, crediting the balance of the bid on its indebtedness.

5. As a deficiency judgment has been waived, the bidding shall close on the date of the sale.

6. That the undersigned Master-in-Equity will, by advertisement according to law, give notice of the time and place of such sale, and the terms thereof; and will execute to the purchaser or purchasers a deed to the property sold. Plaintiff or any other party to this action may become a purchaser at such sale, and if, upon such sale being made, the purchaser or purchasers should fail to comply with the terms thereof within twenty (20) days after date of sale, then the undersigned Master-in-Equity may advertise the said property for sale on the next or some other subsequent sales day, as set by the Court, at the risk of the former highest bidder, and so from time to time thereafter until a full compliance shall be secured.

7. That the undersigned Master-in-Equity shall apply the proceeds of the sales of the properties as follows:

FIRST: To payment of the amount of costs and expenses of this action:

NEXT: To the payment to Plaintiff or its attorney of the amount of debt owed to plaintiff and interest, so much thereof as the purchase money will pay on the same; and

NEXT: Any surplus should be held pending further Order of this Court.

8. That Defendants named herein and all persons whosoever claiming under the Defendants be forever barred and foreclosed of all right, title, interest and equity of redemption in the subject property, or any part thereof.

9. That the deed(s) of conveyance made pursuant to said sale shall contain the names of only Plaintiff, the defendant who was the title holder of the property at the time of the filing of the Lis Pendens, and the grantee; and the RMC is authorized to omit from the indices pertaining to such conveyance the names of all parties not contained in said deeds.

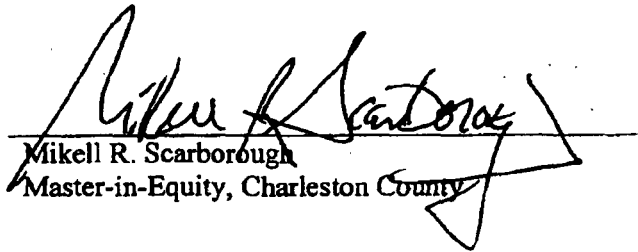
10. That the undersigned Master-in-Equity will retain jurisdiction to do all necessary acts incident to this foreclosure and to hear any post-judgment matters, including but not limited to the issuance of a Writ of Assistance.

11. A description of the subject property encumbered by the Mortgage and herein ordered to be sold is attached hereto as Exhibit "A".

AND IT IS SO ORDERED.

~~October~~, 2009

JAN 21, 2010


Mikell R. Scarborough
Master-in-Equity, Charleston County

PCC-90

EXHIBIT "A"
Property Description

All that piece, parcel or tract of land lying and being in Charleston County, South Carolina being more particularly designated as Residual Tract and more fully described as Residual Tract (17.62 Acres) as shown on a plat entitled "Plat Showing the Subdivision of TMS No. 469-06-00-001 (containing 19.08 acres into Tract "A" (1.46 acres) and Residual Tract (17.62 acres) and showing a Parking Easement (containing 1.23 acres) owned by Atlantic Carolina Retail, LLC" prepared by Hoffman Lester Associates, Inc., dated November 2, 2001, and recorded December 19, 2001 in Plat Book EF, Page 247 in the RMC Office for Charleston County, reference to aforesaid plat being craved for a more complete description.

Being the same property conveyed to Monarch Development, LLC by Deed of Atlantic Carolina Retail, LLC dated December 29, 2004 recorded simultaneously herewith in the RMC office for Charleston County, South Carolina.

TMS No. 469-06-00-001
TMS No. 469-006-00-102

PCC-91

TOGETHER with all and singular the hereditaments, rights, members, and appurtenances whatsoever to the said property belonging or in any wise incident or appertaining, and the reversions and remainders, rents, issues, and profits thereof, and also any estate, right, title, interest, dower, possession, benefit, claim, or demand therein whatsoever of all parties to the said suit and of all other persons who might rightfully claim the same or any part thereof, by, from, or under them, or either of them;

TO HAVE AND TO HOLD the said property, with its hereditaments, privileges, and appurtenances, unto the said grantee, his/her/its/their heirs/successors and assigns for their own use, benefit, and behoof, forever.

IN WITNESS WHEREOF, I, the undersigned, as Master in Equity for Charleston County, under and by virtue of the said order(s), have hereunto set my Hand and Seal the 26 day of March, in the year of our Lord two thousand ten, and in the two hundred and thirty-third year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED, AND DELIVERED)
in the Presence of:)

Janette Weathers
Witness

Janey E. Dineen
Witness

Mikell R. Scarborough (L.S.)
Mikell R. Scarborough, Master in Equity
for Charleston County

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

I, Janey E. Dineen, do hereby certify that Mikell R. Scarborough, as Master in Equity for Charleston County, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this the 25 day of March, 2010.

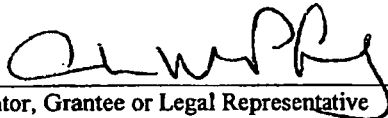
Janey E. Dineen
Notary Public for South Carolina
My commission expires: 10-30-2011

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

AFFIDAVIT

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this affidavit and I understand such information.
2. The property transferred BY MASTER IN EQUITY FOR CHARLESTON
TO ATLANTIC CAROLINA RETAIL, LLC ON MARCH 25 2010
3. Check one of the following: The DEED is
 - (a) _____ subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
 - (b) _____ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.
 - (c) ☒ EXEMPT from the deed recording fee because (exemption # 13)
(Explanation if required) Deed pursuant to foreclosure
(If exempt, please skip items 4-6, and go to item 7 of this affidavit)
4. Check one of the following if either item 3(a) or 3(b) above has been checked.
 - (a) _____ The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of \$ _____.
 - (b) _____ The fee is computed on the fair market value of the realty which is \$ _____.
 - (c) _____ The fee is computed on the fair market value of the realty as established for property tax purposes which is \$ _____.
5. Check YES _____ or NO ☒ to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "YES", the amount of the outstanding balance of this lien or encumbrance is \$ _____.
6. The DEED Recording Fee is computed as follows:
 - (a) _____ the amount listed in item 4 above
 - (b) _____ the amount listed in item 5 above (no amount place zero)
 - (c) _____ Subtract Line 6(b) from Line 6(a) and place the result
7. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as : _____.
8. I understand that a person required to furnish this affidavit who wilfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.



Grantor, Grantee or Legal Representative
Connected with this Transaction

CHAUN W. PFLUGH, ESQ.

Print or Type Name Here

SWORN to Before Me this 29th
day of March, 2010
Phyllis D. Pennell
Notary Public for S.C.
My Commission Expires: 1/20/2014

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

Preservation Capital Consultants, LLC,)

Plaintiff,)

vs.)

First American Title Insurance Company,)

Defendant.)

AFFIDAVIT OF HANLEY

C.A. No.: 09-CP-10-4475

BEFORE ME personally appeared James M. Hanley who, being duly sworn,
deposes and says that:

1. He is employed as the Chief Executive Officer of Preservation Capital Consultants, LLC (Plaintiff) and as such is familiar with the Mortgage and Title Policy (each as defined in the Complaint).

2. Plaintiff brought the foreclosure action C.A. No.: 09-CP-10-406 in the Court of Common Pleas, Charleston County against certain of the property secured by the lien of the Mortgage known as the Shopping Center Parcel (Foreclosure Action).

3. A Master-in-Equity's Order and Judgment of Foreclosure and Sale was entered in the Foreclosure Action, which scheduled the judicial sale of the Shopping Center Parcel.

4. The judicial sale of the Shopping Center Parcel was held on March 1, 2010, at which time the indebtedness owed to Plaintiff was \$3,614,190, with interest accruing at 18 percent per annum.

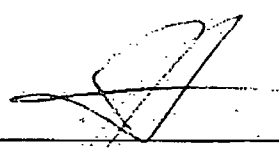
5. Plaintiff entered a credit bid of \$3,250,000, which, as of March 1, 2010, left \$391,190 due and owing, with interest accruing thereon at the per diem rate of \$192.92; so the amount due as of January 14, 2011 is \$452,731.48.

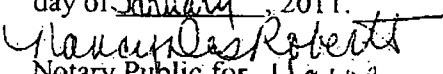
6. Plaintiff has not received any payments on the remainder of the indebtedness and, as of the date of this affidavit, the indebtedness remains due and owing with interest continuing to accrue thereon at \$192.92 per diem until payment is received.

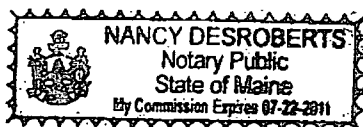
7. When 635 King Street under the lien of the Mortgage, also insured by the Title Policy, was sold on August 9, 2006, without payment to Plaintiff, it is believed to have had a value of \$590,000 based on an appraisal dated December 27, 2006, obtained by Plaintiff.

8. Plaintiff has no information to dispute Defendant's contention that the payoff of the first mortgage against 635 King Street on August 9, 2006, was \$244,665, in which event the liability of Defendant under the Title Policy would be \$345,335.

9. On its First Cause of Action in its Complaint, Plaintiff is seeking entry of judgment against Defendant in the amount of \$345,335.


James M. Hanley
Chief Executive Officer
Preservation Capital Consultants

Sworn to before me this 13th
day of January, 2011.

Nancy Desroberts
Notary Public for Maine
My Commission Expires: 7/22/2011



STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Preservation Capital Consultants, LLC,

Plaintiff,

v.

First American Title Insurance Company,

Defendant.

IN THE COURT OF COMMONS PLEAS

C.A. NO: 2009-CP-10-4475

2011 JAN 18 AM 10:56
JULIE J. ARMSTRONG
CLERK OF COURT
BY

FILED

**DEFENDANT'S MEMORANDUM IN
RESPONSE TO PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

This Memorandum is filed by the Defendant First American Title Insurance Company ("First American") in response to the Plaintiff's Motion for Summary Judgment. First American agrees that there is no genuine issue as to any material fact. However it does not believe that the Plaintiff is entitled to judgment as a matter of law. Rather, First American believes that it is entitled to entry of judgment as a matter of law.

The Plaintiff's Motion suggests a dilatory First American intent on continuously advancing spurious defenses to coverage on a title insurance policy. In fact, this is a case of an insured filing a premature claim and hindering the insurance company's right to thoroughly investigate. Despite this inappropriate conduct on the part of the Plaintiff, First American identified provisions of the policy that clearly provide that the Plaintiff is not entitled to any payment under the policy.

FACTUAL BACKGROUND

With the exception of the choice of certain adjectives, the Plaintiff's Motion correctly provides the history of the Plaintiff's claim against First American. First American issued a single title policy to the Plaintiff's predecessor assuring the priority of mortgage liens on three separate parcels – the "St. Phillip's Street Parcel", the "King Street Parcel" and the "Shopping Center Parcel". All three mortgages provided collateral for a single debt. The Plaintiff discovered that its mortgagor did not own the King Street Parcel and filed a claim on the title insurance policy. At the time of the claim, the Plaintiff had not completed foreclosure on all of its collateral. So, First American

advised that the claim was not ripe in that the Plaintiff could not established a loss until it had exhausted all of its collateral.

The Plaintiff completed foreclosure in March 2010 and resubmitted its claim. At this point First American discovered that the Plaintiff had waived deficiency in the foreclosure. It later learned that the Plaintiff had also released the debt guarantors. To the extent that First American's subrogation rights were compromised, the Plaintiff had compromised its coverage under the policy. Therefore First American engaged in discovery to determine the extent that its subrogation rights were compromised by the Plaintiff's conduct. The parties completed discovery on this point on December 17, 2010.

Following the completion of the discovery, First American reviewed the claim and the litigation to determine what, if anything, should be paid to the Plaintiff on that claim. During this review, the matter was called for trial. The review process continued after the roster meeting setting the matter for trial and First American determined that coverage under the policy had been reduced to nothing because of the extent of the Plaintiff's recovery on its debt. First American promptly moved to have its Answer amended to assure that the defense was asserted and that the Plaintiff knew of its assertion.

ARGUMENT

1. The Plaintiff's claim on the Title Insurance Policy was Premature.

On January 28, 2009 the Plaintiff filed its claim with First American on the King Street Parcel.¹ At the time of the submission of the claim, the Plaintiff had released its lien on the St. Phillip's Street Property and the foreclosure on the Shopping Center action had been filed 5 days prior.² On April 28, 2009³, First American advised the insured that it had not provided proof of loss or damage as required by the policy and that the Plaintiff

¹ Exhibit 1, Letter from M. Jeffrey Vinzani to Susan Davis Stewart dated January 28, 2009, produced by the Plaintiff as documents numbered PCC278-PCC279.

² Exhibit 2, Master's Report and Order of Foreclosure and Sale filed January 26, 2010, paragraph 1 of the Findings of Fact

³ Exhibit 3, Letter from W. Cliff Moore, III to M. Jeffrey Vinzani dated April 28, 2009, produced by the Plaintiff as documents numbered PCC148-PCC150.

needed to complete its foreclosure of the Shopping Center Parcel before it could offer such proof of loss or damage. Pursuant to the terms of the Title Policy, First American reasoned that if the insured was able to recover its debt from the unimpaired collateral there would be no loss.

Since the Plaintiff could not establish a loss until it completed the foreclosure, the claim was premature. *First Commerce Realty, Inc. v. Peninsular Title Ins. Co.*, 355 So. 2d 510 (Fla. Dist. Ct. App. 1978); *see also Green v. Evesham Corp.* 179 N.J.Super. 105, 430 A.2d 944, 946 (N.J.Super.A.D., 1981) (noting “requiring the insurer to pay now for the cost of removing the lien merely creates the conditions for a windfall should the debt be repaid or should the remaining lands provide sufficient security for payment”). Accordingly, the claim was not ripe until the Plaintiff completed the foreclosure on the Shopping Center Parcel on March 25, 2010.⁴

2. The Plaintiff Filed this Action Before its Cause of Action had Accrued.

Despite the fact that its claim had not matured, the Plaintiff filed this breach of contract claim against First American on July 20, 2009 – eight (8) months before it completed its foreclosure action. First American accepted service of the Complaint on November 3, 2009 and filed an Answer on November 25, 2009 alleging, among other things, that the Plaintiff failed to state facts sufficient to constitute a cause of action and that the breach of contract action was premature.

3. The Plaintiff has Withheld Information from First American that has Hindered its Ability to Assess and Analyze the Claim.

a. Foreclosure.

The Plaintiff did not apprise First American of the status of the foreclosure of the Shopping Center Tract. When First American requested critical information on the foreclosure, the Plaintiff refused to provide it.⁵ Because of this refusal to share

⁴ Exhibit 4, Master’s Deed dated March 10, 2010, produced by the Plaintiff as Documents numbered PCC-293 to PCC-295.

⁵ See Exhibit 5 which is an e mail chain between counsel for First American and counsel for the Plaintiff in which the Plaintiff refused to provide First American with foreclosure

information, First American did not learn that the Plaintiff waived the right to a deficiency judgment against the mortgagor until after the foreclosure deed had been issued.

b. Discovery

First American served its initial discovery requests on February 24, 2010.⁶ Because the foreclosure on the Shopping Center Parcel was not complete, First American did not demand timely responses. On July 23, 2010 Driscoll Sheedy, P.A. filed a Motion to Be Relieved as Plaintiff's Counsel and Benjamin Goldberg advised First American that he had been retained to represent the Plaintiff. When Mr. Goldberg learned that the case was to be called for trial during the week of August 23, he secured the consent of First American to a continuance until November, 2010. In his letter dated August 11, 2010, Mr. Goldberg advised the court that "we will work out the details voluntarily relative to discovery, amendments, motions, mediation and any other matters which may come up."⁷ He submitted this in lieu of a scheduling order.

Mr. Goldberg advised First American that he would like to engage in informal discovery and represented that he would provide to First American all of the documents that he had been provided in lieu of specifically responding to outstanding discovery requests. Mr. Goldberg produced an appraisal of the Shopping Center Parcel,⁸ an appraisal of the King Street Parcel, and copies of the pleadings from the foreclosure action, and indicated this was his complete file. First American produced 250 documents to Mr. Goldberg as part of this agreement, even though the Plaintiff had not filed any discovery requests.

The parties engaged mediation on October 11, 2010. During mediation, the Plaintiff first produced to First American a release executed by guarantors of the mortgage loan. References in the release revealed that the Plaintiff had also filed an

bidding information, produced by the Plaintiff as documents numbered PCC445-PCC446.

⁶ Exhibit 11.

⁷ Exhibit 6.

⁸ The Appraisal is attached as Exhibit 7. While it was part of the informal discovery, it was not bates numbered and was not produced by the Plaintiff in their formal discovery responses.

action against the mortgage debt guarantors in federal court on January 26, 2009.⁹ That action was settled and the Plaintiff released the guarantors.

The release of the guarantors is important to First American's coverage assessment. Paragraph 12(b) of the Policy¹⁰ provides

12. SUBROGATION UPON PAYMENT OR SETTLEMENT

(b) The Insured's Rights and Limitations

Notwithstanding the foregoing, the owner of the indebtedness secured by the insured mortgage, provided the priority of the lien of the insured mortgage or its enforceability is not affected, may release or substitute the personal liability of any debtor or guarantor or extend or otherwise modify the terms of payment, or release a portion of the estate or interest from the lien of the insured mortgage, or release any collateral security for the indebtedness.

When the permitted acts of the insured claimant occur and the insured has knowledge of any claim of title or interest adverse to the title to the estate or interest or the priority or enforceability of the lien of the insured mortgage, as insured, the Company shall be required to pay only that part of any losses insured against by this policy which shall exceed the amount, if any, lost to the Company by reason of the impairment by the insured claimant of the Company's right of subrogation. (emphasis added)

By waiving the right to pursue the guarantors, the Plaintiff compromised First American's subrogation rights and, according to the cited provisions of the policy, compromised their coverage to the extent that First American's subrogation rights were impaired. By withholding this information from First American until the mediation, the Plaintiff delayed First American in its efforts to assess the claim.

The matter did not resolve in mediation and First American demanded formal responses to discovery requests. At this point, First American was advised that Mr. Goldberg had only been involved as counsel for mediation only and that Driscoll Sheedy, P.A. would resume as Plaintiff's counsel.¹¹

⁹ *Preservation Capital Consultants, LLC v. James K. Price, John S. Paulson, and Jiri Jilich*, C/A No. 2:09-0184-MBS

¹⁰ The Title Insurance Policy is attached to the Plaintiffs Motion as Tab C.

¹¹ Exhibit 8, Letter from Benjamin Goldberg to Ellis, Lawhorne & Sims, P.A. dated November 4, 2010

On November 4, 2010, Driscoll Sheedy, P.A. finally responded to First American's discovery requests, but did not produce documents. On November 11, 2010 Driscoll Sheedy, P.A. produced a Privilege Log and 466 documents – PCC1 – PCC466. These documents included another Settlement Agreement. This one was between the Plaintiff and the mortgagor dated August 4, 2009 and had never been produced to First American.¹² On December 6, 2010, Plaintiff produced an additional 141 documents – PCC821 – PCC962. Finally on December 14, 2010, Plaintiff produced a Second Privilege Log.

On November 12, 2010, First American noticed the depositions of the guarantors and conducted them on December 16, 2010.

First American has taken the Court on this journey through discovery in this case to demonstrate that it has diligently pursued the investigation of this claim, but those efforts were thwarted by the Plaintiff. Because of the delays caused by the failure of the Plaintiff to timely and completely respond to discovery, First American was unable to complete its investigation into the claim until less than a month from when the case was called to trial. These facts directly contradict the suggestion made by the Plaintiff in its Summary Judgment Motion that First American is unnecessarily, and in bad faith, delaying this matter.

A title insurance company is allowed reasonable time to investigate a claim on a title insurance policy. *First Federal v. Stewart Title*, 317 S.C. 131, 451 S.E.2d 916 (Ct.App. 1995); *Agerton v. National Council*, 11 S.C. 492, 188 S.E. 185 (1936). The Plaintiff did not have full disclosure until it completed the depositions of the guarantors on December 16, 2010. One (1) month is well within the bounds of a reasonable time to investigate and address a claim after complete disclosure. *See, First Federal*, holding that four (4) months is a reasonable time.

4. The Plaintiff is Not Entitled to Payment on its Claim.

The Deed issued by the Master in Equity in the Shopping Center Tract foreclosure action indicates that the bid amount at the foreclosure sale was \$3,250,000.00. That Deed

¹² Exhibit 9 produced by the Plaintiff as document numbered PCC179.

indicates that amount was “paid by the hereinafter named grantee.” The “hereinafter named grantee” is identified as Atlantic Carolina Retail, LLC.¹³

In its Summary Judgment Motion, the Plaintiff demands that judgment be entered against First American in the amount of \$345,335.00. That amount is established by taking the lesser of the deficiency after foreclosure sale (\$383,486.30) and the net equity available at the time of the Sale of the King Street Parcel (\$345,335.00). These calculations were made by the Plaintiff in its assessment of First American’s exposure on the title claim.¹⁴ These calculations use the foreclosure sales proceeds of \$3,250,000.00 to reduce the debt and yield the deficiency. This is in line with the appraisal preformed for the Plaintiff on October 14, 2009.¹⁵ The value offered in that appraisal was \$3,250,000.00.

These facts clearly demonstrate that the Plaintiff received \$3,250,000.00 in value from the foreclosure sale.

The Conditions and Stipulations of the title insurance policy¹⁶ clearly provide:

9. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY

(b) Payment in part by any person of the principal of the indebtedness, or any other obligation secured by the insured mortgage, or any voluntary partial satisfaction or release of the insured mortgage, to the extent of the payment, satisfaction or release, shall reduce the amount of insurance pro tanto. The amount of insurance may thereafter be increased by accruing interest and advances made to protect the lien of the insured mortgage and secured thereby, with interest thereon, provided in no event shall the amount of insurance be greater than the amount of insurance stated in Schedule A. (emphasis added)

The amount of insurance stated in Schedule A is \$3,075,000.00.¹⁷ It is clear that the amount of insurance will never be greater than that amount.

¹³ Exhibit 4. Atlantic Carolina Retail, LLC was not the Plaintiff in the foreclosure action but is believed to be a business related to the Plaintiff in the foreclosure action. Atlantic Carolina Retail, LLC originally sold the property to the mortgagor.

¹⁴ Exhibit 10, document produced by the Plaintiff numbered PCC152.

¹⁵ Exhibit 7.

¹⁶ Tab C, Plaintiff’s Motion for Summary Judgment

¹⁷ Tab C, Plaintiff’s Motion for Summary Judgment.

According to the cited policy provision, the amount of insurance was reduced by the payment that the Plaintiff received from the foreclosure sale - \$3,250,000.00. Since the amount of the payment is greater than the amount of insurance, the amount of insurance was reduced to \$0.00. As such the Plaintiff is not entitled to any recovery on the title insurance policy.

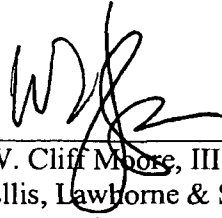
To reach this conclusion, the Court needs to only consider the policy and the foreclosure deed reciting the consideration paid by the purchaser at foreclosure sale. Simply put, the lender had coverage for \$3,075,000.00 and was paid \$3,250,000.00¹⁸ from the sale of the collateral, title to which was insured. There has been no loss under the policy. The Court should enter judgment for First American in this matter.

CONCLUSION

The Plaintiff purchased a title insurance policy from First American to assure its lien position on three parcels. The coverage purchased was \$3,075,000.00. Pursuant to the terms of the policy, payment made through the foreclosure sale reduced the coverage dollar-for-dollar. When the Plaintiff received \$3,250,000.00 from the foreclosure sale, its coverage was extinguished. There is nothing left on the title insurance policy from which the Plaintiff can recover and, as a matter of law, it is not entitled to the relief requested. There are no disputed material facts that would alter this conclusion. First American is entitled to have judgment entered in its favor and the case should be dismissed.

¹⁸ The Plaintiff was also paid \$250,000.00 to release the St. Phillip's Parcel from the mortgage which is not included in the stated \$3,250,000.00

Respectfully Submitted,



W. Cliff Moore, III
Ellis, Lawhorne & Sims, P.A.
1501 Main Street, Fifth Floor
Post Office Box 2285
Columbia, SC 29202
Phone: (803) 254-4190
Fax: (803) 779-4749
cmoore@ellislawhorne.com
*Attorney for the Defendant, First American
Title Insurance Company*

January 13, 2011
Columbia, South Carolina

NEXSEN|PRUET

M. Jeffrey Vinzani
Member
Admitted in SC

January 28, 2009

VIA UPS

Susan Davis Stewart, Esquire
First American Title Insurance Company
200 Center Pointe Circle, Suite 250
Columbia, SC 29210

Re: First American Title Insurance Company
Loan Policy No. FA-31-678957 (the "Policy")

Dear Susan:

We spoke recently regarding a title claim in connection with the above-referenced policy issued by the Evans Law Firm, LLC.

The Policy is in the amount of \$3,075,000 and the original insured is Atlantic Carolina Retail, LLC. A copy of the Policy is enclosed for your reference. The mortgage has since been assigned and is currently held by Preservation Capital Consultants, LLC ("PCC"). A copy of the mortgage and successive assignments to PCC are enclosed for reference. The mortgage and the amounts it secures remain outstanding and have NOT been satisfied or paid off. PCC has requested that we put you on notice of a title claim under the above-referenced policy because "Tract A" (635 and 637 King Street) is not titled in Monarch Development, LLC, and thus may not be subject to PCC's outstanding mortgage. PCC feels that it should be reimbursed for its losses, including attorney's fees and costs, in connection with the claim of title of Tract A in someone other than its Borrower, Monarch Development, LLC.

To better understand this title claim, I will be happy to send to you various materials for your review. The main information that you need to know at this point is that PCC's predecessor, Atlantic Carolina Retail, LLC, lent \$3,075,000 to the owner of Tract A, Monarch Development, LLC, on December 31, 2004, and a mortgage was recorded on February 10, 2005, in Book L-525, at page 414 in the RMC Office for

205 King Street
Suite 400 (29401)
PO Box 486
Charleston, SC 29402
www.nexsenpruet.com

T 843.720.1778
F 843.414.8221
E JVinzani@nexsenpruet.com
Nexsen Pruet, LLC
Attorneys and Counselors at Law



PCC-278

NPCHAR1 458943.1-LT-(MJV) 044120-00001

Susan Davis Stewart, Esquire
January 28, 2009
Page 2

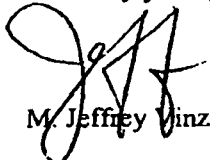
Charleston County, South Carolina ("RMC Office"). The lien of this mortgage is insured by the Policy. Subsequent to the loan closing and grant of the mortgage, Monarch Holding, LLC (not Monarch Development, LLC) conveyed Tract A to 635 King St., LLC by deed dated August 9, 2006 and recorded August 14, 2006 in Book O-594, at page 70 in the RMC Office. 635 King St., LLC is an affiliate of Monarch Holding, LLC and Monarch Development, LLC. Thereafter, 635 King St., LLC conveyed the property to Evening Post Publishing Company by deed dated December 27, 2006 and recorded December 28, 2006 in Book H-610, at page 135 in the RMC Office.

Recently, we were retained to begin work on a workout and/or foreclosure of the mortgage of PCC and various updates of title have been performed. It was at this time that PCC also contacted an appraiser to look at the value of the various real property encumbered by the mortgage, including Tract A. The appraiser discovered that Tract A was not titled in Monarch Development, LLC, and brought to my client's attention that the aforementioned transfers of Tract A had occurred. These transfers occurred without (i.) my client's knowledge (ii.) my client's express permission as required in the mortgage and loan documents; and most importantly, (iii.) without payoff of my client's loan. It is particularly disconcerting to see in the public records the transfer to Evening Post Publishing Company references consideration of \$4,900,000.00 and a closing occurring without payment to my client.

Our review of the title makes it clear that Tract A is not titled in Monarch Development, LLC and therefore the lien of the mortgage may not be effective against Tract A. We, therefore, feel that these facts substantiate the title claim under the Policy. Based on the foregoing facts and circumstances, this letter constitutes our client's official tender of claim under the policy. Please let us know what the next steps in the claims process are and what my client or I can do to assist in expediting the processing of the claim.

If you have any questions or comments or need additional information, please do not hesitate to contact me

Sincerely yours,



M. Jeffrey Vinzani

MJV/tj

PCC-279

ELLIS:LAWHORNE

W. CLIFF MOORE, III
803 212 4956
cmoore@ellislawhorne.com

April 28, 2009

Via e-mail and USPS
M. Jeffrey Vinzani
Nexsen Pruet
205 King Street, Suite 400
Charleston, SC 29401

Re: First American Title Insurance Company
Policy # FA-31-678957 (the "Policy")
Preservation Capital Consultants, LLC ("the "Insured")
635 and 637 King Street, Charleston, South Carolina (the "Property")
First American Claim #SC09-022
Our File No: 168-00104

Dear Jeff:

I have completed a review of documentation that you have provided as well as documentation that we gathered from other sources relating to the facts that are relevant to the claim that you filed on behalf of the Insured.

I believe that the relevant facts are:

1. Monarch Holdings, LLC ("Holdings") acquired the Property from Pearl Thomas on December 10, 2004 for \$300,000.00.
2. Monarch Development, LLC ("Development") executed a mortgage in favor of Atlantic Carolina Retail, LLC ("Atlantic") on December 31, 2004 in the amount of \$3,075,000.00 ("Insured Mortgage"). The mortgage purports to secure a lien on three parcels of real estate, including the Property.
3. First American Title Insurance Company ("First American") issued Policy FA-31 678957 on February 10, 2005 assuring, pursuant to stated terms, that Atlantic had a lien on the Property to secure a mortgage debt. The Policy lists a mortgage given by Holdings to First Palmetto Savings Bank dated November 11, 2004 ("First Palmetto Mortgage") as an exception to coverage.
4. The Property was never owned by Development.
5. On August 9, 2006 Holdings conveyed the Property to 635 King Street, LLC ("King Street"). The conveyance was subject to the First Palmetto Mortgage in the original amount of \$300,000.00.
6. On August 22, 2006, King Street paid the First Palmetto Mortgage and it was satisfied. The amount paid on the Palmetto Mortgage was \$244,665.00.



7. On August 14, 2006 King Street acquired Charleston County Tax Map Parcels 460-08-02-011, 460-08-02-013, 460-08-02-110, 460-08-02-112, and 460-08-02-113 ("Additional Property") from Joyce S. Murphy and Annie L. Steedly in consideration for the payment of \$3,500,000.00.

8. King Street combined the Property with the Additional Property and sold the combined parcels to Evening Post Publishing Company on December 27, 2006 for \$4,900,000.00. The attached tax maps show the Property highlighted in pink and the Additional Property highlighted in yellow.

9. Atlantic assigned the Insured Mortgage to the Insured.

10. The Insured released St. Phillip Street property from the lien of the Insured Mortgage for valuable consideration.

11. The Insured has filed a foreclosure action against Development to foreclose the lien of the Insured Mortgage on real property on Rivers Avenue. The foreclosure is pending.

These facts differ from the facts that the Insured presented in two material respects: (1) the Property did not sell for \$4,900,000.00 to the Evening Post Publishing Company (that was the consideration paid for the combined tract) and (2) Holdings conveyed the Property subject to a mortgage. These facts and the other stated facts are relevant to the amount of the Insured's claim at such point in time that a claim is ripe. An important factor in the determination of the amount of loss attributable to the identified title defect is the fair market value of the Property. The facts that have been presented do not provide an appropriate valuation. If the Insured's claim ripens, First American will secure an appropriate valuation.

Subject to the stated exclusions, exceptions, conditions and stipulations in the Policy, the Policy provides insurance

....against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the Insured by reason of:

1. Title to the estate or interest described in Schedule A being vested other than as stated therein.

Paragraph 5 of the Policy's Conditions and Stipulations requires a signed and sworn statement of proof of loss or damage that

....shall describe the defect in, or lien or encumbrance on the title, or other matter insured against by this policy which constitutes the basis of loss or damages and shall state, to the extent possible, the basis of calculating the amount of loss or damage.

The information that the Insured submitted to First American describes the defect on the title - title was vested in Holdings and not Development. However that information does not contain the basis for the calculation of the loss or damage. The Insured has pointed to the fact

M. Jeffrey Vinzani
April 28, 2009
Page 3

that the property was sold to a third party for funds that it believes would have been sufficient to pay the debt, but that conclusion does not take into account two important facts. First, it does not consider that the transfer of the Property from Holdings to King Street was subject to the First Palmetto Mortgage. Secondly, the fact that the consideration paid by the Evening Post Publishing Company was for several parcels, not just the Property.

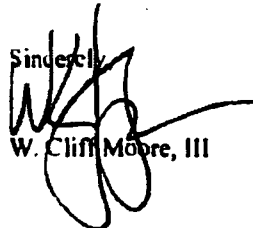
Even if the Insured had appropriately considered the First Palmetto Mortgage and adequately divided the Evening Post Publishing Company proceeds among the several parcels purchased, this matter does not appear to be ripe for a loss claim. While the value of the collateral for the Insured Mortgage may be impaired or diminished, there is collateral on which the Insured has initiated, but not completed, foreclosure. As long as the Insured is able to recover its debt from the remaining unimpaired collateral there is no actual loss and no claim. *See First Commerce Realty Inv. v. Peninsular Title Ins. Co.*, 355 So. 2d 510 (Fla. Dist. Ct. App. 1978). Based on what I have reviewed, it would appear that the Insured would only have a claim on the policy in the event that it was not paid in full from the foreclosure of the Rivers Avenue property. Therefore, until the foreclosure action is completed, the Insured can not establish a loss.

Therefore, it is First American's preliminary position that the Insured's claim is not covered and there is no duty to pay a claim of loss.

As always, any coverage decision by First American is based upon knowledge and information available to it at the time of its review. If you have any further or additional information that you believe would affect First American's decision, please provide me or First American with that information or documentation as soon as possible.

First American reserves all of its rights under the Policy and South Carolina law. By specifically referring to policy provisions, exclusions, and exceptions, First American does not waive its right to assert any additional policy terms, provisions, conditions, exclusions, or exceptions. Nothing in this letter is intended as or should be construed as a waiver of First American's rights.

Should you have any questions or comments, or if you would like to provide additional information or authority for First American to consider, please contact me.

Sincerely,

W. Cliff Moore, III

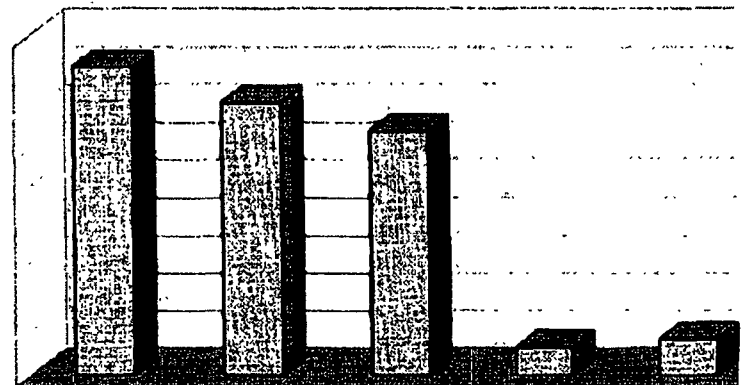
WCMIII/ltd
cc: J.H. Johnson, Esquire

PRESERVATION CAPITAL CONSULTANTS, LLC
VISUAL ANALYSIS OF TITLE CLAIM TIMELINE AND PARAMETERS
PREPARED 10/5/2010

Actual Deficiency Calculation

ss as of Foreclosure Sale	\$ 3,633,486.30	as of: 3/16/2010
Foreclosure Sale Price	\$ (3,250,000.00)	
Initial Deficiency	\$ 383,486.30	
Note Interest @ 18%	\$ 39,307.35	thru: 10/11/2010 205 days
Taxes	\$ 48,719.43	
Atty. Fees	\$ 21,089.31	
Expenses	\$ 72.43	
	<u>\$ 492,674.82</u>	Total

\$4,500,000.00
\$4,000,000.00
\$3,500,000.00
\$3,000,000.00
\$2,500,000.00
\$2,000,000.00
\$1,500,000.00
\$1,000,000.00
\$500,000.00
\$-



Expected Collateral Value Indebtedness as of Foreclosure Sale Actual Collateral Value Initial Deficiency Current Deficiency Due to Delay

Net Equity Available @ Time of Sale of King Street Collateral

Street FMV as of sale date	\$ 590,000.00
Payoff of Senior Debt	\$ (244,665.00)
	<u>\$ 345,335.00</u> Available Equity

Expected Deficiency @ Time of Release of Guarantors

Indebtedness	\$ 3,333,666.42	as of: 8/4/2009
Shipwatch Appraisal	\$ (3,750,000.00)	as of: 10/8/2008
	<u>\$ (416,333.58)</u>	Reasonably Expected Deficiency

Expected Collateral Value	\$ 4,095,335.00
Indebtedness as of Foreclosure Sale	\$ 3,633,486.30
Actual Collateral Value	\$ 3,250,000.00
Initial Deficiency	\$ 383,486.30
Current Deficiency Due to Delay	\$ 492,674.82



tabbies

10

EXHIBIT

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Preservation Capital Consultants, LLC.,

Plaintiff,

v.

First American Title Insurance Company,

Defendant.

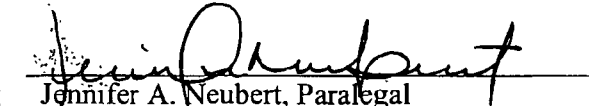
IN THE COURT OF COMMONS PLEAS

CASE NO: 2009-CP-10-4475

CERTIFICATE OF SERVICE

The undersigned, of the law office of Ellis Lawhorne & Sims, P.A., does certify that on January 13, 2011, she did cause to have served by U.S. Postal Service, regular mail with postage prepaid and return address clearly indicated, and by electronic mail, copies of the Defendant's Memorandum In Response to Plaintiff's Motion for Summary Judgment and this Certificate of Service to the following:

James W. Sheedy
Driscoll Sheedy, P.A.
22 E. Main Street, Suite 204
Rock Hill, SC 29730
Attorney for the Plaintiff.


Jennifer A. Neubert, Paralegal
Ellis, Lawhorne & Sims, P.A.

FILED
2011 JAN 18 AM 10:56
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

Preservation Capital Consultants, LLC,)

Plaintiff,)

vs.)

First American Title Insurance Company,)

Defendant.)

C.A. No.: 09-CP-10-4475

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2011 JAN 18 AM 11:23

FILED

**PLAINTIFF'S MEMORANDUM IN SUPPORT
OF ITS MOTION FOR SUMMARY JUDGMENT**

In support of its Motion for Summary Judgment (Motion), Plaintiff respectfully submits the following. Unless otherwise defined herein, all capitalized terms shall have the meanings ascribed to them in the Complaint.

Undisputed Facts

Defendant issued a title insurance policy to Plaintiff's predecessor in interest, Atlantic Carolina Retail, LLC, insuring the lien of a mortgage (Title Policy). (See Tab A.) The mortgage secured a debt owed by Monarch Development, LLC (Borrower) to Atlantic. The face amount of the Title Policy is \$3,075,000.00. There were three parcels of property that secured the mortgage -- the St. Phillips Street Parcel, the King Street Parcel and the Shopping Center Parcel. There were not separate policies for each parcel.

The St. Phillips Street Parcel sold in 2008 and Borrower paid Plaintiff \$250,000.00 to release that parcel. As a result of Borrower's loan default, Plaintiff prepared a foreclosure action against the King Street Parcel and the Shopping Center Parcel, only to discover that, notwithstanding the Title

Policy, Borrower never owned the King Street Parcel. Instead, the King Street Parcel was owned by Monarch Holdings, LLC and was conveyed by Monarch Holdings without payment of any amount to Plaintiff. Upon discovery of this title defect, Plaintiff filed a title claim with Defendant in January 2009. On January 23, 2009, Plaintiff also commenced its foreclosure against the Shopping Center Parcel.

In April 2009, Defendant advised Plaintiff that, until completion of the foreclosure of the Shopping Center Parcel, Plaintiff would not have a loss under the Title Policy. As a result, Plaintiff moved forward with its foreclosure of the Shopping Center Parcel. The foreclosure action was completed on March 1, 2010, when the Shopping Center Parcel was disposed by judicial sale. Plaintiff entered a credit bid of \$3,250,000.00 and thereafter, received a master's deed for the Shopping Center Parcel. Afterwards, Plaintiff had an unpaid remaining debt as of March 1, 2010, of \$391,190 plus per diem interest of \$192.92.

During this same period, Plaintiff brought a federal action against the two loan guarantors, James Price and Jiri Jilich (collectively, Guarantors). Through the prosecution of that action, it became apparent to Plaintiff that neither of the Guarantors had any assets from which a judgment could be satisfied. This was further demonstrated through the depositions of Guarantors taken in connection with the above captioned action. As a result, in exchange for their consent to the entry of a foreclosure order against the Shopping Center Parcel, Plaintiff released both Guarantors from any personal liability on the indebtedness secured by the mortgage, and waived in the foreclosure action its deficiency against Borrower, which also had no assets.

Defendant does not dispute that it issued the Title Policy, the Policy insures the mortgage lien of Plaintiff against the King Street Parcel, the Shopping Center Parcel foreclosure is now complete, Plaintiff has an unpaid debt from that foreclosure of \$391,190 plus per diem interest of \$192.92, the Guarantors have been released and the deficiency against Borrower has been waived. Defendant may not dispute that Borrower and Guarantors are judgment proof, in which event Defendant's defense of impairment of its subrogation interest is without merit. That would leave Defendant with just one defense, i.e., payment (if the Court allows Defendant's late amendment to assert payment as a defense).

Discussion

I. Legal Standard

A. Summary Judgment

The standard for granting summary judgment is well-settled and set forth clearly in Rule 56, SCRCP.¹ A party may move with evidence for entry of summary judgment in its favor. *Id.* at (a). If the motion is supported as provided in the rule, summary judgment will be granted unless the

¹ Although the chances of attaining summary judgment seemed nearly insurmountable after *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009), where our Supreme Court held a nonmoving party only has to show a scintilla of evidence to defeat a motion for summary judgment, the cases since *Hancock* make clear the standard for granting summary judgment has not changed. *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 701 S.E.2d 742 (2010) (Court upheld grant of summary judgment in favor of law firm when plaintiff relied on deposition testimony which did not support a finding of breach of the standard of care.); *Lanier Construction Co., Inc. v. Bailey & Yobs, Inc.*, 384 S.C. 275, 681 S.E.2d 909 (Ct. App. 2009) (homeowner had no duty to warn a subcontractor of location of septic tank); *Bass v. Gopal, Inc.*, 384 S.C. 238, 680 S.E.2d 917 (Ct. App. 2009) (any scintilla must be probative; motel provided adequate exterior lightning and other exterior safety measures, so guest should have stayed in his room rather than answering the door after which he was shot by a stranger); *Weston v. Kim's Dollar Store*, 385 S.C. 520, 684 S.E.2d 769 (Ct. App. 2009) (in cases applying federal law, the nonmovant must show more than a mere scintilla); *Carolina Renewal, Inc. v. South Carolina Dept. Transp.*, 385 S.C. 550, 684 S.E.2d 779 (Ct. App. 2009) (collateral estoppel barred contractor's subsequent breach of contract claim asserting same damages adjudicated by its sole shareholder and officer in a prior slander action); and *Shirley's Iron Works, Inc. v. City of Union*, 2010 WL 530195 (Ct. App. 2010)(unpublished) (city had no liability to subcontractors and suppliers beyond balance of contract amount; only a scintilla is required if the burden is preponderance of the evidence).

adverse party offers into evidence specific facts showing that there is a genuine issue for trial. *Id.* at (e). Where there is no genuine issue as to any material fact, the moving party is entitled to a judgment as a matter of law. *Id.* at (c).

B. Contract Interpretation

“An insurance policy is a contract between the insured and the insurance company, and the terms of the policy are to be construed according to contract law.” *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 606, 663 S.E.2d 484, 487 (2008). Under contract law, “[t]o ascertain the intention of an instrument resort is first to be had to its language, and if such is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument.” *Superior Auto. Ins. Co. v. Maners*, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973), *cited in Super Duper Inc. v. Pennsylvania Nat. Mut. Cas. Ins. Co.*, 385 S.C. 201, 683 S.E.2d 792 (2009). “Whether the language of a contract is ambiguous is a question of law to be determined by the court from the terms of the contract as a whole.” *State Acc. Fund v. South Carolina Second Injury Fund*, 388 S.C. 67, 75, 693 S.E.2d 441, 445 (Ct. App. 2010). Extrinsic evidence will only be admitted after a finding that the written terms of the contract are ambiguous. *See Harris v. Ideal Solutions, Inc.*, 385 S.C. 74, 682 S.E.2d 523 (Ct. App. 2009). “Further, provisions in a policy which extend coverage to the insured must be construed liberally so as to afford coverage whenever possible by reasonable construction.” *State Auto Property & Casualty Insurance Co. v. Travelers Indemnity Co. of America*, 343 F.3d 249, 254 (4th Cir. 2003), *cited in Super Duper*, 385 S.C. at 208, 683 S.E.2d at 796. “Any ambiguous terms must be construed in favor of the insured.” *Super Duper*, 385 S.C. at 210, 683 S.E.2d at 796.

In this case, the Court is asked to construe plain, unambiguous language in a contract of insurance, which is a matter of law for the Court.

II. The release of Guarantors and the waiver of a deficiency judgment did not impair the subrogation rights of Defendant, because neither Guarantors nor Borrower have any assets.

A. Policy Language

The Title Policy states clearly that Defendant's right of subrogation does not arise until "the Company shall have settled and paid a claim". (Title Policy, ¶ 12(a).) At that time "all right of subrogation shall vest in the Company unaffected by any act of the insured claimant." (*Id.*) Further, under the Title Policy, Plaintiff has the right, "provided the lien of the insured mortgage or its enforceability is not affected, [to] release or substitute the personal liability of any debtor or guarantor, or extend or otherwise modify the terms of payment, or release a portion of the estate or interest from the lien of the insured mortgage." (*Id.*, ¶ 12(b).) When these "permitted acts" of the insured "occur and the insured has knowledge of any claim of title or interest adverse to the title to the estate or interest or the priority or enforceability of the lien of the insured mortgage, as insured, the Company shall be required to pay only that part of any losses insured against by this policy which shall exceed the amount, if any, lost to the Company by reason of the impairment by the insured claimant of the Company's right of subrogation." (*Id.* ¶ 12(b).)

B. Case Law Examining Subrogation Rights

In *Simmons v. South Carolina Farm Bureau Mut. Ins. Co.*, 301 S.C. 267, 391 S.E.2d 560 (1990), Simmons was injured in a traffic accident. He notified Farm Bureau of his claim for UIM benefits, which was denied. Simmons then proceeded to sue the driver who caused the accident. He

notified Farm Bureau of the suit and that any judgment against the other driver that was in excess of her coverage would result in an action against Farm Bureau for uninsured motorist benefits. Farm Bureau took no action. Judgment was awarded to Simmons against the driver for \$120,000. Simmons executed a covenant not to levy against the other driver in excess of her policy limit of \$15,000. Simmons then sued Farm Bureau for uninsured motorist coverage.

At issue was whether Farm Bureau's right to subrogation was destroyed by the execution of the covenant not to levy. The Court ruled that it would "not be equitable to permit Insurer to rely upon its right of subrogation after denying, repeatedly, any contractual obligations for UIM benefits." *Simmons*, 301 S.C. at 271, 391 S.E.2d at 562. An insurer, "cannot sit down and hold its hands and purse and thereafter escape liability for fulfillment of its contract by reason of the insured's effort, after fair notice, to recoup his loss by litigation against a wrongdoer." *Id.* at 270. *See also Powers v. Calvert Fire Ins. Co.*, 216 S.C. 309, 57 S.E.2d 638 (1950) ("Subrogation arises upon payment and, in default of that . . . the [subrogation] provision is not now available to appellant because of its conduct which amounted to a breach of the contract of insurance and resulted in a waiver of the right of subrogation.") In *Powers*, the insurance company repeatedly told the insured they would "take care of" his claim, but never paid. When the insured resolved his claim with the third party, the insurance company raised the defense of impairment of subrogation rights. The Court felt that the actions on the part of the insurer were inexcusable and not only was the defense of impairment unavailing, but the insurer's conduct resulted in an actual waiver of the right to subrogation.

C. Defendant's Right to Subrogation Was Not Impaired

The right to subrogation arises upon payment, both according to the Title Policy and the case law. In addition, an insurer cannot hamstring an insured from recovery by denying coverage and then denying payment for impairing insurer's subrogation rights when the insured settles with a third party. Plaintiff filed its claim with Defendant prior to Plaintiff's pursuit and eventual release of Guarantors and waiver of deficiency against Borrower. Defendant did not make any payment on Plaintiff's claim, nor has Defendant to date. Defendant consistently refused to make any payment to Plaintiff during the foreclosure and Plaintiff's pursuit of Guarantors. In an attempt to recoup a portion of its loss, Plaintiff resolved its claims against Guarantors and Borrower, since both were judgment proof. Defendant should not be able to refuse coverage and also prevent Plaintiff from settling its claims. This would result in Plaintiff sitting in limbo while Defendant withheld payment.

Further, the evidence in this case points to the fact that neither of the Guarantors had any assets against which a judgment could be enforced. Both Guarantors testified that they were, in fact, broke.

Q: Jamie, would it be fair to say you are broke?

A: Yes.

Q: Okay. Would it also be fair to say that you've been broke for a while now?

A: Over two years, yes.

(Depos. Tr. Price, J., p. 101.)

Q: Has there been a time since the last quarter of 2007 when you would describe yourself as not broke?

A: No.

(Depos. Tr., Price, J., p. 102.)

Q: Are you broke?

A: Yes.
Q: Have you been broke for awhile?
A: For the last couple years.
Q: Is it true there are a number of judgments against you?
A: Yes.
Q: Do you have the ability to pay those judgments?
A: No.

(Depos. Tr., Jilich, J., pp. 33-34.)

Defendant has not presented any evidence to contradict the testimony of either Guarantor that there were several judgments already entered against them. Nor has Defendant submitted any evidence that, even if these prior judgments were paid, Guarantors have assets from which to satisfy a judgment entered in favor of either Plaintiff or Defendant. Without presenting such evidence, Defendant has not shown how Plaintiff has eliminated Defendant's opportunity to recoup payment from Guarantors. No such opportunity existed and Plaintiff's release of Guarantors did not impact Defendant's subrogation rights. Defendants are headed into bankruptcy. (Depos. Tr. Price, J., pp. 37-38, 40, 75, 84, 102, 104-105, 119; Depos. Tr. Jilich, J., pp. 22, 29-30, 40-41.) And Borrower has no assets with which to satisfy any judgment. (Depos. Tr. Price, J., pp. 100-04.) Defendant had no subrogation opportunity for Plaintiff to impair.

III. There has been no "payment" of the indebtedness that would result in termination of the Title Policy.

A. Remaining Amount of Insurance Under the Title Policy

Paragraph 2(c) specifies what amount of insurance remains under the Title Policy after Plaintiff acquires title to a portion of the insured property through foreclosure. Specifically, that paragraph states that after acquisition, the amount of insurance shall be the lesser of "(i) the amount of insurance stated in Schedule A or (ii) the amount of principal of the indebtedness secured by the

insured mortgage as of the Date of the Policy, interest thereon, expenses of foreclosure, amounts advanced pursuant to the insured mortgage to assure compliance with laws or protect the lien of the insured mortgage prior to the time of acquisition of the estate or interest in land and secured thereby and reasonable amounts expended to prevent deterioration of improvements, but reduced by the amount of all payments made.” (Title Policy, ¶ 2(c)(i) and (ii).) Plaintiff agrees that ¶2(c)(ii) applies here, viz., its remaining unpaid debt or the sum of \$452,731.48 as of January 14, 2011,² which is obviously less than \$3,075,000, the amount of insurance stated in Schedule A. So, the amount of insurance after the foreclosure with interest to January 14th is \$452,731.48.

The Title Policy further provides in paragraph 9(b):

Payment in part by any person of the principal of the indebtedness, or any other obligation secured by the insured mortgage, or any voluntary partial satisfaction or release of the insured mortgage, to the extent of the payment, satisfaction or release, shall reduce the amount of insurance pro tanto. **The amount of insurance may thereafter be increased by accruing interest and advances made to protect the lien of the insured mortgage and secured thereby, with interest thereon,** provided in no event shall the amount of insurance be greater than the amount of insurance stated in Schedule A.

(Title Policy, ¶9(b).) (Emphasis added.)

This language yields the same amount of insurance, \$452,731.48, as the language in paragraph 2(c) of the Title Policy.³

² A more mathematical explanation of the remaining amount of insurance under paragraph 2(c)(ii) is as follows.
\$3,641,190 [adjudicated debt on 3.1.10]
\$(3,250,000) [credit bid, or reduced by payment]
\$391,190.00 [remaining indebtedness]
\$ 61,541.48 [accrued interest from 3.1 to 1.14.11) @ \$192.92 (per diem in judgment)
\$452,731.48 [remaining amount of insurance]

³ A more mathematical explanation of the remaining amount of insurance under paragraph 9(b) is as follows.
\$3,075,000 [amount of insurance stated in Schedule A]
\$(3,250,000) [credit bid, or reduced by payment]

Finally, paragraph 9(c) of the Policy provides that payment in full of the indebtedness “shall terminate all liability of the Company.” There is no dispute that Plaintiff has not been paid in full. Plaintiff entered a credit bid of \$3,250,000 at the March 1, 2010 foreclosure sale of *one* of the properties insured under the Policy. At the time Plaintiff submitted its credit bid, it was owed an adjudicated debt of \$3,641,190. So the credit bid submitted by Plaintiff did not result in a satisfaction of the debt owed to Plaintiff. After the credit bid, Plaintiff was still owed \$391,190, with interest accruing thereon at \$192.92 per diem until the date of judgment in this case, or \$452,731.48 as of January 14, 2011, with interest continuing to accrue at \$192.92 per diem.

B. Plaintiff’s Loss Due to the Title Defect

Plaintiff is entitled to be compensated by Defendant to the extent the title defect in the King Street Parcel caused a loss to Plaintiff in the collection of its remaining adjudicated unpaid debt. It is undisputed by Defendant that the value of the King Street Parcel was \$590,000. Nor does Defendant dispute that the value of the prior lien on the King Street Parcel was satisfied by payment of \$244,665. The deduction from the value of the King Street Parcel of the prior lien resulted in remaining equity of \$345,335 against which Plaintiff’s mortgage attached, which would have been available to pay down Plaintiff’s remaining indebtedness but for the defect in title. Plaintiff’s loss due to the title defect is \$345,335. Defendant is required to pay Plaintiff on its First Cause of Action the sum of \$345,335.

(\$175,000)

\$566,190 [Difference between judgment (\$3,641,190) and principal (\$3,075,000), since paragraph allows non-principal to be added]

\$391,190

\$61,541.48 [accrued interest from 3.1.10 to 1.14.11) @ \$192.92 (per diem in judgment)

\$452,731.48 [remaining amount of insurance]

Defendant took a premium in return for \$3,075,000 of insurance against any defect in title that would result in a loss to Plaintiff. Plaintiff agrees that it can never recover or receive more than \$3,075,000 from Defendant under the Title Policy itself and is not seeking to increase Defendant's exposure beyond the face amount of the Title Policy. But, Plaintiff disagrees that it has no compensable loss if its credit bid exceeds \$3,075,000. That position ignores the plain, unambiguous language of paragraphs 2(c) and 9(b), read together in a consistent way. The credit bid, when subtracted from the total indebtedness, yields the remaining insurance amount (plus continuing interest thereon). Within that amount, Defendant is liable to Plaintiff for \$345,335, because Defendant insured the lien of Plaintiff's mortgage against the King Street Parcel.

C. Applicable Law on Amount of Insurance and Assessment of Loss

Plaintiff's analysis of amount of insurance and assessment of loss is in accord with the decisional law of courts that have examined the issue of what loss is covered and when coverage is terminated. *See Lewis v. First American Title Ins. Co.*, 265 F.R.D. 536, 548-49 (D. Idaho 2010) ("Generally speaking, a policy of title insurance is a contract which, in exchange for a one-time premium payment, insures a lender against actual loss resulting from defects, liens or encumbrances against title existing as of the date the policy goes into effect." Title insurance is "designed to render the insured harmless from any loss through defects, liens or encumbrances that may affect or burden clear title. A "lender's policy remains in effect until the associated mortgage has been satisfied."); *Cale v. Transamerica Title Insurance*, 225 Cal. App. 3d 422 (Cal. App. 3 Dist. 1990), *quoting CMEI, Inc. v. American Title Ins. Co.*, 447 So. 2d 427 (Fl. App. 1984) (Emphasis added.) ("A mortgagee's loss is measured by the extent to which *the insured debt is not repaid* because the value

of security property is diminished or impaired by outstanding lien encumbrances or title defects covered by the title insurance.”); *Hodas v. First American Title Ins. Co.*, 696 A.2d 1095, 1097 (Me. 1997) (The “holder of a loan policy incurs a loss only if the security for the loan proves inadequate to pay off the underlying insured debt due to the presence of undisclosed defects.”); *Focus Inv. Associates, Inc. v. American Title Ins. Co.*, 992 F.2d 1231, 1237 (1st Cir. 1993)(“[W]hat is insured is the loss resulting from a defect in the security.”); *Blackhawk Production Credit Ass’n v. Chicago Title Ins. Co.*, 144 Wis. 2d 68, 79, 423 N.W.2d 521, 525 (1988)(“[M]ost of the cases in which the question has arisen have deemed a mortgagee’s loss to be the difference between the value of the mortgage subject to the defect and what its value would have been had the defect not existed, in other words, the extent to which his security has been impaired.”). *See also Trico Mortg. Co., Inv. v. Penn Title Ins. Co.*, 281 N.J. Super. 341, 657 A.2d 890 (1995) (“Paragraph 8 further states that payment in full by any person or voluntary satisfaction or release of the issued mortgage shall terminate all liability of the company. Obviously, the mortgage was not paid in full, voluntarily satisfied or released. The [life] insurance proceeds did not represent a full payment, therefore, the insurance proceeds could not have satisfied or released the mortgage.”).

C. Payment in full, not a partial credit bid, is required to terminate Defendant’s liability under the Policy.

At least one court has examined language substantially similar to that contained in this Title Policy. In *Paramount Properties Co. v. Transamerica Title Ins. Co.*, 1 Cal 3d 562, 463 P.2d 746 (1970), the Court reviewed what was intended by the words “payment in full by any person . . . of a mortgage covered by this policy shall terminate all liability of the Company to the insured.” The Court reasoned as follows.

In procuring title insurance, a lender seeks to insure himself against the risk that a defect in the underlying title may invalidate his lien and leave him in the status of an unsecured creditor. That risk continues so long as the lender does not receive final and unconditional payment of the loan proceeds. The termination clause of paragraph 7(d) gives no indication of any intention to cut short coverage while the insured's primary risk survived; more reasonably, the provision should be interpreted as designed to reflect the conditions which represent a curtailment of this risk. Once the insured no longer has any interest in the validity of the title, paragraph 7(d) provides that the liability of the insurer ceases. If 'full payment' is interpreted to apply to a payment which does not eliminate the insured's risk, then the provision irrationally ties the termination of the policy to an arbitrary and fortuitous occurrence. We do not think such an interpretation is in accord with the reasonable expectations of the parties."

Id. at 568.

As a result, the Court ruled that full payment of the indebtedness that a borrower claimed was made under duress did not constitute a "payment" under the policy. "Thus, even under generally applicable rules of contract interpretation, we conclude that in light of the reasonable expectations of the parties the term 'payment' must reasonably be construed to encompass only final or unconditional payments, i.e., payments which in fact terminate the insured's risk connected with the validity of title." *Id.* at 569.

The position taken by Defendant is patently without support in its own Policy and applicable decisional law interpreting similar title insurance provisions. Paragraphs 2 and 9, read together, make it clear that after acquisition of title, the remaining amount of insurance is the lesser of the full policy amount or the remaining indebtedness, including interest and protective advances. Here, the lesser amount is the indebtedness remaining after foreclosure of the Shopping Center Parcel that would have been secured by a lien against the King Street Parcel but for the defect in title. Plaintiff is entitled to payment of its loss due to the defect in title (\$345,335), which is less than the amount

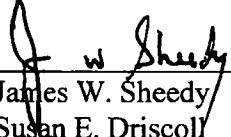
of reduced insurance (\$452,731.48 as of January 14, 2011); and until Plaintiff receives payment in full on the indebtedness, the insured risk continues and the Title Policy is not terminated.

Conclusion

Plaintiff has not impaired Defendant's subrogation rights against the two Guarantors and Borrower. There is no evidence of impairment. Plaintiff's credit bid at a judicial sale did not terminate all liability of Defendant under the Title Policy. The Title Policy provides insurance for the remaining amount of the adjudicated indebtedness, to the extent of the loss of Plaintiff due to the defect in title. Neither of Defendant's grounds for denying liability have any merit, Plaintiff's Motion should be granted and judgment should be entered against Defendant in the amount of \$345,335 on the First Cause of Action in the Complaint.

Date: 1/12/11

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ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

Preservation Capital Consultants, LLC,)

Plaintiff,)

vs.)

First American Title Insurance Company,)

Defendant.)

CERTIFICATE OF SERVICE

C.A. No.: 09-CP-10-4475

BY

J. J. DRISCOLL
CLERK OF COURT

2011 JUN 18 AM 11:23

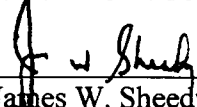
FILED

I certify that a copy of the foregoing Plaintiff's Memorandum in Support of its Motion for Summary Judgment has been served on the following at the address shown below, via First Class, U.S. Mail, postage-paid on the date set forth below.

W. Cliff Moore, III, Esq.
Ellis, Lawhorne & Sims, P.A.
P.O. Box 2285
Columbia, SC 29202

Date: 6/13/11

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ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON) IN THE COURT OF COMMON PLEAS

Preservation Capital Consultants, LLC,)
)
Plaintiff,) **AMENDED COMPLAINT**
)
vs.) (Jury Trial Demanded)
)
First American Title Insurance Company,) C. A. No.: 09-CP-10-4475
)
Defendant.)

Plaintiff, complaining against Defendant, respectfully alleges:

For a First Cause of Action

1. Plaintiff (Lender) is a limited liability company organized pursuant to the laws of the state of Delaware that owns and holds a mortgage recorded in Charleston County, South Carolina, as further described below.

2. Defendant (Insurer) is a corporation organized pursuant to the laws of the state of California, which is authorized to issue title insurance policies in the state of South Carolina, including in Charleston County, and did issue a lender's title policy to Lender insuring the lien of the above mentioned mortgage.

3. On December 31, 2004, Monarch Development, LLC (Borrower) executed a Mortgage in favor of Atlantic Carolina Retail, LLC (Atlantic) which was recorded February 10, 2005 in Mortgage Book L525 at Page 414, in the RMC Office for Charleston County, South Carolina (Mortgage).

4. The Mortgage operated as security for a loan from Atlantic to Borrower in the original

principal amount of \$3,075,000.

5. The Mortgage granted Atlantic a lien against a tract of land further described as follows (Subject Property):

All that lot, piece or parcel of land with the buildings thereon situate, lying and being on the West side of King Street, near line Street, in the City of Charleston, State aforesaid, and known and designated as numbers 635 and 637 King Street;

Measuring and containing in front on King Street Fifty (50) Feet, more or less, and in depth Two Hundred (200) Feet, more or less;

Butting and boundings to the North on Land now or late of the Estate of Sarah Hunt, to the East on King Street aforesaid, to the south on lands of I.D. Rubin, and to the West on lands of Myers Bros.

Tax Map No. 460-08-02-012

6. On February 10, 2005, Insurer issued a lender's title insurance policy number FA-31-678957 naming Atlantic, its successors and assigns, as the insured, the Mortgage as encumbering the Subject Property, and the title to the Subject Property as vested in Borrower (Title Policy). A copy of the Title Policy is attached hereto as **Exhibit A**.

7. The Mortgage was assigned to Lender through assignments recorded October 18, 2005 in Book M558 at Page 596 and January 21, 2009 in Book 30 at Page 658, both in the RMC Office for Charleston County, South Carolina, thereby effectively substituting Lender as the insured on the Title Policy.

8. On the Date of Policy as defined in the Title Policy, Borrower was not the owner of the Subject Property.

9. The Mortgage, therefore, did not encumber the Subject Property.

10. The Subject Property was sold free and clear of the lien of the Mortgage to Evening

Post Publishing Company which is the current owner.

11. Borrower has not paid Lender as agreed, Lender has demanded payment from Borrower which Borrower has failed to remit, and Lender has to foreclose the Mortgage in order to recover in full, which Lender is not able to do since the Subject Property has been conveyed free and clear of the lien of the Mortgage.

12. As a result of being unable to foreclose the Mortgage and judicially sell the Subject Property in order to recover in full on its defaulted loan, Lender has sustained a loss to the extent of the value of the lien purportedly granted by the Mortgage against the Subject Property.

13. Lender has submitted a claim to Insurer for damages under the Title Policy which Insurer has not paid.

14. Insurer has breached the Title Policy by not paying Lender for its loss of the lien purportedly granted by the Mortgage against the Subject Property, which Insurer insured by issuance of the Title Policy.

15. As a result of Insurer's breach of the Title Policy, Lender is entitled to recover actual damages from Insurer in the amount of the value of the lien purportedly granted by the Mortgage against the Subject Property, as well as attorneys' fees and costs.

For a Second Cause of Action

16. Lender hereby reiterates all of the foregoing allegations as fully as if set forth verbatim herein.

17. The Title Policy names the assigns of Atlantic as the insured and Lender owns and holds the Mortgage by assignment from Atlantic.

18. Thus, the Title Policy is a contract of insurance between Lender and Insurer.

19. Insurer has refused to pay benefits under the Title Policy to Lender as it has requested.

20. The refusal of Insurer to pay benefits to Lender is unreasonable and in bad faith in that Insurer has not suffered any impairment of a subrogation interest, nor has Lender received payment or satisfied the Mortgage; and even if the foreclosure credit bid constitutes payment against the amount of insurance, such amount is increased by accruing interest and protective advances sufficient to insure the claim of Lender under the Title Policy.

21. As a result of the bad faith of Insurer, Lender has not been paid its claim as required by the Title Policy, has been forced to litigate this case and has incurred significant interest accrual and other charges on its remaining unpaid debt.

22. In addition to its actual damages, because Insurer's actions were willful and in reckless disregard of Lender's rights, Lender is entitled to recover punitive damages from Insurer.

For a Third Cause of Action

23. Lender hereby reiterates all of the foregoing allegations as fully as if set forth verbatim herein.

24. Should it be determined that Insurer's refusal to pay the claim of Lender under the Title Policy is without reasonable cause and in bad faith, Insurer is liable to Lender for all reasonable attorneys' fees incurred in the prosecution of this case against Insurer, inasmuch as more than ninety (90) days from date of demand for payment has passed.

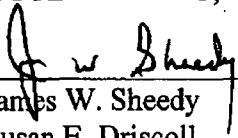
25. Lender is entitled to have the trial judge determine the amount of attorneys' fees and have such amount added to its judgment against Insurer in this case.

WHEREFORE, Lender prays for entry of judgment against Insurer in the amount of the value of the lien purportedly granted by the Mortgage against the Subject Property, for an award of actual and punitive damages against Insurer due to bad faith refusal to settle, for attorneys' fees as awarded by the trial judge; and for such other and further relief as the Court deems proper.

Charlotte, NC

Date: 2/8/11

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ATTORNEYS FOR LENDER

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Preservation Capital Consultants, LLC.,

Plaintiff,

v.

First American Title Insurance Company,

Defendant.

IN THE COURT OF COMMONS PLEAS

C.A. No. 2009-CP-10-4475

**DEFENDANT'S ANSWER TO
PLAINTIFF'S AMENDED
COMPLAINT**

FEB 24 2011

BY

168-00104

2011 FEB 23 AM 11:02

JULIE J. ARISTRONG
CLERK OF COURT

FILED

The Defendant, First American Title Insurance Company, answering the Amended Complaint of the Plaintiff would show this Honorable Court the following:

FOR FIRST DEFENSE TO ALL CAUSES OF ACTION

1. Defendant is without sufficient information or knowledge to form an opinion or belief as to the truth of allegations contained in Paragraph 1 of the Amended Complaint and therefore denies them.

2. Defendant admits the allegations contained in Paragraphs 2, 3, 4 and 5 of the Amended Complaint. Further responding to the allegations contained in Paragraphs 2, 3, 4 and 5, the Defendant alleges that the Subject Property is only a portion of the property secured by the Mortgage.

3. As to the allegations contained in Paragraph 6 of the Amended Complaint, Defendant craves reference to the terms and conditions of the Title Policy and denies any allegations inconsistent with those terms and conditions.

4. Defendant admits the allegations contained in Paragraphs 7 and 8 of the Amended Complaint.

5. Defendant is without sufficient information or knowledge to form an opinion or belief as to the truth of allegations contained in Paragraph 9 of the Amended Complaint and therefore denies them.

6. As to the allegations contained in Paragraph 10 of the Amended Complaint, Defendant admits that at some point in time following the issuance of the Title Policy, The Evening Post Publishing Company owned the Subject Property, but denies any allegations that suggests that The Evening Post Publishing Company

purchased the Subject Property from the entity that owned it at the time of the issuance of the Title Policy. The Defendant is without sufficient information or knowledge to form an opinion or belief as to the truth of the remaining allegations contained in Paragraph 10 and therefore, denies them.

7. As to the allegations contained in Paragraph 11 of the Amended Complaint, the Defendant is without sufficient information or knowledge as to the allegations relating to the relationship between the Plaintiff and its Borrower. Further responding to the allegations contained in Paragraph 11, the Defendant alleges that the Plaintiff has completed foreclosure of its mortgage lien, waived any deficiency judgment and affirmatively released its Borrower and its Borrower's guarantors.

8. Defendant denies the allegations contained in Paragraph 12 of the Amended Complaint.

9. Defendant admits the allegations contained in Paragraph 13 of the Amended Complaint.

10. Defendant denies the allegations contained in Paragraphs 14 and 15 of the Amended Complaint.

11. As to the allegations contained in Paragraph 16, the Defendant incorporates its responses to the allegations contained in Paragraphs 1-15 of the Amended Complaint.

12. Defendant admits the allegations contained in Paragraphs 17, 18, and 19 of the Amended Complaint.

13. Defendant denies the allegations contained in Paragraphs 20, 21, and 22 of the Amended Complaint.

14. As to the allegations contained in Paragraph 23, the Defendant incorporates its responses to the allegations contained in Paragraphs 1-22 of the Amended Complaint.

15. Defendant denies the allegations contained in Paragraphs 24 and 25 of the Amended Complaint.

FOR A SECOND DEFENSE TO ALL CAUSES OF ACTION

16. Defendant reiterates its responses contained in all preceding paragraphs and incorporates them herein as if fully set forth verbatim.

17. The Plaintiff fails to state facts sufficient to constitute a cause of action.

FOR A THIRD DEFENSE TO ALL CAUSES OF ACTION

18. Defendant reiterates its responses contained in all preceding paragraphs and incorporates them herein as if fully set forth verbatim.

19. The Plaintiff has released the guarantors and debtors that were obligated on the debt secured by the insured Mortgage ("Release").

20. At the time of the Release the Plaintiff had knowledge of a claim or interest adverse to the title encumbered by the insured Mortgage.

21. The Release was given without any notice to the Defendant.

22. The Release was given without the Defendant's consent.

23. The Plaintiff's conduct has impaired the Defendant's right of subrogation under the Title Policy.

24. The Plaintiff has violated the Conditions and Stipulations of the Title Policy and is therefore not entitled to recovery under the Title Policy.

FOR A FOURTH DEFENSE TO ALL CAUSES OF ACTION

25. Defendant reiterates its responses contained in all preceding paragraphs and incorporates them herein as if fully set forth verbatim.

26. In addition to other payments, Plaintiff received payment in the amount of \$3,250,000.00 from the foreclosure sale of properties insured by the Title Policy.

27. The Title Policy insured the properties in a cumulative amount not to exceed \$3,075,000.00 and provides that any payment by any person of the indebtedness shall reduce the amount of the insurance *pro tanto*.

28. Plaintiff's claims against Defendant are therefore barred by the terms and conditions of the Title Policy, specifically including, but not limited, Paragraph 9, in that the payment of 3,250,000.00 exceeded the limits of insurance under the Title Policy.

FOR A FIFTH DEFENSE TO THE SECOND AND THIRD CAUSES OF ACTION

29. Defendant reiterates its responses contained in all preceding paragraphs and incorporates them herein as if fully set forth verbatim.

30. The Defendant asserts that there is reasonable basis for the denial of the claim.

FOR A SIXTH DEFENSE TO THE SECOND AND THIRD CAUSES OF ACTION

31. Defendant reiterates its responses contained in all preceding paragraphs and incorporates them herein as if fully set forth verbatim.

32. The Plaintiff has failed to cooperate in the Defendant's investigation of the Plaintiff's claim on the Policy. The Plaintiff's lack of cooperation includes, but is not limited to,

- a. Failing to provide the Defendant with information concerning the status of the Plaintiff's foreclosure action after request and demand by the Defendant.
- b. Failing to timely respond to discovery.
- c. Providing incomplete and misleading discovery responses.
- d. Intentionally withholding information in discovery.

FOR A SEVENTH DEFENSE TO THE SECOND AND THIRD CAUSES OF ACTION

33. Defendant reiterates its responses contained in all preceding paragraphs and incorporates them herein as if fully set forth verbatim.

34. The Plaintiff has breached its duty of good faith and fair dealing under the policy by

- a. Failing to provide the Defendant with information concerning the status of the Plaintiff's foreclosure action after request and demand by the Defendant.
- b. Failing to timely respond to discovery.
- c. Providing incomplete and misleading discovery responses.
- d. Intentionally withholding information in discovery.
- e. By filing the original complaint in this action prior to completion of its foreclosure action on the real property described in the Policy.

35. The Plaintiff's breach was prior to any breach by the Defendant.

FOR AN EIGHTH DEFENSE TO THE SECOND AND THIRD CAUSES OF ACTION

36. Defendant reiterates its responses contained in all preceding paragraphs and incorporates them herein as if fully set forth verbatim.

37. The conduct of which the Plaintiff complains is the manner in which the Defendant has defended the Plaintiff's claims in this litigation.

38. The litigation conduct of the Defendant is not an appropriate basis for a claim of bad faith or attorney fees.

WHEREFORE, having fully Answered the Plaintiff's Amended Complaint, the Defendant prays that the Court requests that the Court dismiss the Plaintiff's Complaint and assess all costs of this action against the Plaintiff.

Cliff Moore by Drew Walker
W. Cliff Moore, III
Ellis, Lawhorne & Sims, P.A.
1501 Main Street, Fifth Floor
Post Office Box 2285
Columbia, SC 29202
Phone: (803) 254-4190
Fax: (803) 779-4749
cmoore@ellislawhorne.com
*Attorney for Defendant, First American
Title Insurance Company*

February 22, 2011
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Preservation Capital Consultants, LLC.,

Plaintiff,

v.

First American Title Insurance Company,

Defendant.

IN THE COURT OF COMMONS PLEAS

CASE NO: 2009-CP-10-4475

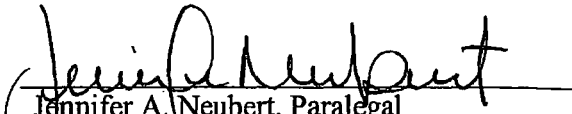
CERTIFICATE OF SERVICE

2011 FEB 23 AM 11:02
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

The undersigned, of the law office of Ellis Lawhorne & Sims, P.A., does certify that on February 22, 2011, she did cause to have served by U.S. Postal Service, regular mail with postage prepaid and return address clearly indicated, copies of the Defendant's Answer to the Plaintiff's Amended Complaint and this Certificate of Service to the following:

James W. Sheedy
Driscoll Sheedy, P.A.
22 E. Main Street, Suite 204
Rock Hill, SC 29730
Attorney for the Plaintiff


Jennifer A. Neubert, Paralegal
Ellis, Lawhorne & Sims, P.A.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Preservation Capital Consultants, LLC,

☒ Plaintiff

v.

First American Title Insurance Company,
☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

09-CP-10-4475

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:
James W. Sheedy, Esq., Bar No. 5052
Address:
Driscoll Sheedy, P.A.
11520 N. Community House Rd., Ste 200
Charlotte, NC 28277
phone: 704-341-2102 fax: 704-341-2105
e-mail: jimsheedy@driscollsheedy.com other:

Defendant's Attorney:
, Bar No.
Address:
phone: fax:
e-mail: other:

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

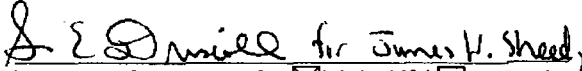
Nature of Motion: Motion for Reconsideration

Estimated Time Needed: 30 min Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☒ Plaintiff / ☐ Defendant

September 1, 2011
Date submitted

SECTION III: Motion Fee

- ☒ PAID - AMOUNT: 25.00
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Collected by: _____

Date Filed: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON) IN THE COURT OF COMMON PLEAS

Preservation Capital Consultants, LLC,)
)
Plaintiff,)
)
vs.)
)
First American Title Insurance Company,)
)
Defendant.)

C.A. No.: 09-CP-10-4475

**PLAINTIFF'S AND DEFENDANT'S JOINT NOTICE OF AND MOTION
FOR RECONSIDERATION OF THEIR SUMMARY JUDGMENT MOTIONS**

PLEASE TAKE NOTICE that Plaintiff and Defendant, through their respective undersigned counsel, hereby move for reconsideration of their respective motions for summary judgment denied by Order filed January 28, 2011, at such time and place as is convenient to the Court and counsel, but in sufficient time to ensure that if the case is required to go to trial that it may be heard during the term commencing October 3, 2011 as presently scheduled.

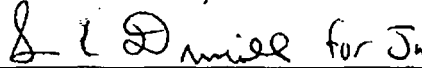
1. This case was on the jury trial roster for the term of court commencing September 6, 2011.
2. When their respective motions for summary judgment were briefed and argued to the Court, Plaintiff and Defendant agreed that the facts on which the claim of Plaintiff is based were not disputed by either of them, and the title policy applied to those facts was a plain and unambiguous contract to be interpreted as a matter of law by the Court. Plaintiff and Defendant still believe the facts are not in dispute and the title policy is a plain and unambiguous contract.
3. Thus, Plaintiff and Defendant both do not believe the services of a fact finder are necessary in this case. This motion for reconsideration is filed in the interest of good

stewardship of County resources and tax revenues prior to the empanelling of a jury to decide issues of fact that the parties themselves do not dispute.

4. This case is a legal dispute involving the interpretation of a provision in a title policy. Plaintiff and Defendant will supplement their prior submissions and are amenable to other forms of communication that the Court may desire in a concerted effort to resolve any concerns the Court may have about the facts in this case and the law that should be applied to those facts.

WHEREFORE, Plaintiff and Defendant seek reconsideration of their respective motions for summary judgment and entry of an order granting at least one of them summary judgment on Plaintiff's claim after the Court interprets the plain, unambiguous title policy.

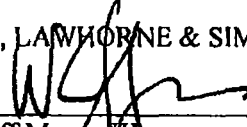
DRISCOLL SHEEDY, P.A.

By:  for James W. Sheedy

James W. Sheedy
Susan E. Driscoll
11520 N. Community House Road
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Charlotte, N.C. 28277
Telephone - (704) 341-2101
Facsimile - (704) 341-2105
jimsheedy@driscollsheedy.com
sdriscoll@driscollsheedy.com

ATTORNEYS FOR PLAINTIFF

ELLIS, LAWHORNE & SIMS, P.A.

By: 
W. Cliff Moore, III
1501 Main Street, Fifth Floor
Post Office Box 2285
Columbia, SC 29202
Phone: (803) 254-4190
Fax: (803) 779-4749
cmoore@ellislawhorne.com

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

Preservation Capital Consultants, LLC,)
)
Plaintiff,)

CERTIFICATE OF SERVICE

vs.)

C.A. No.: 09-CP-10-4475

First American Title Insurance Company,)
)
Defendant.)

I certify that a copy of the foregoing Plaintiff's and Defendant's Joint Notice of and Motion for Reconsideration of Their Summary Judgment Motions has been served on the following at the address shown below, via First Class, U.S. Mail, postage-paid on the date set forth below.

W. Cliff Moore, III, Esq.
Ellis, Lawhorne & Sims, P.A.
P.O. Box 2285
Columbia, SC 29202

Date: 9/11/11

DRISCOLL SHEEDY, P.A.

By: J. L. Driscoll for James W. Sheedy

James W. Sheedy
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jimsheedy@driscollsheedy.com
sdriscoll@driscollsheedy.com

ATTORNEYS FOR PLAINTIFF

STATE OF FLORIDA)
COUNTY OF MARTIN)

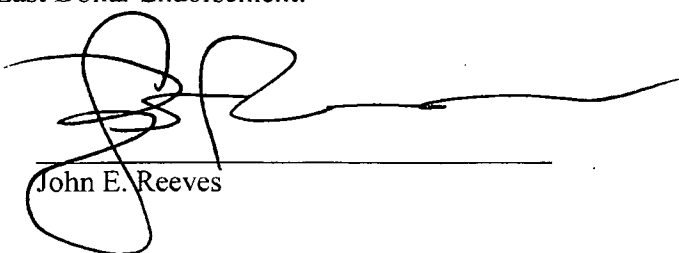
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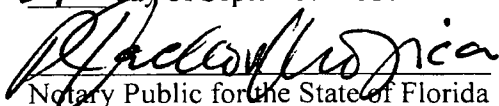
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2011 SEP 26 AM 3:58
JULIE J. ARMSTRONG
CLERK OF COURT

Personally appeared before me, John E. Reeves, who after being duly sworn
deposes and states that:

1. He is an attorney licensed to practice law in the States of Illinois and Florida.
2. He is employed by First American Title Insurance Company as Senior Claims Counsel and in that capacity is responsible for the claim that Preservation Capital Consultants, LLC filed with First American Title Insurance Company on its Policy Number FA-31-678957 (the "Policy").
3. He is familiar with the forms of title insurance policies offered by First American Title Insurance Company and specifically First American Title Insurance Company's version of ALTA Loan Policy (10/17/92).
4. Attached to this Affidavit as Exhibit 1 is a First Loss-Multiple Parcel Transactions Endorsement that was available to be added to the Policy at the time that it was issued.
5. The Policy does not contain a First Loss-Multiple Parcel Transactions Endorsement.
6. Attached to this Affidavit as Exhibit 2 is a Last Dollar Endorsement that was available to be added to the Policy at the time it was issued.
7. The Policy does not contain a Last Dollar Endorsement.


John E. Reeves

Sworn to before me this
21st day of September 2011


Notary Public for the State of Florida
My Commission Expires: _____

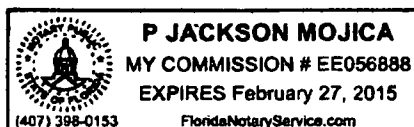


EXHIBIT A

ENDORSEMENT

Attached to Policy No.

Issued by

First American Title Insurance Company

This endorsement is effective only if the Collateral includes at least two parcels of real property.

1. For the purposes of this endorsement:
 - (a) "Indebtedness" means all monetary obligations evidenced by the loan documents at Date of Policy as secured by the insured mortgage, but limited to the balance outstanding at the time the claim is made.
 - (b) "Collateral" means all property, including the land, given as security for the Indebtedness.
 - (c) "Material Impairment Amount" means the amount by which any matter covered by this policy for which a claim is made diminishes the value of the Collateral below the Indebtedness.
2. Subject to the provisions of Section 8 of the Conditions and Stipulations, in the event of a claim resulting from a matter insured against by this policy, the Company agrees to pay that portion of the Material Impairment Amount that does not exceed the limits of liability imposed by Sections 2 and 7 of the Conditions and Stipulations without requiring:
 - (a) maturity of the Indebtedness by acceleration or otherwise;
 - (b) pursuit by the insured of its remedies against the Collateral;
 - (c) pursuit by the insured of its remedies under any guaranty, bond or other insurance policy.
3. Nothing in this endorsement shall impair the Company's right of subrogation. However, the Company agrees that its right of subrogation shall be subordinate to the rights and remedies of the insured. The Company's right of subrogation shall include the right to recover the amount paid to the insured pursuant to paragraph 2 from any debtor or guarantor of the Indebtedness, after payment or other satisfaction of the remainder of the Indebtedness and other obligations secured by the lien of the insured mortgage. The Company shall have the right to recoup from the insured claimant any amount received by it in excess of the Indebtedness up to the amount of the payment under paragraph 2.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

First American Title Insurance Company

By: _____

EXHIBIT B

F.A. Form 51 Last Dollar

ENDORSEMENT

SC2041

Attached to Policy No. PRO FORMA

Issued By

First American Title Insurance Company

By the issuance of this loan policy in the amount of \$32,137,041.17, which is less than the face amount of the mortgage insured and described in Schedule A, the Company agrees that until such time as the aggregate indebtedness outstanding is reduced to the sum of \$32,137,041.17, the amount of coverage afforded under this policy will not be reduced. Any payments which would have the effect of reducing the indebtedness below the sum of \$32,137,041.17 will concurrently reduce the coverage under this policy by \$1.00 for each \$1.00 of reduction of the indebtedness thereafter made.

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

First American Title Insurance Company

By: PRO FORMA

Authorized Signatory

F.A. Form 51 (Rev. 7/92)

Last Dollar Endorsement

ALTA Loan Policy

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Preservation Capital Consultants, LLC.,

Plaintiff,

v.

First American Title Insurance Company,

Defendant.

IN THE COURT OF COMMONS PLEAS
NINTH JUDICIAL CIRCUIT

C.A. NO: 2009-CP-10-4475

**MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION FOR
RECONSIDERATION OF ITS
MOTION FOR SUMMARY
JUDGMENT**

BACKGROUND

This is an action by an insured against its title insurance company. The insured believes that it has suffered losses for which the title insurance company's insurance policy provides indemnity. In January 2011, the Plaintiff and the Defendant filed motions for summary judgment, both arguing that the case turned on the interpretation of the insurance contract. On January 27, 2011 the Court entered its Order denying summary judgment stating that the title insurance policy is ambiguous when applied to the facts.

The matter appeared on the docket for a jury trial in September 2011. That trial was continued so that the parties could file a joint motion requesting that the Court reconsider its decision on the summary judgment motions. That is the motion before the Court.

FACTS

The following facts are not disputed and are set forth in the exhibits to the memoranda supporting the initial Motions for Summary Judgment:

1. First American issued a title insurance policy to Atlantic Carolina Retail, LLC. ("Atlantic") in the form attached as Exhibit 1 ("Policy").

2. The Policy insured the lien of the mortgage that secured a debt owed by Monarch Development, LLC ("Monarch Development") to Atlantic ("Mortgage"). The Mortgage created a lien on three (3) parcels – (1) the St. Phillips Street Parcel, (2) the King Street Parcel, and (3) the Shopping Center Parcel.

3. There was only one title insurance policy that insured the lien of the Mortgage on all three parcels.

4. The amount of the Policy was \$3,075,000.00.

5. Atlantic assigned the Mortgage and the debt that it secured to Preservation.

6. The St. Phillips Street Parcel sold in 2008 and Monarch Development paid \$250,000.00 to release the St. Phillips Parcel from the Mortgage.

7. Monarch Development defaulted on the debt secured by the Mortgage.

8. Preservation performed a title examination of the King Street Parcel and the Shopping Center Parcel in preparation of a foreclosure action on the Mortgage.

9. The title examination revealed that (a) Monarch Development never owned the King Street Parcel, (b) that the King Street Parcel was owned by Monarch Holdings, LLC, and (c) that Monarch Holdings, LLC conveyed the property to a third party without payment to Preservation.

10. The value of the King Street Parcel on the date it was transferred from Monarch Holdings, LLC was \$590,000.00. The King Street Parcel was sold subject to the lien of a mortgage to a third party and to which an exception was made in the Policy. The amount owed on that senior mortgage lien at the time of transfer from Monarch Holdings, LLC was \$244,665.00.

11. On January 23, 2009, Preservation filed a foreclosure action on the Mortgage seeking to foreclose the lien of the Mortgage on the Shopping Center Parcel.

12. On January 28, 2009, counsel for Preservation mailed a letter to First American notifying it of a claim on the policy as it related to the King Street Parcel.

13. On April 28, 2009, counsel for First American sent a letter to counsel for Preservation advising that First American's preliminary position on Preservation's title claim was premature in that it needed to complete the foreclosure of the Mortgage on the Shopping Center Parcel before Preservation could establish a loss under the Policy.

14. On July 20, 2009, Preservation filed a Breach of Contract action against First American alleging breach of the terms of the Policy.

15. The Master-in-Equity for Charleston County entered its Order and Judgment of Foreclosure and Sale, foreclosing the lien of the Mortgage on the Shopping Center Parcel, on January 21, 2010 that was recorded on January 26, 2010.

16. A foreclosure sale was held pursuant to the terms and conditions of the Master's Order and Judgment of Foreclosure and Sale on March 1, 2010.

17. Atlantic purchased the Shopping Center Parcel at the foreclosure sale on a credit bid of \$3,250,000.00. Atlantic and Preservation are related entities owned by the same investors.

18. The Master-in-Equity issued a deed to the Shopping Center Parcel to Preservation citing as consideration \$3,250,000.00.

19. Preservation did not secure a deficiency judgment in the foreclosure action.

20. The amount owed by Monarch Development to Preservation as of the date of the foreclosure sale – March 1, 2010 – was \$3,641,190.00. After applying the credit bid amount of \$3,250,000.00, the amount due on the debt to Preservation was \$391,190.00.

LEGAL STANDARD

First American agrees that the law advanced by Preservation in its Summary Judgment-Memorandum-dated-January-12, 2011-as-to-the-legal-standard-on-summary-judgment. First American also agrees with the standards for contract interpretation that Preservation presented in that Memorandum

ARGUMENT

The ambiguity that the Court perceived in the Policy was created by a misreading of the Policy that Preservation bolstered with isolated application of terms of the Policy that address situations not at issue in this litigation. By applying unambiguous provisions of that Policy, the Court can determine that the contract is not ambiguous and that the Policy has terminated.

Preservation had a Policy that provided \$3,075,000.00 in coverage. Preservation was paid \$3,250,000.00 at the foreclosure sale.¹ That payment reduced the amount of coverage under the policy to nothing and, consequently, there is no coverage for the losses that Preservation claims.

¹ Preservation, or its predecessors, was paid other amounts including \$250,000.00 to release the St. Phillips Parcel in 2008. These payments also operated to reduce the amount of coverage under the policy. For purposes of simplicity and for Summary Judgment only, First American focuses only on the foreclosure sale payment of \$3,250,000.00.

1. **Coverage on the Loan Policy declines with payment on the mortgage.**

The Policy, similar to other title insurance policies, is an indemnity agreement; it is not a guaranty or warranty of the state of title to real property.² The Policy is a Loan Policy. It insures the lien of the insured's mortgage on the identified real estate.³ The amount of the Policy declines as the debt is paid and all liability under the Loan Policy terminates when the debt secured by the insured mortgage is paid.⁴ This differs from an Owner's Policy which insures the property owner's title to the insured property and, since coverage is not tied to a debt, has no declining coverage amount.⁵

A Loan Policy does not guarantee that the loan will be paid.⁶ The Loan Policy only assures the adequacy of title to the mortgaged property.⁷

The extent of liability under the title insurance policy for losses and damages is limited to the amount of the Amount of Insurance stated in the title insurance policy.⁸

Paragraph 9 of the Conditions and Stipulations of the Policy provides the language for the reduction of the coverage under this Loan Policy and the ultimate termination of the coverage upon payment of the underlying debt. Typically, the amount of coverage under a Loan Policy declines as the mortgage debt is paid and is terminated on full payment. Subparagraph (b) of Paragraph 9 of the Policy directs the reduction of insurance when payments are made on the debt that is secured by the insured mortgage.

2. **Coverage under the Policy has terminated.**

The Policy assures the adequacy of the title to the mortgaged property and provides Preservation with the promise of indemnity if title is not as represented, but only to the extent of the amount of coverage provided. That coverage amount is not constant, but declines as the loan

² Policy (Exhibit 1), Statement of Coverage, page 1; First Federal Savings Bank of Brunswick v. Stewart Title Guaranty Company, 317 S.C. 131, 451 S.E.2d 916 (Ct.App. 1995); *see also*, Stanley v. Atlantic Title Insurance Company, 377 S.C. 405, 661 S.E.2d 62 (2008) and Burke, The Law of Title Insurance (3d Ed), §2.01[A] (Aspen Publishers, 2001).

³ Policy, Schedule A, ¶4.

⁴ Policy, Conditions and Stipulations, ¶9(c).

⁵ There is declining coverage in an Owner's Policy, but for the amount paid by the insurance company on the Policy and other non-debt related events.

⁶ First Federal Savings Bank of Brunswick, 451 S.E.2d at 142.

⁷ Id.

⁸ Policy (Exhibit 1), Conditions and Stipulations ¶7(a).

is paid. So when making a claim on the Policy, Preservation must show not only that there is an issue with the title that triggers coverage, but also that the amount of the loss claimed is covered under the policy.

Paragraph 9(b) of the Conditions and Stipulations of the Policy provides:

Payment in part by any person of the principal of the indebtedness, or any other obligation secured by the insured mortgage, or any voluntary partial satisfaction or release, shall reduce the amount of insurance pro tanto. The amount of insurance may thereafter be increased by accruing interest and advances made to protect the lien of the insured mortgage and secured thereby, with interest thereon, provided in no event shall the amount of insurance be greater than the amount of insurance stated in Schedule A.

The payment that Preservation received through the foreclosure bidding process was a payment on the debt secured by the insured mortgage that reduces the amount of the insurance. The foreclosure bid amount was \$3,250,000.00. The amount of coverage is \$3,075,000.00.

Therefore, the amount of payments on the debt, only considering the foreclosure bid, has exceeded the amount of insurance. Upon the payment of the foreclosure bid amount, coverage terminated.

Further, the conduct of Preservation has led to the satisfaction or release of the insured mortgage and therefore the Policy has terminated.⁹ A mortgage is not valid unless it secures a debt or an obligation.¹⁰ The insured mortgage secured payment of a Promissory Note in the amount of \$3,075,000.00 from Monarch Development, LLC to Atlantic dated December 30, 2004.¹¹ Prior to completion of the foreclosure action, Preservation released the guarantors from any obligation to pay that Promissory Note.¹² Through the foreclosure action Preservation converted the obligation owed to it from a Promissory Note to a Judgment. Preservation did not seek a deficiency judgment in the foreclosure action. Accordingly, the proceeds of the sale of

⁹ Policy, ¶9(c).

¹⁰ *Williams v. Lawrence*, 194 S.C. 1, 8 S.E.2d 838 (1940).

¹¹ Master-In-Equity's Order and Judgment of Foreclosure and Sale, Findings of Fact, ¶6, attached as Exhibit 2 to Defendant's Memorandum in Response to Plaintiff's Motion for Summary Judgment, January 13, 2011.

¹² Settlement Agreement between Preservation and Monarch Development, LLC attached as Exhibit 9 to Defendant's Memorandum in Response to Plaintiff's Motion for Summary Judgment, January 13, 2011.

the property were accepted in full satisfaction of Judgment. With no underlying obligation, the mortgage is extinguished, and, therefore, so is coverage under the policy.

3. **Preservation's arguments do not alter the plain meaning of the Policy language.**

A. **The insurance did not increase after the foreclosure bid amount terminated coverage.**

In its memorandum filed in support of its Motion for Summary Judgment dated January 12, 2011, Preservation highlights a portion of paragraph 9(b) of the Policy in the following fashion:

*Payment in part by any person of the principal of the indebtedness, or any other obligation secured by the insured mortgage, or any voluntary partial satisfaction or release, shall reduce the amount of insurance pro tanto. **The amount of insurance may thereafter be increased by accruing interest and advances made to protect the lien of the insured mortgage and secured thereby, with interest thereon,** provided in no event shall the amount of insurance be greater than the amount of insurance stated in Schedule A.*

Preservation then provided a mathematical equation (Footnote 3 to the Memorandum) intending to demonstrate to the Court that coverage existed to indemnify it for its losses. In that equation, Preservation merely computed the deficiency following foreclosure sale and calculated interest on that amount at a default rate of interest of 18%. That calculation was as follows:

\$3,075,000.00	Amount of insurance Stated in Schedule A
<u>(3,250,000.00)</u>	credit bid, or reduced by payment
(175,000.00)	
<u>566,190.00</u>	Difference between judgment (\$3,641,190.00) and principal (\$3,075,000.00) since paragraph allows non-principal to be added
391,190.00	
<u>61,541.48</u>	Accrued interest from 3.1.10 to 1.14.11 @ 192.92 per diem in judgment
452,731.48	Remaining amount of insurance.

This calculation is absurd and has no basis in any language of the Policy. In fact it increases coverage beyond the stated amount of insurance in violation of the last phrase of Paragraph 9(b)

of the policy: *"provided in no event shall the amount of insurance be greater than the amount of insurance stated in Schedule A."*

The language of the Policy highlighted by Preservation clearly states that only **after** the amount of coverage has been reduced by the payment made, the amount of coverage can be increased by accruing interest and advances made to protect the mortgaged property. The Policy language does not allow for an increase in coverage for interest that accrued, and advances that were made, **prior** to the reduction of the amount of coverage by payment being analyzed under Paragraph 9(b) of the Policy. Even though the equation presented by Preservation first subtracts the foreclosure bid from the amount of coverage, it adds back the amount of interest and expenses accrued and incurred pre-bid. Its argument is that coverage is the amount stated in the policy plus pre-payment interest and expenses - $\$3,075,000.00 + 566,190.00 = \$3,641,190.00$. Increasing the amount of coverage by simply adding the amount of non-principal components of the debt incurred or accruing before the application of the payment in this instance would increase coverage beyond the limit of the stated amount of coverage $\$3,075,000.00$. This clearly violates the last phrase of Paragraph 9(b) of the Policy.

If the Court adopts Preservation's reasoning, there would be no purpose to providing an amount of the Policy. The Policy would merely stay in force until the underlying debt is paid. This would not only be contrary to the plain language of the Policy, it would make the Policy a guarantor of the payment of the underlying debt, which it clearly is not.¹³

In oral argument of the original Motion for Summary Judgment, Preservation suggested that it is clear that the language of the Policy allows for increase in coverage equal to the amount of accruing interest and expenses after a payment that reduces the amount of coverage.

¹³ First Federal Savings Bank of Brunswick, 451 S.E.2d at 142.

Preservation suggests that this can happen even after the reductions anticipated by the Policy exceed the amount of coverage. In a nutshell, Preservation argues for coverage in the amount of interest that accrues on a non-covered loss. If the Court believes that the Policy covers interest that accrues on the deficiency post-payment, a position that is also challenged by First American, then only the interest is added to the amount insured, not the underlying non-covered amount on which interest accrues. In that case, more than \$175,000.00 in interest would need to accrue before Preservation would be entitled to any payment by First American.

Once payments on the underlying debt exceed the amount on insurance, coverage terminates. Payment of the foreclosure bid in the amount of \$3,250,000.00 reduced the amount of coverage under the terms of the policy to nothing. Interest and advances can not accrue and be charged on nothing.

B. Paragraph 2 of the Policy does not lend the support to Preservation's position as Preservation claims.

Preservation suggests that Paragraph 2(c) of the Policy supports its reading of Paragraph 9(b) of the Policy. This reliance is misplaced. Paragraph 2 deals with a continuation of coverage after a lender becomes an owner of the property identified in the Policy. Paragraph 9 concerns the reduction and termination of a loan policy.

Paragraph 2 of the Policy is titled "Continuation of Insurance". Subparagraph (a) of Paragraph 2 of the Policy provides the insured lender with continuation of insurance after the foreclosure sale. Subparagraph (b) of Paragraph 2 of the Policy directs how far that continuation of insurance extends, and Subparagraph (c) provides for the amount of coverage in that circumstance. It is clear that, when read in context of the balance of Paragraph 2 of the Policy, Subparagraph (c) is not intended to define the amount of insurance remaining on the Policy to be

available if there are other parcels that serve as collateral under the insured mortgage – that is determined under Paragraph 9 of the Policy.

Paragraph 2 of the Policy does have application to the foreclosure involved in the facts of this case; just not the application that Preservation suggests. Following its purchase of the Shopping Center Parcel, Atlantic (if it is a qualified related entity pursuant to the provisions of the Policy, Paragraph 2(a)) may have coverage under the Policy that insures its interest in the Shopping Center Parcel. With this understanding, it is clear that Paragraph 2 of the Policy concerns title insurance on the property purchased at foreclosure sale, not the amount of insurance remaining on other parcels on which the insured has not foreclosed.

C. Endorsements to the Policy were available to provide the coverage Preservation claims.

A Last Dollar endorsement was available to be added to the Policy and was not.¹⁴ This endorsement would have provided the coverage that Preservation argues that it has under the language of the Policy. It is axiomatic that if an endorsement is needed to provide the coverage suggested, there is no such coverage in the Policy without the endorsement.

¹⁴ Affidavit of John E. Reeves, December 21, 2011.

CONCLUSION

The insured's predecessor in title purchased \$3,075,000.00 in title insurance coverage. The Policy it purchased gave the assurance that the mortgaged collateral would stand for \$3,075,000.00 of the debt. That occurred. In fact the mortgaged collateral stood for more than the stated amount of the Policy. The payment to Preservation clearly terminated coverage under the Policy. First American should be granted summary judgment on Preservation's claim for breach of contract.



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Attorney for Defendant

September 26, 2011
Columbia, SC

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Preservation Capital Consultants, LLC.,

Plaintiff,

v.

First American Title Insurance Company,

Defendant.

IN THE COURT OF COMMONS PLEAS

CASE NO: 2009-CP-10-4475

CERTIFICATE OF SERVICE

The undersigned, of the law office of Ellis Lawhorne & Sims, P.A., does certify that on September 27, 2011, she did cause to have served by U.S. Postal Service, regular mail with postage prepaid and return address clearly indicated, and by electronic mail (September 26, 2011), copies of Memorandum in Support of Defendant's Motion for Reconsideration of its Motion for Summary Judgment and this Certificate of Service to the following:

James W. Sheedy
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Attorney for the Plaintiff



Liz Davison, Legal Assistant
Ellis, Lawhorne & Sims, P.A.

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON) IN THE COURT OF COMMON PLEAS

Preservation Capital Consultants, LLC,)

Plaintiff,)

vs.)

C.A. No.: 09-CP-10-4475

First American Title Insurance Company,)

Defendant.)

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF JOINT MOTION FOR
RECONSIDERATION OF SUMMARY JUDGMENT MOTIONS OF THE PARTIES**

In support of Plaintiff's and Defendant's Joint Motion for Reconsideration of Their Summary

Judgment Motions (the "Reconsideration Motion"), Plaintiff respectfully submits the following. Unless otherwise defined herein, all capitalized terms shall have the meanings ascribed to them in the Complaint as supplemented by Plaintiff's prior Memorandum in Support of Summary Judgment.

Procedural History

This matter was previously before your Honor on January 14, 2011, for hearing on three motions, to wit: Plaintiff's and Defendant's motions for summary judgment, and Plaintiff's motion to amend its complaint to add a cause of action for bad faith refusal to settle. The motion to amend was granted. Both motions for summary judgment were denied.

During the hearing on January 14th, counsel for both parties argued to the Court on their respective summary judgment motions that there were no facts in dispute, that the Court was being asked to interpret language in a plain and unambiguous contract, and summary judgment should be

granted to one of the parties. Counsel for both parties represented that the services of a fact finder were unnecessary. The Court denied both motions by Order filed January 28, 2011.

But for the parties' joint motion for reconsideration, this case would be ready for a jury trial. Plaintiff has demanded a jury trial should the Court conclude after hearing this motion that the language of the Title Policy as applied to the facts of Plaintiff's claim under such Policy is ambiguous and allow the introduction of evidence extrinsic to the Policy in order for a fact finder to resolve the purported ambiguity. Plaintiff and Defendant both do not believe the services of a fact finder are necessary. Neither party disagrees with respect to the facts of Plaintiff's claim under the Policy. Both parties still earnestly aver that this case involves the interpretation of a plain and unambiguous contract which is a matter of law to be decided by the court. Specifically, Plaintiff says there is coverage under paragraph 9(b) of the Title Policy, Defendant says there is not,¹ and the Court just has to interpret the plain, unambiguous language in paragraph 9(b).

While the Court may feel it has already ruled the facts of Plaintiff's claim under the Title Policy are disputed and should be heard by a jury, the parties wish to make sure the Court appreciates that they do not dispute the facts of Plaintiff's claim. This motion is filed in the interest of good

¹Defendant's positions are contrary to the plain language of paragraph 9(b), its positions call for the Court to gloss language onto paragraph 9(b) in order to find for Defendant, and Defendant has no law to support its positions. Defendant says the second sentence of 9(b) presupposes the amount after payment is a positive number. However, the second sentence does not contain such a qualifier. Defendant, not Plaintiff, drafted the Title Policy. Plaintiff is not exposing Defendant to a claim in excess of the amount of insurance. The claim is \$345,335, the insurance is \$3,075,000. Defendant withdrew its subrogation defense at the prior summary judgment hearing. Plaintiff waived any deficiency because the obligor and guarantors had nothing. Plaintiff satisfied the mortgage as required by statute once the lien of the mortgage no longer attached to any real estate. Policy coverage remains in effect so long as PCC, the insured, has an unpaid debt the security for which is impaired by a title defect (which is the case here). Plaintiff cited law from FL, ID, ME, CA and the 1st Cir. (RI) in support of this proposition. Plaintiff also cited cases from NJ and CA interpreting paragraph 9 payment provisions in title policies similar to this Policy and ruling that "payment" means only full payment, which terminates the insured's risk in connection with a title defect. Defendant has now filed two long briefs without a single arrow of relevant law in its quiver.

stewardship of County resources and tax revenues prior to the empaneling of a jury to decide issues of fact that the parties themselves do not dispute.

This memorandum is submitted to memorialize for clarity's sake that certain arguments your Honor may hear during reconsideration of the summary judgment motions, although they may seem at first blush to suggest there are facts in dispute, upon closer analysis the Court should recognize that the main issue in the case, viz., coverage, is for the Court to decide and not a jury.

Discussion

First, Defendant is likely to brief to the Court prior to the hearing on reconsideration the language of paragraph 2 of the Title Policy as it may affect the meaning of paragraph 9(b) of such policy. Plaintiff already briefed this issue in its memorandum in support of summary judgment. When the motions for summary judgment were heard on January 14th, it was within a few days of a snowstorm that had hit Columbia. Counsel for Defendant has asserted that he did not previously have an opportunity to brief paragraph 2. He did, however, engage in oral argument on paragraph 2 at the summary judgment hearing. From Plaintiff's perspective, it is important for the Court to keep in mind that neither party is suggesting paragraph 2 is ambiguous or that the facts of Plaintiff's claim as applied to the Title Policy including paragraph 2 are in any sense disputed.

Second, Defendant has submitted to the Court an affidavit attached to which are two endorsements that are not a part of the Title Policy. Obviously, Defendant cannot say the Title Policy is plain and unambiguous and then, in the same breath, offer evidence extrinsic to the Policy for reconsideration as to the meaning of the Policy.² Rather (hopefully), Defendant is just using the

² "An insurance policy is a contract between the insured and the insurance company, and the terms of the policy are to be construed according to contract law." *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 606, 663 S.E.2d 484, 487 (2008). Under contract law, "[t]o ascertain the intention of an instrument resort is first to be had to its language, and

endorsements at the hearing on reconsideration as the basis for legal arguments to support its interpretation of the unambiguous meaning of paragraph 9(b) in this case. Of course, Plaintiff will oppose any arguments by Defendant based on the endorsements.

Third, no one is suggesting that Plaintiff's Second Cause of Action, i.e., bad faith refusal to settle, is not a proper matter for jury trial or even before the Court on the motion for reconsideration. If the Second Cause of Action is discussed, it should only be because the Court decides to hear Defendant's motion to bifurcate, which really ought not be heard by anyone other than the trial judge just prior to trial. Bifurcation is a trial management tool that the trial judge decides whether to utilize in order to avoid prejudice to or confusion by the jury from the presentation of the evidence.

Obviously, Plaintiff must succeed on the First Cause of Action that there is coverage under the Title Policy in order to go forward on bad faith refusal to settle. Equally obvious is that if summary judgment is granted to either party and there is an appeal, the Second Cause of Action is on hold until the appeal is decided. And, not to beat a dead horse, if summary judgment is denied to both parties, this case proceeds to trial on both causes of action unless the trial judge exercises discretion

if such is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument." *Superior Auto. Ins. Co. v. Maners*, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973), cited in *Super Duper Inc. v. Pennsylvania Nat. Mut. Cas. Ins. Co.*, 385 S.C. 201, 683 S.E.2d 792 (2009). "Whether the language of a contract is ambiguous is a question of law to be determined by the court from the terms of the contract as a whole." *State Acc. Fund v. South Carolina Second Injury Fund*, 388 S.C. 67, 75, 693 S.E.2d 441, 445 (Ct. App. 2010). Extrinsic evidence will only be admitted after a finding that the written terms of the contract are ambiguous. See *Harris v. Ideal Solutions, Inc.*, 385 S.C. 74, 682 S.E.2d 523 (Ct. App. 2009). "Further, provisions in a policy which extend coverage to the insured must be construed liberally so as to afford coverage whenever possible by reasonable construction." *State Auto Property & Casualty Insurance Co. v. Travelers Indemnity Co. of America*, 343 F.3d 249, 254 (4th Cir. 2003), cited in *Super Duper*, 385 S.C. at 208, 683 S.E.2d at 796. "Any ambiguous terms must be construed in favor of the insured." *Super Duper*, 385 S.C. at 210, 683 S.E.2d at 796.

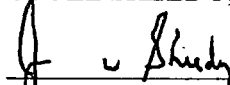
to bifurcate coverage from bad faith refusal. The point is the facts which may be in dispute on bad faith refusal are not also a reason for coverage to be heard by a jury.³

Conclusion

The Court, not a jury, should decide as a matter of law whether there is coverage for Plaintiff's loss under paragraph 9(b) of the Title Policy. While there may be facts flying around the room during the hearing on reconsideration, the parties submitted a joint motion to the Court in which they represented in compliance with Rule 11, SCRPC, that there were no facts in dispute with respect to the coverage question, the title policy was unambiguous, and the Court should resolve the meaning of paragraph 9(b) in this case.

Date: 9/27/11

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By: 

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ATTORNEYS FOR PLAINTIFF

³ What was probably confusing to the Court when summary judgment was heard on January 14th is that most of Defendant's prior brief addressed facts in dispute on bad faith refusal and its subrogation defense. Defendant conceded subrogation was not a defense at the hearing on January 14th. The last few pages of Defendant's brief discussed coverage and did not portray coverage as ambiguous under the Title Policy.

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

Preservation Capital Consultants, LLC,)

Plaintiff,)

vs.)

First American Title Insurance Company,)

Defendant.)

CERTIFICATE OF SERVICE

C.A. No.: 09-CP-10-4475

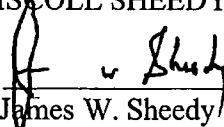
I certify that a copy of the foregoing Plaintiff's Memorandum in Support of Joint Motion for
Reconsideration of Summary Judgment Motions of the Parties has been served on the following at

the address shown below, via First Class, U.S. Mail, postage-paid on the date set forth below.

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Date: 9/27/11

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ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Preservation Capital Consultants, LLC.,

Plaintiff,

v.

First American Title Insurance Company,

Defendant.

IN THE COURT OF COMMONS PLEAS

C.A. No. 2009-CP-10-4475

**NOTICE OF MOTION AND
DEFENDANT'S MOTION TO
RECONSIDER, ALTER AND AMEND
ORDER GRANTING SUMMARY
JUDGMENT FOR PLAINTIFF**

To: James W. Sheedy and Susan E. Driscoll, attorneys for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that the undersigned, on behalf of First American Title Insurance Company ("First American"), will move before the Chief Administrative Judge or her designee at the Charleston County Judicial Center on the tenth day after service hereof, or as soon thereafter as may be convenient for the Court, for an Order pursuant to Rule 59(e), SCRPC, altering and/or amending the Order Granting Summary Judgment for Plaintiff filed on October 6, 2011 (the "Order"). First American received written notice of the entry of the Order on October 12, 2011.

MOTION FOR RECONSIDERATION

I. STANDARD

The South Carolina Rules of Civil Procedure contemplates two basic situations in which a party may file a Rule 59(e) motion. "A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not

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JULIE J. ARMSTRONG
CLERK OF COURT

ruled on, in order to preserve it for appellate review.” Elam v. S. Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis in original).

A Rule 59(e) motion is not only as a vehicle to request the trial court “alter or amend the judgment,” but it is also as a vehicle to seek “reconsideration” of issues and arguments. Id. at 21-22, 602 S.E.2d at 778-79. A motion under Rule 59(e) long has been viewed as “motion for reconsideration” despite the absence of those words from the rule. Id.; see Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992) (“purpose of Rule 59(e), SCRPC, to alter or amend the judgment is to request the judge to reconsider matters properly encompassed in a decision on the merits”). Rule 59(e) allows “a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument.”

II. ANALYSIS

First American issued a loan policy of title insurance (the “Policy”) to Plaintiff - not an owner’s policy. [Order, ¶ 1.] The distinction is significant. As a loan policy, the Policy insures the lien of the insured’s mortgage, not the property owner’s title to the insured property. [Policy, Sch. A, ¶ 4.] Because it is a loan policy, the amount of insurance under the Policy declines as the debt is paid. [Policy ¶ 9)]. Paragraph 9(b) allows for certain non-principal accruals to increase the amount of insurance *after* payment, but in no event does the Policy allow for the amount of insurance to exceed the amount provided in Schedule A.

As discussed throughout the various exceptions below, two fundamental misapprehensions misguide the Order. First, the Order fails to give effect under the Policy to the fact that Plaintiff’s claimed loss has no relation to the foreclosed property,

the Shipping Center Parcel. Second, the Order inadvertently calculates the amount of insurance under the Policy as of March 1, 2010 to equal \$3,641,190.00 in violation of the Policy's mandate that the amount of insurance will not exceed \$3,075,000.00. Therefore, the Order mistakenly fails to conclude that, because of \$3,250,000.00 payment on March 1, 2010, no amount of insurance remains under the policy to indemnify Plaintiff for its loss for not having a lien on the King Street Parcel.

A. Exception #1: Finding of Fact #10

The Order states that the Findings of Fact are undisputed. However, Finding of Fact # 10 improperly states that First American agreed that paragraph 2(c) of the Conditions and Stipulations of the Policy is relevant to this case. [Order ¶ 10.] First American did not agree that paragraph 2(c) has any bearing on this case. Rather, the Plaintiff argued that paragraph 2(c) of the Policy should be read to determine the amount of insurance under the Policy after the insured foreclosed on the Shopping Center Parcel. First American countered that paragraph 2(c) of the Policy must be read in the context of the entire paragraph 2 of the Policy, and that paragraph 2(c) determines only the amount of insurance remaining for the Shopping Center Parcel. See Madden v. Bent Palm Investments, LLC, 386 S.C. 459, 466, 688 S.E.2d 597, 601 (Ct.App.2010) (when the court construes a contract, a "sentence must be read in the larger context in which it appears.").

First American contends that Schedule A and paragraph 9(b) of the Policy determine the amount of insurance under the Policy in this case. First American respectfully requests that the court amend Finding of Fact number 10 to clarify that First American disagrees that Paragraph 2(c) has any applicability to this case.

B. Exception #2: Misconstruction of the Policy language by applying paragraph 2(c) to determine the amount of insurance.

The Order errs by misconstruing the Policy language. A loan policy does not guarantee that the loan will be paid. First Fed. Sav. Bank of Brunswick v. Stewart Title Guar. Co., 317 S.C. 131, 142, 451 S.E.2d 916, 922 (Ct.App.1994). A loan policy only assures the validity of the insured's lien up to the amount of insurance provided by the loan policy. Id. The amount of insurance is defined on Schedule A of the Title Policy. The Order correctly finds the amount of insurance is \$3,075,000.00. [Order ¶ 1.] The Order errs, however, by altering this Amount of Insurance by applying paragraph 2(c), the portion of the Title Policy that calculates the amount of insurance available on a parcel *after* one of two events: acquisition of title or conveyance of title. [Policy ¶ 2].

The loss Plaintiff experienced by not having a lien on the *King Street Parcel* amounts to \$345,335.00. [Order ¶ 9.] In this case, the acquisition of title occurred on the Shopping Center Parcel, not the King Street Parcel. Plaintiff has claimed no loss with respect to the Shopping Center Parcel. Since there is no dispute that the King Street Parcel was not acquired or conveyed within the meaning of paragraph 2(a) or 2(b), paragraph 2(c) has no bearing on the amount of insurance for Plaintiff's loss on the King Street Parcel. First American respectfully requests that the court amend the Order to correct its construction of the Policy language.

C. Exception #3: Misconstruction of paragraph 9(b) and miscalculation of the amount of insurance.

The result in this case is dictated by Paragraph 9 of the Conditions and Stipulations of the Policy. Typically, the amount of coverage under a Loan Policy declines as the mortgage debt is paid. See Charles J. Jacobus, TEXAS REAL ESTATE, p.

108 (11th Ed. 2009). Paragraph 9 of the Policy provides for the reduction of the amount of insurance under the Policy as payments, releases, and satisfactions occur and for the ultimate termination of the coverage upon payment of the underlying debt. Subparagraph (b) of Paragraph 9 of the Policy directs the reduction of insurance when payments are made on the debt that is secured by the insured mortgage.

The Order misconstrues the Policy by adding the difference between the adjudicated debt as of March 1, 2010 (the date of the sale of the Shopping Center Parcel) and the principal into the amount of insurance provided in paragraph 9(b) to the amount of insurance. Specifically, the Order fails to address the meaning of the first sentence of paragraph 9(b) of the Policy and ignores its impact on the amount of insurance. That sentence requires a reduction in the amount of insurance equal to the amount of payments on the mortgage debt pro tanto. Since the foreclosure bid *exceeded* the amount of insurance, payment of that bid reduced coverage to nothing.¹

The Order also fails to discuss or apprehend the meaning of the word “thereafter” in the second sentence of paragraph 9(b). Reading the second sentence of paragraph 9(b) in the context of the entire paragraph (as the court must, Madden, *supra*), “thereafter” refers to a point in time *after* coverage has been reduced as provided in the first sentence of paragraph 9(b). That point in time is the only event in paragraph 9(b) that precedes the word “thereafter” that could require chronological explanation. This proper interpretation of paragraph 9(b) results in a different amount of insurance because it prevents the addition of non-principal amounts that accrued *before* the reduction required in the first sentence of paragraph 9(b).

¹On the copy of the Order provided to First American, footnote 4 contains a blank space wherein the court intended to indicate the paragraph in the Policy that permitted this inclusion. First American respectfully contends that no paragraph in the Policy permits this inclusion under these facts.

In footnote 4, the Order starts with the amount of insurance (\$3,075,000.00) and properly subtracts the payment, Plaintiff's credit bid of \$3,250,000.00, to produce a negative number (-\$175,000.00). At this point, the amount of insurance under the Policy is reduced to nothing. The Order's calculation erred, however, by then adding the difference between the amount of principal and the adjudicated debt as of March 1, 2010, which is the *very date* of the reduction required by the first sentence of paragraph 9(b).

The only justification for this addition is the misapprehension that the Policy allows non-principal - *whenever it accrued* - to be added when determining the amount of insurance. The footnote then calculates interest on this *non-covered* amount to add over \$60,000.00 more in coverage without any basis in the Policy. This reading violates a

paramount rule of contractual construction by improperly rendering any limitation on coverage and any language requiring the reduction of insurance meaningless. 1 Richard A. Lord, WILLISTON ON CONTRACTS § 32:5 (4th ed.1999) (stating that contracts should not be interpreted to render a portion of the writing "superfluous.")

Plainly speaking, the Plaintiff cleverly ordered its mathematical sentence to mask the error it has advocated and the Order has mistakenly adopted. Despite the arbitrary ordering of the mathematical sentence reflected in Footnote 4, the Order actually finds and concludes that (1) on March 1, 2010, the amount of insurance equaled \$3,641,190.00 and that (2) \$452,731.48 of remaining insurance existed after the payment of \$3,250,000.00 on March 1, 2010. However, this finding and conclusion is expressly prohibited by paragraph 9(b), which states: "provided in no event shall the amount the amount of insurance be greater than the amount of insurance stated in Schedule A."

First American respectfully requests that the court amend the Order to correct its construction of the Policy language. The Order should include specific conclusions as to the meaning of the first sentence of paragraph 9(b) of the title policy. The Order should also make specific conclusions as to the meaning of the term "thereafter" in the second sentence of paragraph 9(b) of that policy. First American respectfully suggests that, once paragraph 9(b) is construed *in toto*, the Order must conclude that non-principal accruing prior to March 1, 2010, and interest on that non-principal, cannot be added into the amount of insurance available for Plaintiff's loss from not having a lien on the King Street Parcel. Finally, the miscalculation in Footnote 4 should be deleted from the Order.

D. Exception #4: Misinterpretation of First American's positions and misapplication of case law

Many of the reported decisions on which the Order relies are either misinterpreted or misapplied to the facts of this case. The cases presented by the Plaintiff and cited in the Order involve facts similar to the case at bar. None of the case law provides guidance on the amount of title insurance that remains on non-foreclosed property following the foreclosure of a separate portion of the property secured by the insured mortgage.

(1). CMEI, Inc. v. Am. Title Ins. Co., 447 So.2d 427 (Fl.App 5 Dist. 1984) ("CMEI"). The Order misstates First American's argument and uses an incorrect reading of CMEI to then dismiss First American's argument. First American did not argue that the title policy converts from a loan policy to an owner's policy after the Plaintiff acquired title through foreclosure. First American argued that the Plaintiff continued to have coverage on that foreclosed property under the loan policy as an owner following the foreclosure sale. This is a subtle, but important, difference because a loan policy and an owner's policy are two distinct policies providing different coverage.

Following the foreclosure sale, Plaintiff had coverage on that foreclosed property - in this case, the Shopping Center Parcel - as an owner, but that coverage is governed by the terms of the loan policy. This distinction was the basis of the holding in CEMI. CEMI does not stand for the proposition that there is no coverage for the insured, as owner through foreclosure, under a loan policy as suggested by the Order. Rather, CEMI determined that the loan policy provides coverage for a lender under the loan policy once it became owner through the foreclosure process. CEMI and its reasoning support First American's construction of the Policy.

(2). Blackhawk Production Credit Assn. v. Chicago Title Ins. Co., 423 N.W. 2d 521 (Wis. 1988) ("Blackhawk"). This case stands for the same cited proposition as CMEI. Both cases stand for the proposition argued by First American, namely, that coverage for foreclosed property (the Shopping Center Parcel) continues under a loan policy after foreclosure pursuant to the language of paragraph 2 of the title insurance policy. Stated another way, Paragraph 2 is the vehicle through which a lender's post-foreclosure ownership interest is insured -- it is not a paragraph that directs the amount of coverage on the property not foreclosed. Paragraph 9 directs the amount of coverage on the property not foreclosed - the King Street Parcel in this case.

(3). Hodas v. First Am. Title Ins. Co., 696 A.2d 1095 (Me. 1997) ("Hodas"). The Order suggests that the fact scenario in Hodas is similar to the case at bar. The case does involve a foreclosure and does involve continuation of loan policy insurance following foreclosure by a lender. However, the case does not support the Order's conclusions in this matter. In fact the case supports First American's reading of paragraph 2 of the Policy and is consistent with the holdings in CMEI and Blackhawk.

The Order overlooks the critical difference between the facts in Hodas and the Plaintiff's case. Hodas concerned continuation of coverage on property a lender purchased at foreclosure sale; Hodas did not involve a lien for property on which the lender did *not* foreclose. This case involves a loss claimed due to the Plaintiff not having its lien on the King Street Parcel - a lien that the lender did not foreclose. As such, Hodas and paragraph 2(c) have no application whatsoever to the amount of coverage on property the lender did not foreclose.

(4). Trico Mortgage Company, Inc. v. Penn Title Ins. Co., 657 A.2d 890 (N.J. Super. 1995) ("Trico"). The Order cites Trico to emphasize that the indebtedness contemplated by the Policy includes both principal and interest. The Order suggests this distinction is contrary to the position taken by First American. This is another strawman, as the distinction is not contrary to First American's position, namely, that paragraph 9 determines the amount of insurance for the King Street Property after the March 1, 2010 payment. According to paragraph 9(b) of the Policy, the amount of insurance is reduced by payment "of the principal of the indebtedness" (principal), "or any other obligation secured by the insured mortgage" (interest).

(5). Paramount Prop. Co. v. Transamerica Title Ins. Co., 463 P.2d 746 (Cal. 1970) ("Paramount"). Paramount addresses the affect of a conditional payment on the reduction of insurance and stands for the proposition that only unconditional final payments will have the affect of reducing coverage. This case presents no conditional payment issue. No party disputes that the foreclosure bid was final and, as a credit bid, was paid and the deed was delivered. Accordingly, Paramount should have no bearing on the court's decision in this case.

First American's argued at the initial summary judgment hearing in January 2011 that no case law is on point that provides an interpretation of the policy language in an situation analogous to the case at bar. The cases submitted by the Plaintiff and adopted by the Order are related in some respects, but miss the mark. If anything, the cases cited by the Order speak to the arguments advanced by First American and not the Plaintiff. Accordingly, First American respectfully requests that the court amend the Order to correct its construction of these cases and to remove mischaracterizations of First American's positions.

E. Exception #5: Failure to address endorsements

The Order fails to address the significance of endorsements available to the Policy, but not purchased in connection with the Policy. First American has submitted two endorsements that provide the coverage the Plaintiff argues it now has under the Policy. First American's argument is that, if the Policy provides as the Plaintiff suggests, these endorsements are rendered superfluous and nugatory. The Order failed to mention or analyze these endorsements and First American's arguments related to those endorsements, and First American respectfully requests that the court amend the Order to enter findings of fact and conclusions of law regarding the endorsements and First American's argument.

F. Exception #6: Inconsistent application of Paragraph 2(c)

The Order contains inconsistent applications of paragraph 2(c) of the Policy. Citing CMEI and Blackhawk, the Order states that paragraph 2(c) does not address insurance on the insured's interest in foreclosed property. [Order pp. 7-8.] Later in the Order at page 10, the court adopts the reasoning in Hodas that "[a]fter an insured

mortgagee purchases the mortgage premises at foreclosure, coverage continues provided there remains unpaid principal indebtedness.” Hodas, 696 A.2d at 1097-98. These positions are inconsistent. First American respectfully suggests that, to the extent that the Order need to reflect any construction of paragraph 2, the Order must decide whether paragraph 2 of the policy provides for continuation of insurance on the property purchased at foreclosure sale.

G. Exception #7: Failure to make Finding of Fact regarding the existence of three parcels.

The findings of fact in the Order fail to contain the finding that the Policy insured the lien of the Plaintiff’s mortgage on the King Street Parcel, the St. Phillips Street Parcel, and the Shopping Center Parcel. As written, the Order suggests that the Policy only concerned the King Street Parcel. First American respectfully requests that the court amend the Order to enter explicit findings of fact regarding the Policy insuring the lien of the Plaintiff’s mortgage on the King Street Parcel, the St. Phillips Street Parcel, and the Shopping Center Parcel.

H. Exception #8: Failure to address First American’s argument that there is no debt to enforce

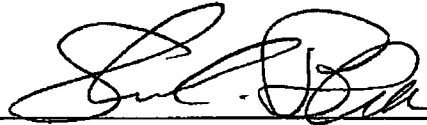
The Order does not address First American’s argument that there is no debt to enforce under the facts of this case. The Order determined that the debt was not paid in full, a fact not contested by First American. However, First American did contest the ability of the Plaintiff to recover because the Plaintiff released the guarantors and elected not to seek a deficiency in the foreclosure proceedings. By these elections it avoided the appraisal statutes applicable when a mortgagee seeks a deficiency and accepted the Shopping Center Parcel in full satisfaction of the mortgage debt. First American

respectfully requests that the court amend the Order to enter findings of fact and conclusions of law regarding First American's argument that there is no debt to enforce in this case.

III. CONCLUSION

In addition to the foregoing, First American relies on the record established through its previous memoranda filed in this matter and the arguments made through oral argument on the motion for summary judgment and in support this motion. First American requests that the court reconsider and amend its Order to address and correct the misapprehensions of law and fact set forth in this motion.

Respectfully submitted,



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Attorneys for Defendant

October 14, 2011
Columbia, SC

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Preservation Capital Consultants,
LLC.,

Plaintiff,

v.

First American Title Insurance
Company,

Defendant.

IN THE COURT OF COMMONS PLEAS
NINTH JUDICIAL CIRCUIT

C.A. NO: 2009-CP-10-4475

CERTIFICATE OF SERVICE

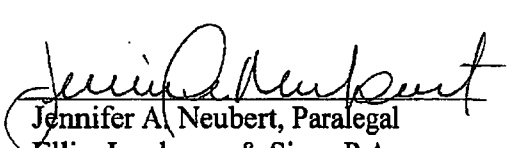
The undersigned, of the law office of Ellis Lawhorne & Sims, P.A., does certify that on October 14, 2011, she did cause to have served by U.S. Postal Service, regular mail, a copy of the Notice of Motion and Defendant's Motion to Reconsider, Alter and Amend Order Granting Summary Judgment for Plaintiff, Motion Coversheet and this Certificate of Service to the following:

James W. Sheedy
Driscoll Sheedy, P.A.
11520 North Community House Road,
Suite 200
Charlotte, N.C. 29277
Attorney for the Plaintiff

JULIE J. ARMSTRONG
CLERK OF COURT

2011 OCT 17 PM 2:01

FILED


Jennifer A. Neubert, Paralegal
Ellis, Lawhorne & Sims, P.A.

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

Preservation Capital Consultants, LLC,)
)
Plaintiff,)
)
vs.)
)
First American Title Insurance Company,)
)
Defendant.)
_____)

C.A. No.: 09-CP-10-4475

**PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO DEFENDANT'S RULE 59(e) MOTION**

In opposition to Defendant's Motion to Reconsider, Alter and Amend Order Granting Summary Judgment for Plaintiff (the "Rule 59(e) Motion"),¹ Plaintiff respectfully submits the following.

Procedure

Rule 59(e), SCRCF, is for the very limited purpose of obtaining a ruling on matters raised prior to judgment but not ruled on. *Bodkin v. Bodkin*, 388 S.C. 203, 694 S.E.2d 230 (S.C. App. 2010). Rule 59(e) is unavailable to raise a new issue that could have been heard prior to judgment but was not. *Gartside v. Gartside*, 383 S.C. 35, 677 S.E.2d 621 (S.C. App. 2009). Rule 59(e) is not

¹ Unless otherwise defined herein, all capitalized terms shall have the meanings ascribed to them in the Complaint as supplemented by Plaintiff's prior Memorandum in Support of Summary Judgment.

a means for asking a court to reconsider an argument that was rejected.² *Matthews v. Richland County School Dist. One*, 357 S.C. 594, 594 S.E.2d 177 (S.C. App. 2004).

Discussion

Plaintiff hereby responds to Defendant's grounds for altering or amending the Order in the same sequence briefed by Defendant in its Rule 59(e) Motion.

The Order Granting Summary Judgment for Plaintiff (Order) relates the claimed loss, i.e., \$345,335, to the foreclosed property, i.e., Shopping Center Parcel, in that Plaintiff is entitled to be indemnified for the defects in title to the insured King Street Parcel (\$345,335), only to the extent of the remaining unpaid indebtedness (\$452,731.48), which reflects the credit bid of \$3,250,000. (Order, pp. 2, 12-13).

The Order refers to \$3,641,190 as the adjudicated debt, not as the amount of insurance. (*Id.*, pp. 2, 7, 9 and 11).

In its Rule 59(e) Motion, Defendant says it did not agree that paragraph 2(c) has any bearing on this case. (Rule 59(e) Motion, p.3). Yet on page 9 of its Memorandum in Support of Defendant's Motion for Reconsideration of its Motion for Summary Judgment, Defendant wrote: "Paragraph 2 of the Policy does have application to the foreclosure involved in the facts of this case; just not the application that Preservation suggests." When the Court issued the Order, paragraph 2 was relevant according to Defendant.

² Contrary to Defendant's suggestion, *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772 (S.C. App. 2004), and *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992), do not stand for the proposition that Rule 59(e) allows a litigant to re-hash arguments already lost. The language "misunderstood, failed to fully consider" is just a slightly lesser way of saying failure to rule. If an argument is unaddressed in an order, Rule 59(e) is there to make sure the trial court addresses it.

The Order examines the Title Policy language, including paragraph 2, as construed under applicable law to determine the amount of insurance. (Order, pp. 6-12). Just because Defendant now believes paragraph 2(c) is irrelevant to the amount of remaining insurance after Plaintiff's acquisition through foreclosure of the Shopping Center Parcel, does not mean the Court failed to rule. Paradoxically, Defendant concedes in this exception to the Order that "a loan policy only assures the validity of the insured's lien up to the amount of insurance provided by the loan policy." (Rule 59(e) Motion, p.4). This is exactly what the Court did in its Order, viz., calculated the lien against the King Street Parcel as \$345,335 and since this amount was less than the amount of remaining insurance (\$452,731.48), \$345,335 was adjudged to be the amount of the covered loss.

In Exception No. 3, Defendant resurrects its argument that the entire credit bid must be applied to the principal of the indebtedness within the meaning of the first sentence in paragraph 9(b); therefore, Defendant reasons, there is no insurance for the balance of the debt rendered uncollectible by the defect in the lien against the title to the King Street Parcel. The debt at issue here has been reduced to a judgment called "Total Debt Secured by Mortgage." (Master-in-Equity's Order filed January 26, 2010, p.6, ¶1). The entire Total Debt Secured by Mortgage became principal on which interest accrued at 18% per annum. (*Id.*). A judgment accrues interest thereon at the statutory rate, S.C. Code Ann. § 34-31-20 (1976), or the contract rate, *Turner Coleman, Inc. v. Ohio Const. & Engineering, Inc.*, 272 S.C. 289, 251 S.E.2d 738 (1979), but the judgment is not artificially de-constructed into principal and interest, with post-judgment interest only accruing on the principal portion of a judgment as Defendant suggests. So, the credit bid reduced, but did not satisfy, the judgment or principal, and a balance remained on which interest continued to accrue at the contract

rate of 18%. (*Id.* at p.5, ¶ 27(b)). Footnotes 2 and 3 of the Order correctly set forth the unsatisfied judgment as \$391,190 which is principal upon which interest of \$61,541.48 was added in accordance with applicable law and the second sentence in paragraph 9(b).

Next, according to Defendant, it is not that the Court failed to address the case law; it is that the Court misapplied the case law. This is not a proper basis for relief under Rule 59(e). Furthermore, Defendant concedes the cases involve facts similar to this one. (Rule 59(e) Motion, p.7). And, Defendant still has no law to support its grounds for concluding there is no coverage for Plaintiff's loss.

Defendant criticizes the Order for not addressing the endorsements. Plaintiff and Defendant represented to the Court that the Title Policy was plain and unambiguous. Counsel for Defendant agreed with Plaintiff's citations to law that the Court should not resort to extrinsic evidence unless the Policy was ambiguous. (Defendant's Memorandum dated September 26, 2011, p.3). The Order found the Title Policy to be unambiguous. The endorsements were not a part of the Title Policy. The Court correctly did not consider the endorsements which were extrinsic to the Title Policy.

The Order disagrees with Defendant's argument that when Plaintiff acquired the Shopping Center Parcel, the Title Policy converted into an owner's policy insuring \$3.075 million, but providing no coverage for the defect in the lien against the King Street Parcel. (Order, pp. 7-8). Plaintiff is not making a claim for coverage on the Shopping Center Parcel. Consequently, the Court does not have to decide the amount of insurance under paragraph 2 for the Shopping Center Parcel after Plaintiff acquired title to it.

The Findings of Fact in the Order do state that Plaintiff had a lien on three parcels. (*Id.*, p. 1, ¶ 3).

Defendant's Memorandum dated September 26, 2011 makes no mention of an argument that there is no debt to enforce. Nor does Defendant's Memorandum dated January 13, 2011. Defendant's defenses to Plaintiff's coverage claim were impairment of subrogation and no remaining insurance after the credit bid. This "no debt to enforce" is a new argument from Defendant. It cannot be raised for the first time on a Rule 59(e) motion. The argument also has no merit. Before the Court is whether there is coverage under the Title Policy for the loss due to the defect in the lien against the King Street Parcel. Plaintiff could have foreclosed its lien against the King Street Parcel irrespective of waiver of any deficiency *in personam* against borrower and guarantors, or any appraisal statutes they may have tried to invoke to reduce the deficiency. Plaintiff never accepted the Shopping Center Parcel in full satisfaction of the debt. In fact, this lawsuit was pending when the judicial sale of the Shopping Center Parcel was held. Defendant may have had a right under the Title Policy to be subrogated to Plaintiff's claims against borrower and guarantors, but Defendant has no right under the Policy or at law to assert any defenses of borrower and guarantors to the debt.

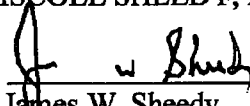
Conclusion

Defendant's Rule 59(e) Motion is not for the purpose of obtaining a ruling on matters raised prior to judgment but not ruled on. With one exception, this Rule 59(e) Motion is a rehash of what has already been heard and rejected. The "no debt to enforce," however, is a new argument and, therefore, improperly before the Court on Rule 59(e). But, "no debt to enforce," like all of the other

arguments by Defendant, has no underlying merit. There is no basis for amending or altering the Order. The Rule 59(e) Motion should be denied.

Date: 11/8/11

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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

Preservation Capital Consultants, LLC,)

Plaintiff,)

vs.)

First American Title Insurance Company,)

Defendant.)

CERTIFICATE OF SERVICE

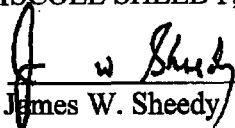
C.A. No.: 09-CP-10-4475

I certify that a copy of the foregoing Plaintiff's Memorandum in Opposition to Defendant's Rule 59(e) Motion has been served on the following at the address shown below, via First Class, U.S. Mail, postage-paid on the date set forth below.

W. Cliff Moore, III, Esq.
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Date: 11/5/11

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	)	COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
Preservation Capital Consultants, LLC	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 09-CP-10-4475
	)	
First American Title Insurance Company,	)	
	)	
Defendant.	)	

TRANSCRIPT OF HEARING

The within Hearing was held the above-captioned action on January 14, 2011, before The Honorable Kristie Harrington in the Court of Common Pleas at the Charleston County Courthouse, 100 Broad Street, Charleston, South Carolina; attended by Counsel, as follows:

APPEARANCES:

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 Susan E. Driscoll, Esq.
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 for Preservation Capital Consultants

Cliff Moore, Esq.
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Transcribed for Brenda Cooley, Retired Court Reporter

DEBORAH GARRISON

Circuit Court Reporter - 9th Judicial Circuit

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Preservation Capital v First American Title
Case No. 09-CP-10-4475
Hearing of January 14, 2011
Before The Honorable Kristie Harrington

2

1 THE COURT: Thank you. Please be
2 seated. Counsel, please state your name for the
3 record and the party that you represent.

4 MS. DRISCOLL: Good morning, Your
5 Honor. Susan Driscoll for Preservation Capital
6 Consultants.

7 MR. MOORE: Your Honor, I am Cliff
8 Moore. I am here representing First American
9 Title Insurance Company.

10 THE COURT: And you are?

11 MR. SHEEDY: Good morning, Your Honor.
12 I am Jim Sheedy. I am representing the plain-
13 tiff, as well. I will address the plaintiff's
14 Motion for summary judgment. Ms. Driscoll will
15 address the two pending Motions for amendment.

16 THE COURT: And it is Sheedy?

17 MR. SHEEDY: Jim Sheedy, S-h-e-e-d-y.

18 THE COURT: Thank you. All right, I
19 have before the court today plaintiff's Motion
20 for summary judgment, the defendant's Motion to
21 file a second amended Answer and plaintiff's
22 Motion to amend the Complaint if the Motion to
23 file a second amended Answer is granted. Is
24 that correct?

25 MS. DRISCOLL: Yes, it is, Your

1 Honor.

2 MR. MOORE: Yes, Your Honor.

3 THE COURT: Are there any other
4 matters before the court?

5 MR. MOORE: None that I am aware of,
6 Your Honor.

7 THE COURT: Okay. All right. Mr.
8 Sheedy, I will be happy to hear from you on your
9 Motion for summary judgment.

10 MR. SHEEDY: Your Honor, may I suggest
11 that we have a different order for Motions? I
12 mean no disrespect, I am just thinking about the
13 exchange that Mr. Moore and I have had about the
14 case.

15 In time, the first matter that was
16 filed as Mr. Moore's Motion to amend his Answer.
17 As Your Honor correctly pointed out, plaintiff's
18 Motion to amend its Complaint is conditioned or
19 contingent upon whether defendant's Motion to
20 amend its Answer is granted.

21 The Motion for summary judgment,
22 presumes, either way a disposition of whatever
23 the jury issues may be in the case. But, uh, it
24 would seem at least to the plaintiff, logically,
25 to decide what the issues are before the court

1 before we decide -- before we hear the Motion
2 for summary judgment, which could include the
3 payment defense sought by the second amended
4 Answer, depending on Your Honor's ruling. If
5 that makes sense.

6 THE COURT: So, Mr. Sheedy, your
7 position, just so that I am clear, is -- if I
8 agree to amend the Answer, then that would --
9 and summary judgment is granted -- then that

10 would address all of the claims. Is that
11 correct?

12 MR. SHEEDY: Now, Your Honor, is
13 definitely getting down to the -- because I
14 didn't, in fairness to the court, answer that
15 question.

16 THE COURT: All right.

17 MR. SHEEDY: If the court were to
18 grant the Amended Answer and if the court were
19 to allow plaintiff to amend its Complaint, the
20 summary judgment Motion would go to the first
21 cause of action in the existing Complaint. It
22 would not address the second and third causes of
23 action in the Amended Complaint. So the answer
24 to Your Honor's question is 'sort of.'

25 THE COURT: All right.

1 MR. SHEEDY: If that is helpful.

2 THE COURT: Not so much.

3 MR. SHEEDY: I'm sorry. Do I need to
4 say that again?

5 THE COURT: So, Mr. Moore, is it your
6 preference to hear your Motion first?

7 MR. MOORE: Your Honor, I think what
8 Mr. Sheedy has suggested to the court is
9 appropriate given what has transpired, and also

10 given the order of the filing of the Motions.

11 THE COURT: All right. Well then,
12 Mr. Moore, I will be happy to hear from you.
13 Since you are going first, if you would please
14 just give me a nonargumentative, to the best of
15 your ability, statement of the facts so that I
16 am clear. I believe that I understand what is
17 going on but, if you will, just give me a brief
18 synopsis so that I can have that to apply to the
19 argument.

20 MR. MOORE: Thank you, Your Honor.
21 This is a action that was filed pursuant to a
22 title insurance policy. I represent a title
23 insurance company and Preservation Capital is
24 the insured.

25 The title insurance policy that was

1 issued was for a debt that came into existence
2 back in December of 2004. It is a debt for
3 Three Million Seventy-five Thousand Dollars
4 (\$3,075,000).

5 The collateral for that loan was a
6 mortgage loan on three pieces of property.
7 It was a shopping center up in the north area.
8 When I was growing up, we referred to it as the
9 Pinehaven Shopping Center. It was also

10 collateralized by property on King Street and
11 property on St. Phillips Street.

12 This claim arose when the insured was
13 performing a title search to foreclose its lien
14 on the property. The St. Phillips property had
15 been released from the mortgage by that point in
16 time, so we were only looking at the King Street
17 parcel and the shopping center parcel.

18 What they discovered at that point in
19 time is that the mortgagor, the person who was
20 indebted to the insured, never owned title to
21 the King Street property. So they filed a claim
22 with the title insurance company saying, 'The
23 mortgagor doesn't own the property. You've
24 issued a policy that assures we have a lien on
25 that property. We don't have a lien.'

1 First American, the title insurance
2 company responded, 'Well, you haven't gone in
3 and exhausted your rights against your
4 collateral. You still have this shopping center
5 that you need to foreclose on. Foreclose on the
6 shopping center, then come back and talk to us.'
7 They did that. They foreclosed on the shopping
8 center. The shopping center sold for Three
9 Million Two Hundred and Fifty Thousand

10 (\$3,250,000) and now they've come back in and
11 said, 'But our debt was more than three million
12 two hundred fifty and we don't have that
13 collateral on Main (sic) Street to go after.
14 You need to pay us for what is still owed or for
15 the equity that we would have gotten from that
16 Main (sic) Street...' -- or King Street --
17 parcel.

18 We've here today talking about cover-
19 age, what the title insurance policy requires
20 to be done in that factual situation. That is
21 my assessment of what the facts are. The
22 plaintiff may have additional facts that it
23 wants to add at this point of time, but I can
24 get into my argument and why we think we should
25 be allowed to amend.

1 THE COURT: Any additional facts that
2 the court should be aware of?

3 MS. DRISCOLL: Your Honor, I would
4 just emphasize that -- I think Mr. Moore
5 mentioned the Three Million Seventy-five
6 Thousand Dollars. That was the principal of the
7 debt and obviously since that debt was incurred
8 interest has accrued.

9 THE COURT: All right. Mr. Moore?

10 MR. MOORE: Your Honor, we're here
11 today asking that the court allow us to amend
12 our Answer, to be allowed to assert an
13 additional defense. That is the defense that
14 we have paid -- that the amount of the policy
15 that has been paid has nothing to do with the
16 insured. This matter was called for trial last
17 Friday. We think that as a matter of law that
18 we are entitled to amend. We can amend as long
19 as there is no prejudice to the plaintiff. We
20 suggest that there is no prejudice. The only
21 prejudice that they have suggested is the
22 timing. By case law that we have cited to the
23 court, timing alone does not establish
24 prejudice. Our rules even allow amendment of
25 pleadings after a case has ended, prior to entry

1 of judgment. So we think the timing alone, and
2 that's all that they have advanced, can't be
3 used to defeat our Motion.

4 We would also ask the court to consider
5 the history of this case. This action was filed
6 prematurely. Back in January of 2009, the claim
7 was filed against First American. That same
8 month, Preservation Capital filed foreclosure
9 against its debtor for the property -- the

10 shopping center parcel.

11 First American responded to the insured
12 and said, 'You don't have a claim until you can
13 establish a loss.' Title insurance policies are
14 indemnity policies, they indemnify against loss.
15 'You haven't shown a loss until you've completed
16 your foreclosure on the property, the shopping
17 center property.'

18 They continued their foreclosure. They
19 did not complete their foreclosure until March
20 16th, 2010. That was the date of the foreclosure
21 sale. The Master's Deed is actually dated March
22 25th, 2010. But they filed their action back in
23 July of 2009. This case was filed before their
24 claim had matured and before they could
25 calculate the damages that they are now asking

1 the court for.

2 We served discovery in this case back
3 in February of 2010. Since then there has been
4 a carousel of counsel. We've had Mr. Sheedy,
5 who initially filed the Complaint, who filed a
6 Motion to be relieved as counsel in July of 2010
7 and was replaced locally by Mr. Goldberg. Mr.
8 Goldberg came into this court and got a
9 continuance on the matter because he was new

10 counsel involved. We mediated the matter and
11 then, after mediation didn't resolve the case,
12 Mr. Goldberg stepped back and said, 'I am only
13 involved in this matter for mediation purposes.
14 Mr. Sheedy is coming back in.'

15 I offer that to the court to explain
16 that it wasn't until November of 2010 that we
17 got any responses to our discovery requests that
18 we served initially. Mr. Goldberg suggested
19 that we engage in informal discovery and
20 represented that he had given me everything from
21 his file. At mediation, we found that that was
22 not true. There was a group of documents and a
23 group of facts that had been kept from us.

24 Since Mr. Sheedy has been back involved
25 in the case, everything has been fine. We've

1 gotten our documents, they have produced or
2 identified over six hundred documents. We've
3 gotten those. After we got the documents,
4 within days, we noticed depositions. We had
5 depositions back last -- the only depositions
6 taken in this case were December 17th of 2010,
7 twenty-one days before this case was called for
8 trial.

9 What I am suggesting to the court and

10 why this is material to my Motion is that while
11 this case has some age on it, our efforts to
12 find out what is going on and what has gone on
13 with this case has been delayed and I think has
14 been stalled. We think, given those facts and
15 given that there has been no showing of pre-
16 judice on the part of the plaintiff, that we
17 should be allowed to amend to assert this
18 defense.

19 The only thing that this defense says
20 is that, 'the amount of coverage that we offered
21 to you was Three Million Seventy-five Thousand
22 Dollars (\$3,075,000).' That is the policy
23 amount. That policy assures that the collateral
24 will stand for that amount of debt. They have
25 received Three Million Two Hundred and Fifty

1 Thousand Dollars (\$3,250,000) when they received
2 that shopping center, that was the bid at the
3 foreclosure sale. So there's no coverage. It's
4 there on the face of the policy.

5 There are no surprises in the facts.
6 There are only two facts that are relevant
7 there: What was the foreclosure sales
8 proceeds? What does the policy say?

9 His final argument, I would suggest to
10 the court that the very fact that they can stand
11 before you today, one week after we had moved to
12 amend, and suggest that they are entitled to
13 summary judgment on that point, too, because
14 that's what their memo has said, even on the
15 Amended Complaint we're entitled to summary
16 judgment shows no surprise. It shows no
17 prejudice. We should be allow to amend and
18 assert our defense.

19 MS. DRISCOLL: Good morning, Your
20 Honor. Susan Driscoll on behalf of Preservation
21 Capital.

22 I do agree with Mr. Moore's
23 characterization that an amendment can only be
24 allowed if there is no prejudice to the opposing
25 party.

1 I do not agree, however, that the
2 prejudice from his amending his Answer a second
3 time immediately prior to trial is the
4 additional work that we would have to do in
5 discovery as to that defense.

6 Mr. Moore is correct that the
7 additional work would not be required if summary
8 judgment is granted. However, if summary
9 judgment is not granted, we would need to engage

10 in certain discovery because we would not be
11 receiving credit that constituted dollar for
12 dollar payment on the policy. As a result, we
13 would have to engage in certain discovery on
14 that issue, which would include retaking the two
15 depositions that were taken in December to
16 establish the value of the shopping center
17 parcel as of the date of the foreclosure sale.
18 Those topics would include whether or not there
19 were tenants in there, what rents were being
20 received from the tenants, if the shopping
21 center had a positive or negative cashflow. We
22 would also have to determine the appropriate
23 methodology of valuing the center to determine
24 if the \$3.2 Million dollars of that foreclosure
25 includes a dollar for dollar discount off -- I'm

1 sorry, a dollar for dollar subtraction from the
2 policy amount itself.

3 I would also add, Your Honor, that Mr.
4 Moore's discussion with the court about timely
5 discovery responses really has nothing to do
6 with the defense, because the defense is based
7 on language in their own policy that was
8 available to First American from the beginning
9 of this case. On March 3rd, that was in the

10 record and they knew what it was. So at least
11 as of March they knew of this defense of full
12 payment and yet they did not allege it until
13 after -- until the Friday roster meeting which
14 set the date for trial, set the case on the
15 docket for trial the following week.

16 As of right now, this case is scheduled
17 for trial on January 31st. We would argue that
18 if summary judgment is denied here today that it
19 would be extremely prejudicial to us to have to
20 undertake all the additional discovery as to
21 this new defense, which First American had at
22 its disposal based on language in its own
23 policy. We shouldn't be forced to undergo
24 additional discovery based on language that they
25 had in their policy. So we would argue not only

1 delayed defense but that it is prejudicial to us
2 in the delay and in the amount of time and work
3 that would be required for discovery.

4 THE COURT: Thank you. Mr. Moore?

5 MR. MOORE: Yes, Your Honor. The
6 only discovery that has been engaged by the
7 plaintiff in this action were discovery requests
8 that were served in mid-November 2010. No
9 discovery prior to that.

10 I do not agree -- and I think what is
11 being done here is that there is an attempt to
12 create an issue where there is no issue. The
13 bid at the foreclosure sale was two million --
14 excuse me -- was Three Million Two Hundred and
15 Fifty Thousand Dollars (\$3,250,000). That bid
16 was supported by an appraisal that the plaintiff
17 did. That appraisal was provided to me by Mr.
18 Goldberg, but it was not provided in the formal
19 discovery that plaintiff responded to me in
20 November. I've provided the court with a copy
21 of that appraisal.

22 All of the arguments that the plaintiff
23 is advancing of calculating what is owed on the
24 policy, the arguments on the other causes of
25 action, all assume that that Three Million Two

1 Hundred Fifty Thousand Dollars (\$3,250,000) was
2 the fair market value of the property.

3 When they say that this is the amount
4 that is still owed on the policy, we disagree on
5 that. They say, 'Here's the debt, here is the
6 three million two hundred fifty thousand dollars
7 (\$3,250,000) that was bid, here is the balance.'

8 So their other argument is saying
9 'That's the fair market value for the property.

10 That's the amount that should be applied to the
11 debt. You will owe us money.'

12 So they're arguing in one instance that
13 number is okay but now, because 'we need a
14 reason to complain, we need a reason for the
15 defendant not to be able to assert this defense,
16 we are going to argue that it is not the fair
17 market value of the property.'

18 The fact is that when you have a fore-
19 closure sale the mortgagor -- the mortgagee is
20 not required to bid. They do not -- they don't
21 have to show up. The Master's report, which is
22 attached as Exhibit 2 in my memorandum, says
23 'This is what happens: We determine the amount
24 owed on your debt. The debtor has until the
25 foreclosure sales date to come and pay that. If

1 you don't, we're going to sell this property and
2 we're going to use the proceeds of that sale to
3 satisfy the debt.' That is what the foreclosure
4 Order says.

5 The Master's Deed, which is attached as
6 Exhibit 4 to my memorandum, says that there was
7 a sale, there was a three million two hundred
8 fifty dollars (\$3,250,000) bid. That amount has
9 been paid. We're crediting that to the debt.

10 That is what the foreclosure process says.

11 For them to now stand and say, 'Even
12 though we have an appraisal in our file, even
13 though we bid \$3,250,000 and even though we want
14 the court to consider that \$3,250,000 to be the
15 amount of the value of that property for
16 purposes for all of our arguments, other
17 arguments, defendant -- because we now need a
18 reason for the defendant now not to be able to
19 assert this new defense.' I don't think that
20 that is prejudice.

21 Your Honor, if the court does not allow
22 us to assert this defense, what it has done --
23 what it will do, it will increase the amount of
24 coverage under this policy. This policy clearly
25 says that it is for Three Million Seventy-five

1 Thousand (\$3,075,000). They have received a
2 piece of property that, by their own admission,
3 that is Three Million Two Hundred Fifty Thousand
4 (\$3,250,000). They want more coverage than was
5 allowed in the title insurance policy. If this
6 court does not allow us to argue the plain
7 meaning of the language in the policy, then that
8 is what the court will be doing, is expanding
9 the policy.

10 I think if the court looks at the facts
11 -- we generally deny each one of the
12 allegations. The plaintiff suggests that this
13 defense is a payment defense, which is an
14 affirmative defense which we have to raise.
15 This issue technically is already raised, Your
16 Honor. We just want to be sure that they don't
17 have a technicality that this payment defense
18 has not been asserted.

19 This may have an unfortunate
20 consequence for the plaintiff in this case, a
21 consequence that we didn't talk about before;
22 and that is that they've been paid everything
23 under the policy and their expectation that
24 they'd get more money just is not fair.

25 THE COURT: Well, what about Mr.

1 Moore' position that this has been raised in
2 other -- in -- excuse me -- that you had notice
3 of this issue?

4 MS. DRISCOLL: Your Honor, I
5 believe we assert a general denial, there was
6 no specific entry of what is called a payment
7 defense. There was never an assertion by First
8 American that the plaintiff's credit bid
9 constitutes a payment defense.

10 I would also just add just a few
11 points. I am not going to respond to the
12 summary judgment Motion. Mr. Sheedy can respond
13 to that.

14 If we'd had this defense, we would have
15 undertaken discovery but since we didn't have it
16 until January 7th of this year, we did not
17 (inaudible on tape) -- if the Motion is denied,
18 then we would not (inaudible). That is our
19 Motion for summary judgment.

20 *(Disclosure: Transcript is being prepared from*
21 *audio recordings provided by Brenda Cooley,*
22 *retired court reporter. No text notes were*
23 *provided).*

24 THE COURT: Mr. Moore, what about Ms.

1 Driscoll's position that you had this
2 information a year ago? Late filed?

3 MR. MOORE: Well, we couldn't have
4 filed it a year ago, Your Honor, because the
5 foreclosure sale was not held until March of
6 2010.

7 THE COURT: Nine months ago.

8 MR. MOORE: Your Honor, the
9 allegation in the Complaint, paragraph fourteen,

10 says that the insured has breach the policy by
11 not paying the lender for its loss -- paragraph
12 fourteen.

13 The discovery that was served in
14 November, which we responded to in December,
15 less than a month ago, asked us what we meant by
16 that. That's the only definition that is given
17 to our general denial, that they now rely on.

18 We would suggest that the fact that
19 they've been sitting on that for a month and
20 now, a month later, want to change what we --
21 that we expand that to something that we now see
22 clearly -- sometimes when you get in the forest
23 you can't see the trees. This is a tree which
24 says, 'Wait a minute, we've got a policy that is
25 for \$3,075,000. Yet they've already received

1 the bid which was for \$3,250,000.' Why do we
2 have to pay them anything?

3 As soon as I found that out, I called
4 and told Mr. Sheedy, told him before I filed the
5 Motion, 'Jim, this is what we've found. This is
6 what we are going to do.'

7 I think if there is anything that can
8 be relied on, it is the discovery responses that
9 say, 'This is what we meant by this general

10 denial.' That was back at the beginning of
11 December 2010, less than a month ago.

12 THE COURT: All right. Let me hear,
13 Ms. Driscoll, your Motion for the amended
14 Complaint if I were to allow him to file his
15 Amended Answer.

16 MS. DRISCOLL: Your Honor, that
17 Motion would add two causes of action to our
18 Complaint. The first would be bad faith and the
19 second would be for recovery of statutory
20 attorneys' fees as a result of the bad faith
21 cause of action.

22 We would just simply argue that if the
23 Motion to amend is allowed that that would
24 naturally expand the time that we would have to
25 conduct discovery for these two causes of

1 action. It would also expand the time that the
2 defendant would have to initiate discovery on
3 these two causes of action.

4 Your Honor, also these are two topics
5 that have been discussed between our client and
6 First American for a period of time. It is
7 really no surprise, so basically we assert that
8 it would not be prejudicial due to fact that
9 they've been aware for some time through our

10 discussions.

11 MR. MOORE: Your Honor, I would be
12 disingenuous if I argued that we would not be
13 entitled to an expanded period of time if we are
14 allowed to amend -- if the court allows the
15 amendment. These are new causes of action. We
16 think that we should be given time as relates to
17 attorneys' fees and bad faith.

18 We don't agree that additional time is
19 needed for discovery on the defense that we have
20 raised because the plaintiff has moved for
21 summary judgment on that point. We in our
22 memorandum agree that there is no genuine issue
23 of material fact as to that new defense which we
24 asserted. So we are ready to argue that today.
25 While the bad faith may require additional time,

1 I don't think that amendment on the other would.

2 THE COURT: Any response?

3 MS. DRISCOLL: Your Honor, I really
4 don't have a response that he has an objection
5 to our amended complaint.

6 THE COURT: I thought I would give
7 you the opportunity.

8 MS. DRISCOLL: Thank you, Your
9 Honor.

10 THE COURT: Let's take just a moment
11 -- I'm assuming that you want me to rule on
12 these two Motions before we hear summary
13 judgment argument, is that correct?

14 MR. SHEEDY: Unless Mr. Moore has an
15 objection, as a courtesy to the court I am
16 perfectly fine with proceeding to argue the
17 Motion for summary judgment.

18 THE COURT: All right.

19 MR. SHEEDY: Practically speaking,
20 I think what that means is that if the court
21 disallows the defendant to amend its Answer,
22 the summary judgment Motion is just on the sub-
23 brogation defense. If the court allows the
24 amended Answer, then summary judgment Motion
25 will extend to the payment defense as well.

1 So I -- I say that not to put Your Honor on the
2 spot.

3 THE COURT: All right, Mr. Sheedy, I
4 will be happy to hear from you.

5 MR. SHEEDY: Your Honor, let me begin
6 by making sure that the court has available to
7 it some materials that have been submitted by
8 both parties.

9 THE COURT: Yes, sir.

10 MR. SHEEDY: I feel somewhat
11 apologetic because I know the e-mails were
12 flying and I know from past experience in this
13 court that sometimes when there are lots of
14 attachments that it becomes difficult to
15 download, so let me start from a housekeeping
16 perspective. The court should have the
17 plaintiff's notice of and Motion for summary
18 judgment.

19 THE COURT: Yes.

20 MR. SHEEDY: Attached to that Motion,
21 at Tab A, is the Master's Deed to which Mr.
22 Moore referred a few minutes ago.

23 THE COURT: Yes.

24 MR. SHEEDY: Also attached would be
25 transcripts of depositions of the two

1 guarantors, ---

2 THE COURT: Yes.

3 MR. SHEEDY: And the title policy
4 should appear as Tab C.

5 THE COURT: Yes.

6 MR. SHEEDY: Okay. In addition, the
7 court should have the affidavit of Hanley
8 (phonetic).

9 THE COURT: Yes.

10 MR. SHEEDY: Okay. Along with
11 plaintiff's memorandum in support of its Motion
12 for summary judgment.

13 THE COURT: Yes.

14 MR. SHEEDY: And as a courtesy to the
15 court, I've attached to that Motion another copy
16 of the title policy -- so I apologize for the
17 correctness of that, but the purpose was to
18 ensure that the court had a highlighted policy
19 with respect to paragraphs two and nine.

20 THE COURT: Okay.

21 MR. SHEEDY: Next the court should
22 have defendant's memorandum in response to
23 plaintiff's Motion for summary judgment. Then
24 attached to that are eleven exhibits.

25 Okay, so let me make sure that the

1 court has those materials. If not, I'm happy to
2 hand up any or all.

3 THE COURT: I have them all. Thank
4 you.

5 MR. SHEEDY: Excellent. Excellent.

6 MR. MOORE: As a matter of house-
7 keeping, before we get into argument, I can
8 provide the court -- I've got a tabbed copy also
9 that has reference to the exhibits.

10 THE COURT: Thank you, because that
11 did not print out.

12 MR. MOORE: (Tenders).

13 THE COURT: Thank you.

14 MR. MOORE: Your Honor, also as a
15 housekeeping matter -- and I'm realizing this,
16 again, trying to jump out of the forest and look
17 at the trees, that part of the memoranda that we
18 received last night from Mr. Sheedy argues the
19 defense that we asserted relating to release of
20 guarantors. What happened in this matter is
21 that when they were doing the foreclosure
22 action, unbeknownst that the title insurance
23 company, they released the -- they released the
24 primary debtor, and then they also released all
25 the guarantors. They filed a separate action in

1 Federal Court against the guarantors and in
2 settlement of everything released them. They
3 did not tell us. The policy provides that if
4 they do that that they may have compromised
5 their coverage to the extent that there are sub-
6 brogation rights against those guarantors that
7 have been compromised.

8 The discovery that was conducted in
9 this case, that ended in December, was an

10 inquiry of those guarantors as to what their
11 assets were and if they could stand, and whether
12 or not there was jeopardy to the title insurance
13 company because of those releases that were done
14 without its consent.

15 We asserted in our second -- in our
16 first amended complaint that that was a defense,
17 to payment of the claim, that they had not
18 notified us about these. We are now satisfied
19 that there was no jeopardy suffered, because we
20 were able to file a release of these guarantors.
21 I would have been happy to show that there was
22 some pool of money that I could have gotten back
23 from them. I can't show that. So for purposes
24 of summary judgment argument, we're abandoning
25 that defense. So we don't need -- I don't think

1 that we need to argue about that part.

2 I think that all we are going to be
3 arguing about is what I want to assert in my
4 amended Complaint -- I mean my amended Answer.
5 Sorry. That's our argument. Mr. Sheedy may see
6 it differently.

7 MR. SHEEDY: Your Honor, before I
8 respond to the invitation to see it differently,
9 let me make a comment, which is obvious to the
10 court and Ms. Driscoll, but may not be to the
11 record. Mr. Moore's references to "they" are
12 not necessarily references to our law firm.
13 Let me make it clear that this is a file that we
14 inherited from Nexsen Pruet in foreclosure, so
15 some of the matters or things that Mr. Moore
16 makes reference to with "they" is actually
17 reference to Nexsen Pruet and not Mr. Sheedy.

18 MR. MOORE: Your Honor, I think the
19 record will reflect that when I refer to "they"
20 that I'm referring to his client and the actions
21 of his client. Certainly I don't mean to impugn
22 anything that Mr. Sheedy or Ms. Driscoll has
23 done. I tried to make that clear in my earlier
24 argument to the court. That's not our beef.
25 Our beef is with the conduct of the insured.

1 MR. SHEEDY: Accepting Mr. Moore's
2 representation as perhaps being just a, uh, I
3 would say the plaintiff takes exception to that
4 portion of the defendant's Motion for summary
5 judgment which pertains to impairment of sub-
6 brogation interests. Consequently that would
7 be the fourth defense -- yes. I misspoke. We
8 would take exception to the plaintiff's ---

9 THE COURT: I wondered if there was
10 another Motion. That you, Ms. Driscoll.

11 MR. SHEEDY: I'm sorry, Your Honor.
12 So I think we're talking about the fourth
13 defense. And I agree with Mr. Moore that in
14 light of that defense, the fourth defense, uh,
15 we turn then to the proposed fifth defense,
16 which is this argument of payment.

17 Essentially it is First American's,
18 the defendant's, position that whatever the
19 credit bid that exceeds the amount of insurance
20 that there is no more insurance, therefore there
21 was no coverage. I think it is purely a legal
22 issue by the defendants thus far, because there
23 can be no factual question that the face amount
24 of the insurance under the policy is Three
25 Million Seventy-five Thousand (\$3,075,000).

1 Likewise, there can be no factual dispute that
2 the credit bid that was submitted by this
3 plaintiff at the foreclosure sale was Three
4 Million Two Hundred Fifty Thousand (\$3,250,000).
5 Those two facts, to the best of my knowledge,
6 Your Honor, are not in dispute.

7 Nor do I believe that there can be any
8 dispute that Judge Scarborough entered an Order.
9 His Order adjudicated the debt, his Order

10 provided an amount that included interest and
11 protected advances and set forth, as his Orders
12 typically do, a per diem rate of interest which
13 continues to accrue until the debt is paid in
14 full. I don't think that any of that, to the
15 extent that it is factual, for purposes of this
16 Motion can be fairly disputed.

17 So I think where we are is whether the
18 plaintiff, as First American would argue, is
19 necessarily exceeding the cap of the amount of
20 insurance by adding its unpaid adjudicated debt
21 after the credit bid to the amount of the
22 insurance. I think that it is purely a
23 question of interpretation of a plain and
24 unambiguous contract, which is a matter for the
25 court.

1 Should the court find that there is
2 some ambiguity of the policy, and such
3 ambiguity would have to be found in the
4 language itself -- forensic evidence and in
5 order to create an ambiguity is impermissible
6 (phonetic), but if the court found that the
7 language was capable of more than one meaning,
8 that would of course constitute an ambiguity.
9 Based upon on that ambiguity, forensic evidence

10 would be admissible. I emphasize this at the
11 outset in order to make the point that I think
12 plaintiff and defendant also agree that there
13 is no ambiguity in the policy. The difference
14 lies in the reading of that language, which is
15 where I am going to take the court in just a
16 minute.

17 The last sort of black letter law rule
18 that I would like to make or two related rules
19 that I would like to make. The first is a
20 matter of contract interpretation. The
21 contract is to be construed against the
22 insurance company. This is the insurance
23 company's contract. The law in this and other
24 states is to the effect that the construction
25 of an insurance contract is to confine

1 coverage, not to eliminate coverage.

2 We cited a couple of cases in our
3 brief to that proposition. We cited a Fourth
4 Circuit case; Your Honor, interpreting North
5 Carolina law, which is Travelers Indemnity but
6 that -- that is the *Super Duper* case that can
7 be found at 385 S.E. 201.

8 I want to turn now, Your Honor, to the
9 policy of insurance. Again, it is tabbed in

10 our memoranda in support of our Motion for
11 summary judgment. There are two paragraphs in
12 the policy of insurance that I apologize to the
13 court for including but I think it is important
14 to keep the record clear.

15 I am looking now, Your Honor, at
16 paragraph 2(c), and it has highlighting for the
17 court, (reading): "*The amount of insurance*
18 *after the acquisition or after the conveyance*
19 *shall in neither event exceed the least of...*"
20 -- now, the reference to acquisition is clearly
21 a reference to the fact that title was taken
22 back by the lender in a foreclosure.

23 To support that assertion, I call the
24 court's attention to paragraph 2(a), which is
25 on the prior page, and that describes

1 "acquisition of title." It says an insured who
2 acquires interest by foreclosure..." -- okay?
3 So 2(c) begins, "The amount of insurance after
4 the acquisition..." -- or after the foreclosure
5 -- "shall in neither event exceed the least
6 of..." -- and then we have two subsections.

7 The first subsection is the amount of
8 insurance stated in Schedule A. As I said
9 earlier, plaintiff doesn't dispute the amount

10 of insurance stated in Schedule A. There is an
11 Exhibit A, so it gets a little confusing. That
12 would be the first page behind Tab A to the
13 plaintiff's memorandum. That amount of
14 insurance appears in the upper right-hand side
15 as Three Million Seventy-five Thousand Dollars
16 (\$3,075,000).

17 Next it says that "the amount of
18 principle indebtedness secured by the insured
19 mortgage as to the date of policy, interest
20 thereon, expenses of foreclosure, amounts
21 advanced pursuant to the insured mortgage to
22 assure compliance with laws and to protect the
23 lien of the insured mortgage prior to the
24 acquisition or interest in the land..." --
25 and "reasonable amounts expended to prevent

1 deterioration of improvements."

2 For purposes of this Motion rather
3 than come before the court and say that there
4 are genuine issues of material fact as to what
5 those dollars are that fit within that
6 subsection, plaintiff is saying that has been
7 adjudicated by Judge Scarborough.

8 Then it goes on to say, and these are
9 the key words in the second subsection, "...

10 *but reduced by the amount of all payments*
11 *made."*

12 So it is the least of three million
13 seventy-five (\$3,075,000) or the total debt
14 minus the amount of payments. We don't dispute
15 nor have we ever disputed -- we don't get more
16 than Three Million Seventy-five Thousand
17 (\$3,075,000). The risk that First American
18 took in return for the payment of the premiums
19 was the cap of Three Million Seventy-five
20 Thousand (\$3,075,000). In no event do they pay
21 more than three million seventy-five and we're
22 not here asking today for them to cut check
23 more than three million seventy-five thousand.
24 We're saying that you get the property back by
25 foreclosure. You then look to 2(c), and it's

1 the lesser of the amount of insurance, three
2 million seventy-five, or the total debt minus
3 the payments; in this case Three Million Two
4 Hundred Fifty (\$3,250,000).

5 Now before I go any further, I would
6 ask the court to look next at footnote two
7 which appears on page nine three. This is our
8 effort, Your Honor, now -- and it's always
9 dangerous for lawyers to (inaudible) -- but I

10 think this is completely supportable without
11 the court having to go anywhere except to Judge
12 Scarborough's Order.

13 At the date of the foreclosure sale,
14 which was March 1, 2010, the debt was Three
15 Million Six Hundred Forty-one Thousand Dollars
16 (\$3,641,000). That is what we think can be
17 easily determined from Judge Scarborough's
18 Order.

19 Mr. Moore has made it clear to this
20 court that the bid was Three Million Two
21 Hundred Fifty Thousand (\$3,250,000), and I
22 would inform the court that we don't dispute
23 that was the credit bid at foreclosure.

24 Now, this is a bit of distraction but
25 in anticipation that the court would hear us

1 but because Atlantic Credit-something, a
2 subsidiary or affiliated or related company to
3 Preservation Capital is actually the one who
4 bid the bid back in. I don't want the court to
5 get confused that somebody paid Three Million
6 Two Hundred Fifty Thousand cash to Judge
7 Scarborough and then his office took out
8 expenses and disbursed a sum of money to my
9 client, because that is not the way that it
10 happened. It was a credit bid.

11 So that leaves, under paragraph
12 2(c)(2), Three Hundred Ninety-four Thousand One
13 Hundred Ninety Dollars (\$394,190) as the
14 remaining indebtedness as of March 1, 2010.

15 Under the terms of the Order, you can
16 see where the interest has been calculated from
17 that date to today's date, January 14th, based
18 on the per diem in that Order, \$192.92, uh, --
19 and for clarity sake, the Order of Judge
20 Scarborough said eighteen percent and we've
21 converted that eighteen percent into a per
22 diem. Okay? If that makes sense to the court.

23 So the total amount of remaining
24 insurance under paragraph 2(c)(2) is Four
25 Hundred Fifty-two Thousand Seven Hundred

1 Thirty-one Dollars and forty-eight cents
2 (\$452,731.48). We're not saying that it is
3 three million four hundred fifty-two -- no.
4 What we're saying is that it is \$451,731.48.

5 And for purposes of this Motion,
6 we're not trying to make some argument that the
7 liability of the insurance had somehow expanded
8 beyond the face amount of the insurance
9 contained on Schedule A.

10 Now let's turn our attention to the
11 next dispositive paragraph, which is paragraph
12 nine, and that happens to be the paragraph that
13 Mr. Moore likes so much.

14 The first sentence is the sentence
15 where Mr. Moore addresses his case, "...to the
16 extent that the payment reduces the amount of
17 insurance." Real simple math calculation.
18 Three million seventy-five minus Three Million
19 Two Hundred Fifty gives a negative number.

20 It ignores the next sentence in that
21 very subsection. It ignores the amount of
22 insurance that will thereafter be increased by
23 accruing interest and advances made to protect
24 the lien of the insured mortgage, as secured
25 thereby. Now, I will get to the proviso in

1 just a second -- but let's take the first part
2 of that sentence before you reach the clause at
3 the end. For the benefit of the court, I also
4 have a footnote in our memorandum tracking the
5 language of 9(b): Three Million Seventy-five
6 Thousand, that's the amount of insurance, the
7 first part of the first sentence. The second
8 part, "reduced by payment *pro tanto*," Three
9 Million Two Hundred Fifty Thousand.

10 The footnote continues on page ten,
11 and that leaves a negative number of One
12 Hundred Seventy-five Thousand (\$175,000) and
13 the nonprincipal as adjudicated by Judge
14 Scarborough. That takes you back to the same
15 number under paragraph 2(ii), Three Hundred
16 Ninety-four Thousand One Ninety (\$394,190) as
17 of March 1, 2010, and then we have per diem
18 interest to today's date.

19 So it seems to the plaintiff, as we
20 hope it will seem to the court clearly, that
21 these two clauses are not inconsistent or at
22 odds with each other. They ultimately produce
23 the same number. That number is Four Hundred
24 Fifty-two Thousand Seven Hundred Thirty-one and
25 forty-eight cents (\$452,731.48) as of today's

1 date.

2 With respect to whether that amount
3 of insurance is increasing due to the interest
4 accrual, I think it's clear that it was
5 intended to be increased. Otherwise the words
6 in the second sentence of 9(b) "with interest
7 thereon" would be superfluous. Words in a
8 contract are to be construed with their simple
9 meaning and that's the meaning to be given to

10 those words, we would submit.

11 Now, the math doesn't stop there.
12 Just because plaintiff still has an amount of
13 insurance for roughly four hundred fifty
14 thousand under the terms of the policy doesn't
15 mean that is the amount that the plaintiff has
16 lost. We have to calculate the amount that the
17 plaintiff has lost. Obviously the amount of
18 the plaintiff's loss has to be within the
19 amount of insurance -- because if it isn't,
20 anything over is not compensable. But in this
21 case, gratuitously for First American, it's a
22 lesser number. So let's talk about that for a
23 moment.

24 As Your Honor heard during Mr. Moore's
25 characterization of the facts of this case at

1 the beginning of his argument on his Motion to
2 amend, plaintiff takes a loan, the loan is
3 secured by a mortgage, the mortgage describes
4 three pieces of property, one of the pieces of
5 property is sold and the lien is paid down,
6 another piece of property is foreclosed by
7 Nexsen Pruet, the third piece of property we
8 are here arguing about today because we didn't
9 get a good lien -- because the plaintiff was

10 supposed to have owned it but didn't and we had
11 a title defect. So what is the loss to the
12 plaintiff because of the title defect? That,
13 too, is a mathematical calculation.

14 For the purposes of today, and as far
15 as I know based upon the record in this case,
16 there has been only been one appraisal done of
17 what I call the King Street, the 35 King Street
18 parcel. It was done, I believe, in December of
19 -- although it had been sold, if memory serves,
20 in August. The appraiser set the value at Five
21 Hundred Ninety Thousand (\$590,000). First
22 American has not come forward with any
23 different evaluation number in this case --
24 that \$590,000 is an undisputed figure.

25 Unfortunately for my client, my client

1 didn't have the first mortgage on that piece
2 of property. Another lender had the first
3 mortgage. The other lender had a first
4 mortgage for two hundred forty-four, two
5 hundred forty-five thousand dollars, the amount
6 we set forth in our memorandum. Five hundred
7 ninety thousand minus the two hundred forty-
8 four defines the plaintiff's loss as three
9 hundred forty-five thousand dollars (\$345,000).

10 We wish it were four hundred fifty-two seven
11 hundred thirty-one dollars and forty-eight
12 cents (\$52,731.48), but I can't make it happen
13 because those aren't the facts.

14 We are here today, Your Honor, seeking
15 justice for three hundred forty-five thousand
16 dollars and some change (\$345,000-and-some-
17 change) as forth in our memoranda: three
18 hundred forty-five three hundred thirty-five
19 based on this math that I just shared with the
20 court.

21 Now, let me take a second and describe
22 where I've been before I move into some law.
23 We've got a plain and unambiguous contract.
24 You've got to construe it as no ambiguity.
25 We're here at summary judgment and while I

1 understand the *Hancock* case and the ruling of a
2 scintilla, there have been plenty of cases
3 other than Hancock where summary judgment has
4 been upheld under circumstances, particularly
5 in tort matters, where it was a lot easier to
6 find a scintilla than in this case where we
7 have a contract that needs to be interpreted by
8 the court anyway.

9 Now we have run through the language
10 of paragraphs two and nine of the policy and
11 let me turn my attention to some law. Because
12 I learned in law school not to mislead the
13 court and I don't want to mislead the court, I
14 will just tell the court that I don't know of
15 any South Carolina law directly on point deal-
16 ing with this very narrow issue of a credit
17 bid. Consequently, Your Honor will see in our
18 brief that we have turned to the law of another
19 jurisdiction, and have law in other
20 jurisdictions dealing with calculating loss and
21 when coverage is terminated. Because at the
22 end of the day that's what First American is
23 saying, is that it's liability was terminated
24 upon the entey of the credit bid.

25 We have brought to the attention of

1 Your Honor cases from Idaho, California,
2 Florida, Maine, the First Circuit Court of
3 Appeals, Wisconsin and New Jersey; all of
4 which, in our opinion, stand for the pro-
5 position of how to calculate loss and how to
6 determine the amount of insurance. We do not
7 think that they support the position that the
8 plaintiff is facing today. It is a simple
9 calculation because the credit bid exceeds the
10 amount of the insurance.

11 Now, there is one case in particular
12 which we think is useful to the court. Because
13 in that case we actually have a court looking
14 at provisions which, if not identical, are
15 substantially similar to paragraph two of nine
16 that I tediously walked the court through a few
17 minutes ago, for which I apologize.

18 I would like to quote from this case
19 just because the language is so strong and so
20 appropriate. (Reading): "*In procuring title*
21 *insurance, a lender seeks to insure itself*
22 *against the risk that if a defect in the*
23 *underlying title is raised it may invalidate*
24 *the lien and leave them in the status of*
25 *unsecured creditors.*" Let me stop right there.

1 That's exactly what happened here if the court
2 rules that there is no liability on the part of
3 First American. My client, Preservation
4 Capital, ends up as an unsecured creditor with
5 no collection opportunity, through no fault of
6 its own. It had a conceptual defense to the
7 King Street property, protected itself by
8 taking title insurance and paying premiums, and
9 believed that by the payment of that premium if

10 there was any title defect -- a rather latent
11 defect in this case because the parties that
12 granted the mortgage didn't own the property,
13 uh, that the Bank would be protected or that
14 Preservation Capital would be protected.

15 Continuing with the language from this
16 case, that risk continues so long as the lender
17 does not receive payment for full proceeds.
18 Again, I will stop. No question, the loan was
19 paid in full. The termination clause in
20 paragraph 7(b), -- the numbers are different in
21 this policy and the number in the policy, you
22 can look at the numbers in the policy -- there
23 is no indication of any intention to cut short
24 coverage.

25 More recently the provision should be

1 interpreted as designed to reflect the
2 conditions which are representative of dealing
3 with this. Paragraph 7(d) provides that if
4 full payment is interpreted to apply to a
5 payment which does not eliminate the insured's
6 risk -- a very important point.

7 If full payment means that the
8 insurance has a debt out there and they
9 anticipate that they have collateral for that

10 debt and full payment does not eliminate the
11 risk for the insured -- if "full payment" is
12 interpreted to apply to a payment which does
13 not eliminate the insured's risk, then the
14 provision irrationally ties the termination of
15 the policy to an arbitrary and fortuitous
16 occurrence.

17 That is what First American is here
18 today to achieve. We do not think that such
19 interpretation is in accord with reasonable
20 expectation. And, Your Honor, it was certainly
21 not the reasonable expectation of my client
22 under these circumstances. There are so many
23 things that could be said about the ramifica-
24 tions that First American wants to make.

25 Let's think about this for a moment,

1 plaintiff is still sitting there with about a
2 hundred and ten thousands dollars that it will
3 never collect. So it is not like there is
4 somehow a windfall to the plaintiff in this
5 case.

6 Your Honor, I have a copy of this case
7 and I'll be happy to hand it up. I've also got
8 an extra copy for Mr. Moore if he wants it.

9 THE COURT: Which case are you
10 referring to?

11 MR. SHEEDY: I am referring, Your
12 Honor, to *Paramount Properties*, which is the
13 case that I quoted a few minutes ago. Would
14 your Honor like this, (tendering).

15 THE COURT: Thank you.

16 MR. SHEEDY: And, lastly, Your Honor,
17 I would say that if Your Honor rules in favor
18 of the position that the defendants are
19 advocating in this case, ---

20 THE COURT: I'm sorry?

21 MR. SHEEDY: The last point that I
22 would make is that if Your Honor rules in favor
23 of the position that the defendant is taking in
24 this case, that it pockets the premiums, has a
25 termination of liability and is essentially

1 exculpated from any responsibility whatsoever
2 due to the fact that this agency issued a title
3 policy on a piece of property that was supposed
4 to be owned by one party and was in fact owned
5 by another party such that the plaintiff
6 sustains a four hundred fifty-two thousand
7 dollars (\$452,000) loss, doesn't collect it's
8 three hundred forty-five thousand (\$345,000),
9 which it ought to collect because of the title

10 defect, the title company just pockets the
11 money and has no liability. That's not right.
12 Thank you.

13 MR. MOORE: Your Honor, as a
14 preliminary matter, I would offer to the court
15 that the additional facts that were provided by
16 Mr. Sheedy, especially those relating to the
17 value of the property, and the amounts due on
18 the debt were all accurate. We just don't like
19 how he's put them together to come up with the
20 numbers that he has come up with.

21 The plaintiff submitted copies of
22 their appraisals on the King Street property
23 and on the shopping center. We've had them
24 reviewed and we agree with them. So we
25 disposed of that as a issue in controversy

1 early on. And I thank the plaintiff for
2 working with us on that.

3 Before we start drowning in the
4 language of the policy, I think the court needs
5 to understand what is going on here. Let's go
6 up to a thousand feet and let's look down on
7 the transaction:

8 A title insurance policy was issued.

9 That title insurance policy was a lender's

10 policy. That policy assured that there was a
11 lien on a piece of property, and it assured the
12 plaintiff that it would not suffer a loss; but,
13 they capped that at a certain dollar amount:
14 three million seventy-five thousand dollars.

15 The insured goes to foreclosure, as a
16 lot of insureds do. They foreclosed on a piece
17 of property. If they bid on that property and
18 they don't get cash back, they get a piece of
19 property. And they're standing there relying
20 on the title that was represented to them as
21 having value. They have three million two
22 hundred fifty thousand dollars worth of value
23 in that property.

24 What Mr. Sheedy said is not correct.
25 Liability doesn't end there. The paragraph

1 that he has landed on is language that says
2 what happens is that this lender's policy
3 becomes an owners policy. If you look at the
4 language in paragraph two it says "continuation
5 of insurance." That continuance of insurance
6 says First American continues to insure this
7 property, but it's no longer a loan policy
8 because your mortgage is gone, you foreclosed
9 on that and this is now an owners policy.

10 I think what has happened is that
11 the plaintiff has manufactured confusion, has
12 manufactured ambiguity by trying to tie para-
13 graph two with paragraph nine. Paragraph nine
14 clearly says that you've got coverage, three
15 million seventy-five thousand dollars
16 (\$3,075,000), but if payment is made on that
17 debt then your coverage is reduced. They've
18 acknowledged in their mathematical equation to
19 the court that at that foreclosure sale
20 coverage was over. That was the end. That's
21 all there was.

22 Now, there is some suggestion that the
23 fact that this was a credit bid should have
24 some significance. The term "credit bid" is a
25 tag. It is not something that is defined in

1 the law. It is a tag that we use in the
2 foreclosure process to explain the process,
3 whereby the mortgagee comes in and bids. Their
4 bid is a real bid. They just don't have to pay
5 the dollars in to the court because they've got
6 a judgment. So the fact that this was a credit
7 bid doesn't have any bearing on this at all.
8 They bid that, they gave value for the property
9 and that value was three million two hundred
10 fifty thousand dollars (\$3,250,000).

11 Paragraph nine says that when they
12 made that payment that coverage was reduce to
13 zero.

14 Now, the plaintiff would suggest to
15 the court, 'Well, we still had money owed to
16 us. We still had money owed to us. Because it
17 was decreased to zero, it needs to go back up
18 because there is still money owed to us.'
19 If that is the plain reading of this contract,
20 the cap makes no sense whatsoever. That can't
21 be.

22 Paragraph two and paragraph nine have
23 to be read as steps in a process. What I am
24 asking or what this policy says is, 'After you
25 bid on this property, after you take this

1 property back, you have been given back --
2 you have been given -- in this case -- three
3 million two hundred fifty thousand dollars
4 (\$3,250,000) worth of value. Now there's no
5 more coverage. That's what you have. You have
6 those pieces of property.

7 Let's look at paragraph two, though.
8 Paragraph two says *but* -- 'but because we will
9 give it to you, you've got now owners coverage

10 and we are going to continue to assure that
11 you've got good title to that property which
12 you have now taken back in satisfaction of your
13 debt.' That's all it says. It applies only to
14 property purchased at foreclosure sale.

15 The plaintiff's argue suggests that it
16 applies to the Main (sic) Street property -- or
17 the King Street property, which isn't property
18 that was a part of the foreclosure sale. Read
19 paragraph two. It says this is a continuance
20 of insurance if you buy property at a
21 foreclosure sale, if you take property back by
22 Deed in lieu of foreclosure, if you're a
23 government agency and you buy it -- it says
24 "if you take the property back." That is what
25 paragraph two applies to. It does not apply to

1 this deficiency, this balance that is still
2 due. It says "after coverage has been
3 exhausted."

4 The California case that was cited by
5 counsel is completely different. First of all,
6 it's not appropriate or the same language.
7 Secondly, in that situation the mortgagee
8 accepted cash and received cash in satisfaction
9 of its debt. The title insurance company said,

10 'okay, our responsibilities are ended, you've
11 been paid in cash.' After that payment of
12 cash, someone came in and challenged that
13 payment, said 'you gotta give us that payment
14 back.' They filed a claim with the title
15 insurance company, the title insurance company
16 said 'we don't have any coverage because it's
17 already gone.' Facts are different here.

18 Here we are saying that they've gotten
19 three million two hundred fifty thousand
20 dollars (\$3,250,000) worth of value in a piece
21 of property, they've still got that in their
22 pocket. We stand as assurers of that title
23 pursuant to the terms of this policy. So they
24 have three million two hundred fifty thousand
25 dollars.

1 The only thing this policy assured
2 was that the collateral would stand for three
3 million seventy-five thousand dollars
4 (\$3,075,000) worth of coverage. They got that,
5 and they got more.

6 Granted, there is a debt out there.
7 Judge Scarborough said it. Granted, that debt
8 was more than this policy amount. Granted,
9 they've got something that is not going to be
10 paid to them.

11 All we are offering to the court is
12 that, under the plain language of this policy,
13 my client is not the one who has to pay.

14 We have asked also for summary
15 judgment in our response. We agree that there
16 is no genuine issue of material fact that would
17 hold this matter over for trial before a jury.
18 The relevant facts are the policy and what they
19 did at the foreclosure sale. Thank you, Your
20 Honor. May I add one other thing?

21 THE COURT: Yes, sir.

22 MR. MOORE: I just -- we just
23 learned that paragraph two would be an issue or
24 would be argued as of last night. We would ask
25 for the opportunity to respond to some of the

1 case law that has been cited in writing, so
2 that the court and the record will be complete.
3 Thank you.

4 THE COURT: All right. Thank you.

5 MR. SHEEDY: We would indicate to the
6 court that, uh, but I, uh, for lack of -- I
7 can't resist the opportunity to point out to
8 the court that Mr. Moore has not cited any law
9 to support the position that he is taking.

10 Second, we have our memorandum in
11 opposition that constitutes evidence, Rule 56,
12 except that we agree on the appraisal numbers.

13 This, too, perhaps is just a house-
14 keeping manner but we do not agree that under
15 South Carolina corporate statutes and
16 decisional law that 29-3-650 et al, the credit
17 isn't just a tag. I think that it is something
18 that has significance in terms of whether the
19 parties gets the credit, as to how the action
20 should be taken as a credit.

21 But the real crux of Mr. Moore's
22 argument, I think, goes to the notion that
23 paragraph two doesn't apply because it's a
24 continuation, that paragraph nine is the only
25 applicable provision, and then there's this

1 confusion over the property, the acquisition of
2 title. But I think factually that there can be
3 no dispute as to the title. My client took
4 title to the shopping center parcel. We have
5 some applicability by virtue of that fact. My
6 client did not take title to the King Street
7 parcel, they couldn't afford to close on the
8 King Street parcel. My client took title to
9 the shopping center parcel.

10 So let's just assume for argument that
11 paragraph two is applicable. I'm not saying
12 that I agree with that. But for purposes of
13 making this point, we will take that as an
14 exception. He is giving no meaning to the
15 sentence in paragraph 9(b) "the amount of
16 insurance may thereafter" -- "thereafter".
17 What does "thereafter" mean? It's got to
18 describe something. It describes after the
19 payment, in this case the credit bid. Okay.
20 "...be increased..." -- okay, we've got
21 coverage that is increasing after the
22 reduction. That's what it says. And it
23 provides some detail as to how that happens.

24 Now, when I made my argument in chief
25 a moment ago, I did not comment, I reserved the

1 right to comment, on the pending clause at the
2 end of the second sentence in paragraph 9(b).
3 I think those words are very important and give
4 a lot of clarity to how this action works.

5 The words are "Provided in no event
6 shall the amount of the insurance be greater
7 than the amount of the insurance stated in
8 Schedule A."

9 So paragraph one says 'we paid it,
10 subtract it from the amount of insurance.'
11 The second sentence says, 'may be increased
12 thereafter' and then at the very end of that
13 second sentence it says, 'but in no event is
14 it going to be greater than the amount of
15 insurance on Schedule A.' In no event after
16 you've gotten this increase are you to end up
17 with a value of insurance that is greater than
18 three million seventy-five thousand
19 (\$3,075,000). That's what the sentence says.

20 As I indicated to the court earlier,
21 we're not here asking for three million-
22 whatever. Four hundred fifty-two-plus some,
23 almost \$3.5 Million dollars worth of coverage.
24 That's not our request.

25 We are just asking that this language

1 be given its plain, ordinary meaning as
2 intended by the parties to provide coverage for
3 the defect in the lien, that the agent --
4 through First American -- obviously committed
5 to when this policy of insurance was issued.

6 Now, the last thing that I will say to
7 the court is that I am having some difficulty
8 distinguishing between paragraph 7(d) in the
9 California case and paragraph 9(b) that we have
10 been discussing in this case. If Your Honor
11 looks at footnote three from page three of this
12 Decision, here's what the California case was
13 construing:

14 (Reading): *"All payments under this*
15 *policy, except payments made for costs,*
16 *attorneys' fees and expenses, shall reduce the*
17 *amount of the insurance pro tanto..."* -- well,
18 that reflects the first sentence in 9(b), I
19 believe -- *"...and no payment shall be made*
20 *without producing this policy for endorsement*
21 *of such payment unless the policy be lost..."*

22 COURT REPORTER: Slow down for me a
23 little bit, please.

24 MR. SHEEDY: I'm sorry. Where did I
25 lose you?

1 COURT REPORTER: ... unless the
2 policy be ...

3 MR. SHEEDY: (Reading resumed):
4 "...this policy for endorsement of such payment
5 unless the policy be lost, or destroyed, in
6 which case proof of such loss or destruction
7 shall be furnished to the satisfaction of the
8 Company; provided, however, if the owner of an
9 indebtedness secured by a mortgage shown in
10 Schedule B is an Insured here then such
11 payments shall not reduce pro tanto the amount
12 of the insurance afforded hereunder as to such
13 Insured.

14 Then it goes on basically , Your Honor
15 -- if the court reporter would like, I can hand
16 this up, (tendering Westlaw cite).

17 While the case may not be identical to
18 the facts which are before Your Honor, it's
19 pretty close. We think, in summary, that while
20 we understand the insurance company's argument
21 -- certainly commend Mr. Moore for making the
22 argument -- uh, I think there is coverage here
23 for the three hundred forty-five thousand
24 (\$345,000) and plaintiff is entitled to be

1 paid.

2 MR. MOORE: If I may, please, Your
3 Honor.

4 THE COURT: Briefly.

5 MR. MOORE: In response, when we
6 filed our memorandum, we had a Motion for
7 summary judgment as to everything that
8 previously had been amended. We were showing
9 the court through discovery, which I think that
10 we can do, all of our documents attached, with
11 Bates-stamped numbers -- Bates-stamped numbers
12 which the plaintiff had put on them, showing
13 that there may be a genuine issue of material
14 fact as to the bad faith aspects and the
15 amended pleadings that he was arguing. So we
16 think that.

17 As to the Master's report and Order in
18 the foreclosure sale and also the Deed, that
19 was admitted not only by us but also by the
20 plaintiff, we think the court can also take
21 judicial notice of those documents. So those,
22 we think that the court should consider.

23 Mr. Sheedy is correct, no law. There
24 is no law. The cases that we were finding that
25 talked about bidding at foreclosure sales, some

1 were from states where you have trustee sales,
2 where it is not traditional foreclosure. Some
3 of them involved situations where you had a
4 third party coming in to bid, not necessarily
5 the lender in the case. We could not find any
6 case in South Carolina or any other cases that
7 were exactly on point. The one case that they
8 landed on is this California case, which is so
9 factually distinguishable that we don't feel
10 that we can rely on it. So we are saying to
11 look at the plain language of the policy.

12 The argument, just very briefly, on
13 paragraph nine, about the opportunity for the
14 insurance to increase, after reduction. The
15 word "thereafter" is very important. What Mr.
16 Sheedy is arguing is not the increasing amount
17 thereafter. He's saying -- the amount that he
18 wants to add as the increasing amount was
19 incurred before the reduction. The court said
20 'here's the debt', a payment was made, 'here's
21 the reduction.' So the amount that he wants to
22 add wasn't approved thereafter but for the
23 interest that continued to accrue on the amount
24 that accrued before the reduction. I don't
25 think that you can get that inference. I think

1 that's an important distinction. It's been
2 made, reference to, in argument before --
3 written argument to the court and we've made
4 allusion to the fact that the St. Phillips
5 Street property was released for a two hundred
6 fifty thousand dollar (\$250,000) payment. That
7 payment reduced the coverage, but that amount
8 went back up because thereafter -- after that
9 payment -- there was interest and other costs
10 that accrued that took it back up to the amount
11 of the debt. That's the type of decrease/
12 increase that we're talking about, not that
13 'I've got a debt that is not fully satisfied,
14 so I get to increase the amount after we've
15 already been paid.'

16 What they have and what is different
17 from the California case is that they have got
18 a piece of property, and they've got a piece of
19 property that still has an insurance policy on
20 it with coverage in the amount of three million
21 seventy-five thousand dollars (\$3,075,000).

22 Thank you.

23 MR. SHEEDY: May I say one thing?

24 THE COURT: You may say briefly
25 whatever you want to say, Mr. Sheedy.

1 MR. SHEEDY: I will be very quick.
2 The words in the second sentence of 9(b), if
3 Your Honor will look at it, is "accruing", not
4 accrued. "Accruing".

5 THE COURT: Thank you. All right.
6 Counsel, if you would submit a proposed Order
7 regarding the summary jury Motion by close of
8 business, which is 5:00 p.m. on Tuesday -- the
9 Court is closed on Monday. I don't know if
10 you'll be working or not, but the court is
11 closed on Monday. You will have my ruling by
12 noon on Wednesday.

13 Are we still on a trial roster? Are
14 you up next week?

15 MR. MOORE: Your Honor, I think
16 we're up -- according to Don's, what he has
17 told us, we're up Wednesday of the following
18 week.

19 THE COURT: Okay. So that will give
20 you time. And then -- because I am not here
21 that following week.

22 MR. MOORE: I'm sorry, Your Honor?

23 MR. SHEEDY: I would never dream of
24 putting that on the record. This is selfish of
25 me, and I understand the court, but I guess I

1 was hoping to have the Martin Luther King
2 holiday.

3 THE COURT: I was attempting because
4 I know -- I was attempting to accommodate you
5 all because there seemed to be some pressing
6 nature. If you want -- work amongst yourselves
7 and tell me when would be convenient for you to
8 do proposed Orders. I, too, would like to have
9 a holiday. We work to get an Order ready and
10 then compare it to yours, so we would be
11 working Martin Luther King day as well. So you
12 tell me ---

13 MR. SHEEDY: Would Your Honor be
14 terribly offended if I suggested that we submit
15 competing Orders by next Friday?

16 THE COURT: That would be perfect,
17 and I'll tell you what I will do. Pursuant to
18 that, I will protect you from trial that
19 following week. I will give you -- make a note
20 to send to Mr. Michel that I will protect you
21 for the following week. Thank you.

22 MR. MOORE: Your Honor, should the
23 proposed Orders address only the Motions for
24 summary judgment or should we also submit
25 proposed Orders on ---

1 THE COURT: If you would, just for
2 clarity sake, do a proposed Order as to the two
3 Motions. I believe that the best way to do
4 those -- because if I grant your Motion, then
5 you -- so if we could, keep those two Motions
6 together and then the Motions for summary
7 judgment separated.

8 MR. MOORE: May I suggest, Your
9 Honor, that if there is a new cause of action
10 that the plaintiff assert against my client for
11 bad faith, I -- I doubt that -- we might be in
12 front of you arguing again, for a continuance
13 in order to be able to file responsive
14 pleadings since we would have to do some
15 limited discovery on that.

16 THE COURT: All right. Well, we
17 will address that issue when that arises.

18 MR. MOORE: Thank you.

19 THE COURT: All right, anything
20 further Ms. Driscoll?

21 MR. DRISCOLL: No, Your Honor.

22 THE COURT: Mr. Sheedy?

23 MR. SHEEDY: (No verbal response).

24 THE COURT: Well, thank you. Enjoy
25 your holiday.

1 MR. SHEEDY: Thank you, Your Honor,
2 for hearing us on short notice.

3 MR. MOORE: Thank you, Judge.

4 THE COURT: Please submit those
5 Orders in Word so that we can make changes, so
6 that my clerk doesn't have to stay on his
7 holiday retyping.

8 MR. MOORE: Your Honor, can we just
9 submit those, then, by e-mail?

10 THE COURT: Please by e-mail.

11 (HEARING CONCLUDED)

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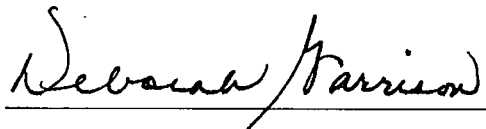
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CERTIFICATE OF REPORTER

I, the undersigned, Deborah Garrison,
official court reporter for the 9th Judicial
Circuit of the State of South Carolina, do
hereby certify that the foregoing is a
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Brenda Cooley, retired court reporter, of the
hearing held before The Honorable Kristie
Harrington on January 14, 2011;

I further certify that I am neither kin nor
counsel to any of the parties and have no
interest in the outcome of this action.



Deborah Garrison
Circuit Court Reporter
9th Judicial Circuit

Charleston, South Carolina
May 25, 2012

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) 09-CP-10-4475

PRESERVATION CAPITAL)
CONSULTANTS, LLC,)
)
PLAINTIFF,)
) TRANSCRIPT OF RECORD
vs.) ORIGINAL
)
FIRST AMERICAN TITLE)
INSURANCE COMPANY.)
)
DEFENDANT.)

SEPTEMBER 28, 2011
CHARLESTON, SOUTH CAROLINA

B E F O R E:

THE HONORABLE KRISTI LEA HARRINGTON, JUDGE.

A P P E A R A N C E S:

JAMES W. SHEEDY, ESQ.,
Attorney for the Plaintiff.

W. CLIFF MOORE, III, ESQ.,
Attorney for the Defendant.

VIVIAN H. CROSS
OFFICIAL COURT REPORTER

I-N-D-E-X
SEPTEMBER 28, 2011
PRESERVATION CAPITAL CONSULTANTS, LLL v.
FIRST AMERICAN TITLE INSURANCE COMPANY
(MOTIONS HEARING)
(09-CP-10-04475)

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E X H I B I T S

IDENTIFICATION

ENTERED

*****NO EXHIBITS OFFERED*****

P R O C E E D I N G S

(SEPTEMBER 28, 2011 - 12:08 P.M.)

(CASE NUMBERS: 09-CP-10-04475)

THE COURT: *Preservation Capital versus American Title.*

(WHEREUPON, PROCEEDINGS WERE INTERRUPTED FOR A
CONFERENCE, OFF THE RECORD.)

(WHEREUPON, PROCEEDINGS CONTINUED.)

THE COURT: All right, Counsel, if you'll state your
name for the record and the party you represent?

MR. MOORE: Yes, Your Honor; I'm Cliff Moore, I
represent First American Title Insurance Company, the
Defendant in the action.

THE COURT: All right.

MR. SHEEDY: Good morning, Your Honor; um, I'm Jim
Sheedy, I'm here on behalf of the Plaintiff, Preservation
Capital.

THE COURT: All right; I have two Motions before me, is
that correct?

MR. MOORE: I believe that's correct, Your Honor. The
first one was a Joint Motion for Reconsideration of an
earlier Summary Judgment denial, um, that this Court issued.

And the second was my Motion, um, for separate trials in
this action.

THE COURT: All right. What's your position, Counselor,
as to separate trials? Mr. Sheedy?

1 **MR. SHEEDY:** On behalf of the Plaintiff, Your Honor, I
2 oppose it. And I believe Your Honor has a copy of our
3 memorandum that, uh, we submitted in opposition to that
4 Motion.

5 **THE COURT:** All right; and there was a Joint Motion for
6 Reconsideration. And just, uh, so that you understand and,
7 um -- the -- the Motions don't necessarily come back to me
8 unless you address them to me. The only reason it got placed
9 on -- on the docket is because we were having a Motions
10 docket and so this was an outstanding.

11 So just, um -- just for future reference, um, just
12 because a Motion to Reconsideration is filed, it may linger
13 until there's a trigger. Um -- it doesn't automatically --
14 the Clerk doesn't know to automatically bring them to my
15 attention. Just so you know. That's why we hadn't addressed
16 it before. All right?

17 **MR. MOORE:** It -- it was just recently filed,
18 Your Honor.

19 **THE COURT:** Correct; but, I'm just -- just for future
20 reference, I'm -- I'm assuming that this will not be the last
21 case before -- uh, that you have before me or that, uh,
22 members of your firm have before me. So, I'm just trying to
23 let you know because I like to hear those Motions to
24 Reconsider and handle those as expeditiously as possible.

25 And, I think there's some understanding that is

1 misplaced that the Clerk knows to bring those directly to me.

2 So, just make sure, uh, just in the future -- and if
3 you'll just spread that word for me so that we can handle
4 those Motions to Reconsider. All right?

5 **MR. MOORE:** Would it be -- would it be helpful, Your
6 Honor, in the future, if that were handled the same way that
7 I handled my two memoranda yesterday? Which is to say, send
8 it to your Law Clerk and to your Secretary?

9 **THE COURT:** You may, but you still will need to file it.
10 But, it just needs to be brought to my attention because
11 otherwise it's just gonna lay in The Clerk's office until
12 the -- the Clerk says oh, we have some other Motions.
13 They -- they treat it as any other Motion. All right? And
14 that's more of an aside and not a -- and not---

15 **MR. SHEEDY:** Well, thank you for your helpful comment.

16 **THE COURT:** ---and nothing was inappropriate -- or,
17 inappropriately done. It's just, it -- what happens
18 sometimes is the Motions to Reconsider just languish. And
19 especially, if that's the only Motion that's pending, then
20 they may stay out for six, eight months until another Motion
21 is filed. So, just to let you know.

22 All right, Counsel, my -- my sole question on my Motion
23 to Reconsider is, um, the -- the premise that I based my
24 denial of your, uh, Motions for Summary Judgment was that,
25 um, the Plaintiff discover -- borrower never owned the parcel

1 on King Street and that, um, that would be -- equate -- in
2 my -- in The Court's mind that that was a question of fact.

3 I understand that your position is that, uh, there are
4 only questions of law that remain and this Court should just
5 make a decision. Is that -- am I -- have I adequately
6 summarized your Motion?

7 **MR. SHEEDY:** I think Your Honor has cut to the chase.

8 **THE COURT:** Okay.

9 **MR. SHEEDY:** There is no dispute that the Plaintiff's
10 borrower did not own the King Street parcel.

11 **THE COURT:** There is no dispute; is that correct?

12 **MR. SHEEDY:** There is no dispute about that, Your Honor.

13 **THE COURT:** Was there not testimony -- and it's been --
14 been a while, Counsel -- was there not testimony or
15 information presented that there was some question, um, that
16 the Plaintiff in this action discovered the -- the borrower
17 never actually owed the parcel? That there was some -- in
18 the -- in the transfer of -- of title or something? That's
19 what I recall that I had placed some significance on.

20 **MR. MOORE:** I may have confused The Court with my
21 recitation of facts.

22 **THE COURT:** Okay.

23 **MR. MOORE:** In going through the chronology of what
24 happened, uh, we were explaining to The Court how this issue
25 came up.

1 THE COURT: Okay.

2 MR. MOORE: And the issue came up when Mr. Sheedy's
3 client was looking at the title to the property for purposes
4 of foreclosing. They thought they had two pieces of
5 property.

6 And when they did the title search, they found they only
7 had one. And so, they filed a claim at that point in time.

8 My client, the title insurance company, said we
9 understand and we agree that the borrower never had title to
10 that property.

11 We said, move forward, complete your foreclosure on the
12 property you do have and then come back and see if there are
13 any damages. Because, we're looking at an indemnity policy
14 and a title insurance policy; one that only pays if there are
15 damages that have been sustained.

16 So, our point was, prove that you have sustained damages
17 because of this problem and then we'll address the issue.

18 So, there -- like Mr. Sheedy said, there's no -- there's
19 no question of fact there. We know that the borrower never
20 had title to that piece of property. So that's -- that is
21 not disputed between us.

22 THE COURT: All right; and with that then, it is your
23 position that there's only a question of law in which I
24 must -- The Court must decide? And I can decide this on a
25 Motion for Summary Judgment?

1 MR. MOORE: Yes, Your Honor.

2 THE COURT: All right; and you wish for me to find for
3 you?

4 MR. MOORE: Of course.

5 THE COURT: All right; same thing -- same question to
6 you, Mr. Sheedy?

7 MR. SHEEDY: Uh -- in response to the first question,
8 yes; it's a claim, it's not an ambiguous, uh, policy of
9 insurance. Consequently, it is to be interpreted by The
10 Court as a matter of law.

11 And on Your Honor's second question, yes---

12 THE COURT: All right.

13 MR. SHEEDY: ---I believe that you should find for us.
14 And perhaps the most succinct expression of the Plaintiff's
15 position on the entirety of the merits appears in the first
16 footnote in our memorandum.

17 THE COURT: All right, thank---

18 MR. SHEEDY: I tried to encapsulate that, uh, realizing
19 The Court hasn't been involved in this for about eight
20 months.

21 THE COURT: It, um, it came back to me reviewing the
22 file for today's hearing. And, uh -- which means that you've
23 made some significant impact on my brain. So, I recall being
24 somewhat, uh, confused as to -- as to the transfer of the --
25 uh, having difficulty following, uh, the transfers. And

1 perhaps that is where I hung my legal theory that there was a
2 question of fact that did remain.

3 MR. MOORE: It -- the only thing that we are asking -- I
4 think both of us -- is for the interpretation of the specific
5 provision of the policy, which is paragraph nine-B.

6 THE COURT: All right. Now, as to the Motion for
7 Separate Trials, let me hear briefly on that.

8 MR. MOORE: Um -- Your Honor, uh, at the time that The
9 Court heard the last Motion, there was an allowance, uh, on
10 request of the Plaintiff, to add a cause of action for bad
11 faith. So, what we have now is we have two claims that --
12 that were filed.

13 And actually, there's three causes of action, but two
14 basic claims: One is the Breach of Contract and the other is
15 a Bad Faith claim.

16 Um -- the matter -- the -- the facts and the issues that
17 The Court will consider in the Breach of Contract action all
18 deal with construction of the contract if it goes to trial
19 and no Summary Judgment is granted.

20 On the Bad Faith claim, it's how the claim was handled.

21 We think that there is room for substantial prejudice
22 when you present to a jury whether or not there's a breach of
23 contract. If you're also muddling that with issues of how
24 the claim was handled, we think there's a possibility of
25 prejudice to the title insurance company.

1 The title insurance company, if they are right on the
2 Breach of Contract claim, it does not matter how that claim
3 was handled.

4 And, we don't believe that a jury can give -- can sort
5 through that and -- and the potential risk and the prejudice
6 that would exist to -- to my client, I think, uh, directs
7 that The Court should consider bifurcating this and ordering
8 separate trials.

9 We agree with the case law, um, that Mr. Sheedy
10 presented to The Court in his memorandum. It is a
11 discretionary call from the part -- The Court's part. But,
12 we think, and that justice would be met, if separate trials
13 were ordered in this action.

14 **THE COURT:** All right; I'll be happy to hear from you
15 briefly.

16 **MR. SHEEDY:** Um -- again, Jim Sheedy on behalf of the
17 Plaintiff.

18 Uh -- it certainly shortens my argument that Mr. Moore
19 agrees with my characterization of the law as set forth in my
20 memorandum.

21 Therefore, I think, um, I'm going to limit myself to the
22 application of fact to that body of law.

23 With respect to Your Honor exercising her discretion to
24 bifurcate, I will first say that bifurcation, uh, is an
25 extraordinary remedy. It is not, um, typical.

1 Second, uh, it's certainly not typical, uh, in matters
2 involving insurance companies where there are coverage issues
3 where the coverage, uh, and the bad faith are to be handled,
4 uh, separately.

5 Uh -- it's not like this is a highly anomalous, uh,
6 situation. Uh -- it's really rather run of the mill.

7 Uh, third, I would -- would emphasize, uh, to Your
8 Honor, uh, that there really is prejudice, uh, and there
9 really is, uh, inefficiency, uh, and there really is, um --
10 uh, a question with respect to the efficient administration
11 of justice, uh, and economy here.

12 We're talking about two trials. We're talking,
13 conceivably -- depending on Your Honor's out- -- ruling under
14 Reconsideration -- uh, holding a trial where we panel a jury
15 with respect to the first cause of action and then impaneling
16 another jury with respect to the bad faith claim.

17 We're talking about bring the same witnesses into this
18 forum twice, uh, and it's really not necessary; it's
19 inconvenient.

20 We're talking about, uh, a judge familiarizing him or
21 herself, uh, twice, um, with the, um, law and the facts, uh,
22 in this case.

23 Uh -- and unless there is some tangible, compelling
24 prejudice, uh, to the Plaintiff, a bifurcation just is not
25 warranted in this instance.

1 That's the Plaintiff's position, Your Honor.

2 THE COURT: All right; briefly.

3 MR. MOORE: In -- in very brief response, Your Honor,
4 uh, through discovery that -- that has occurred in this case,
5 we have learned that the abusive of process did not start
6 until this year according to the testimony that was offered
7 by the Plaintiff's thirty-B-six request. The abusive of
8 process, therefore, is all tied to the litigation.

9 We have a problem which we can address, and that is, as
10 counsel for, um, the Defendant in this action, I necessarily
11 become a witness. In that instance, what we have decided to
12 do is to have another law -- lawyer from my law firm
13 prosecute the case and me appear as a witness. I was
14 identified in discovery as a witness soon after this action
15 was added.

16 So there is some prejudice. This isn't just, um, facts
17 that will be, um, just as convenient to do it. I think that
18 there are some -- some issues that are going to come up. And
19 because the litigation itself is what's being called into
20 question, I think it makes sense to go ahead and hear, uh,
21 the -- have a trial on the coverage issue and then and only
22 then -- if Mr. Sheedy is successful -- would another --
23 another trial be necessary.

24 I think Mr. Sheedy said something else which was very
25 correct in his memorandum. That is, based on The Court's

1 determination on Summary Judgment, one or the other of us is
2 going to appeal. And I think this whole argument will be
3 moot, uh, because before we can---

4 **THE COURT:** The Motion to -- for Separate Trials?

5 **MR. MOORE:** Yes; because I think we'll -- we'll have a
6 determination, um -- if The Court rules on the Summary
7 Judgment Motion for Mr. Sheedy, then I intend to appeal. And
8 he's advised me the -- the same.

9 So -- I think he even wrote it in his memorandum.

10 **MR. SHEEDY:** I'd like to say that a little differently.
11 Bifurcation is relevant in the event that Your Honor
12 disagrees with the two litigants, finds that there are issues
13 of fact under Rule Fifty-six, and sends the first cause of
14 action to jury trial. That's the narrow case where a
15 bifurcation becomes relevant.

16 Now, I have two other comments to make, but I'll wait
17 for Mr. Moore is finished.

18 **MR. MOORE:** I -- I was through. That was -- that was---

19 **THE COURT:** Okay, great. All right, Mr. Sheedy, we're
20 gonna end on your two final comments.

21 **MR. SHEEDY:** I -- I'm not calling Mr. Moore as a
22 witness; he's calling himself as a witness. Or, his client's
23 chosen to call himself -- call him as a witness.

24 So, the in- -- inconvenience is really one that the
25 Defendant has decided, um, under the circumstances or- -- in

1 order to defend the Bad Faith claim.

2 And second -- and it's -- it's, um---

3 **THE COURT:** But wouldn't he have the right to do that,
4 Mr. Sheedy?

5 **MR. SHEEDY:** Oh, he has the right to do that; I just
6 don't want The Court to think that I have created the
7 inconvenience that gives rise to the bifurcation. It is the
8 Defendant that would be calling Mr. Moore as a witness.

9 And the second thing that I would say -- and -- and
10 I'll -- I really do want to be abbreviated about this because
11 Your Honor has heard this point now twice. Once on January
12 14th, once in the brief that was just submitted, and here is
13 the third time.

14 Where is his law? Where is the law in South Carolina or
15 elsewhere supporting the idea of bifurcation in the context
16 where there is a coverage claim followed by a bad faith
17 refusal claim?

18 Maybe I missed it. I looked; I didn't see it.

19 Thank you, Your Honor.

20 **THE COURT:** All right, Counsel, where are we on the
21 trial docket?

22 **MR. MOORE:** Next week.

23 **MR. SHEEDY:** I think we're on line Friday morning.

24 **THE COURT:** Oh, all right.

25 **MR. SHEEDY:** Now, obviously, if Your Honor doesn't issue

1 a ruling prior to Friday morning, we're carried forward. So
2 my understanding of how this works is---

3 THE COURT: Not necessarily, Counsel.

4 MR. SHEEDY: Pardon me?

5 THE COURT: Not necessarily.

6 MR. SHEEDY: Well, I think that's what Don Michel told
7 us and maybe he's -- he maybe overstated, Your Honor.

8 THE COURT: All right, Counsel, so you are on the docket
9 for next week---

10 MR. MOORE: We were---

11 THE COURT: ---potentially.

12 MR. MOORE: ---we were on the docket in September and we
13 called and talked with Don Michel and -- and told him our
14 predicament and told him what we believed about the -- the
15 underlying Breach of Contract claim, and together we agreed
16 that we would file this joint motion and take it off the
17 docket.

18 We are -- of course we will do what The Court pleases,
19 but if -- if The Court needs time to consider and review the
20 memorandum, um, that -- that -- our -- our witnesses are
21 here; um, they're all lawyers. Uh -- so, we -- they -- they
22 understand and we -- we can get them here.

23 Um -- and, you know, we -- Mr. Sheedy and I would have
24 some work to do. I think -- we could probably stipulate to a
25 lot of the facts that would reduce the -- the time that we

1 would have to call witnesses here and just present
2 information on what the policy says.

3 So I think that's -- that's the kind of -- that's what
4 we were wrestling with when we were trying to figure out how
5 this trial would move forward.

6 Because, you know, we have worked together. It's been a
7 pleasure working with somebody who is willing to represent
8 his client well and also work to try to -- to -- to find a
9 resolution without fighting. So...

10 MR. SHEEDY: All right, and -- and -- and -- and right
11 back, Mr. Moore, with respect to that.

12 And I don't want to repeat what he has said. But, um,
13 I -- I think that it might be beneficial to The Court for me
14 to offer a couple of sentences, um, the -- the intent of
15 which is -- is to help The Court understand, uh, why it is
16 that this go forward on a trial of what may seem like a
17 somewhat bizarre Motion.

18 Um -- and the reason behind that is this. Let's just
19 suppose, for the sake of discussion, that The Court grants
20 bifurcation.

21 Next, let's assume, for the sake of discussion, that the
22 first cause of action goes forward, which is the coverage.

23 And then we ask ourselves, well, what does that really
24 look like to a jury in this case?

25 Well, I put a witness up on the stand. Almost

1 everything that Mr. Moore recited in his memo as numbered
2 paragraphs, the Plaintiff agrees. The only exceptions,
3 really, are paragraphs that we think go to bad faith as
4 opposed to go -- going to coverage.

5 So, we close our case, and assuming again that Your
6 Honor has bifurcated bad faith from coverage, uh, I'm not
7 sure Mr. Moore even has a witness where the facts are even
8 stipulated.

9 And at that point, we're not sure exactly -- I mean
10 we're -- we're arguing D-V Motions, but they're the same as
11 the Summary Judgment Motion that Your Honor has been saddled
12 with.

13 And -- and we're closing to the jury and I'm not sure
14 what we're asking the jury to resolve factually as the
15 dispute between the parties.

16 So I hope that's helpful, uh, to The Court in
17 understanding why it is that we give great pause to spending
18 taxpayers' money with paneling a jury essentially to hear
19 nothing.

20 **THE COURT:** All right. All right, Counsel, I'm gonna
21 take this matter under advisement. I hope to have a ruling
22 to you, uh, by close of business today; if not, by lunchtime
23 tomorrow.

24 All right, um, I will touch base with Mr. Michel and let
25 him know that, uh, you are off the docket. You are protected

1 until I have issued my ruling.

2 MR. SHEEDY: Thank you, Your Honor.

3 THE COURT: Thank you.

4 MR. MOORE: Thank you, Your Honor.

5 (WHEREUPON, HEARING ENDED AT 12:25 P.M.)

6 *****END OF REQUESTED TRANSCRIPT*****
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STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED VIVIAN H. CROSS, OFFICIAL COURT REPORTER FOR THE NINTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF THOSE PROCEEDINGS REQUESTED AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE COURT OF COMMON PLEAS FOR CHARLESTON COUNTY, SOUTH CAROLINA, ON THE 28th DAY OF SEPTEMBER 2011.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL NOR INTEREST TO ANY PARTY HERETO.

JUNE 6, 2012


VIVIAN H. CROSS
CIRCUIT COURT REPORTER

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Case No. 2009-CP-10-4475

Preservation Capital Consultants, LLC, ... Respondent,

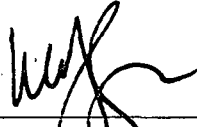
v. .

First American Title Insurance Company, ... Appellant.

CERTIFICATE OF COUNSEL

Pursuant to Rule 210(g) of the South Carolina Appellate Court Rules, the undersigned does hereby certify that the Record On Appeal contains all materials proposed to be included by any of the parties and not any other material.

October 8, 2012



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Case No. 2009-CP-10-4475

Preservation Capital Consultants, LLC, ... Respondent,

v.

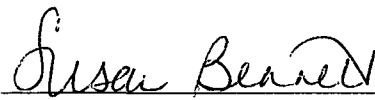
First American Title Insurance Company, ... Appellant.

PROOF OF SERVICE

I, Susan Bennett, an employee of the law firm of Ellis, Lawhorne & Sims, P.A., do hereby certify that I have served a copy of the **Record on Appeal** upon Preservation Capital Consultants, LLC by depositing a copy of same in the United States Mail, postage prepaid, this the 8th day of October, 2012 addressed to its attorneys of record:

James W. Sheedy, Esq.
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Driscoll Sheedy, P.A.
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October 8, 2012



Susan Bennett, Paralegal