

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas  
The Honorable R. Markley Dennis, Jr.

Appellate Case No. 2016-001496

**RECEIVED**

SEP 26 2016

SC Court of Appeals

---

David B. Powell and Carol Ann Powell ..... Respondents,

v.

SunTrust Bank, Midland Funding LLC,  
and Pavilion Place Property Owners' Association, Inc. .... Defendants,

Of whom SunTrust Bank is the..... Appellant.

---

**INITIAL BRIEF OF THE APPELLANT**

---

Sean M. Foerster (SC Bar # 77466)  
ROGERS TOWNSEND & THOMAS, PC  
1221 Main Street, 14<sup>th</sup> Floor (29201)  
Post Office Box 100200  
Columbia, South Carolina 29202-3200  
(803) 771-7900  
sean.foerster@rtt-law.com

Attorneys for Appellant SunTrust Bank

## INDEX

Index .....	i
Table of Authorities .....	ii
Questions Presented .....	iii
Statement of the Case.....	1
Statement of the Facts.....	2
Standard of Review.....	6
Argument .....	7
I.    The lower court erred in concluding as a matter of law that <i>res judicata</i> bars SunTrust’s counterclaim for foreclosure of the Additional Mortgage because the counterclaim does not concern the same subject matter as any prior litigation and there has been no adjudication of the issues raised by this counterclaim in any prior action .....	7
II.   The lower court erred in concluding as a matter of law that the unavailability of the statutory appraisal rights during the Foreclosure Action was relevant to the enforceability of the Additional Mortgage because the Appraisal Statutes do not operate to extinguish the mortgage debt.....	10
III.  The lower court erred in concluding as a matter of law that SunTrust’s waiver of its right to a personal judgment against David Powell for the deficiency operated as a waiver of its right to enforce the Additional Mortgage because a deficiency judgment waiver does not satisfy the underlying debt.....	11
Conclusion .....	16

## TABLE OF AUTHORITIES

### CASES

<i>Bank of Am., N.A. v. Draper</i> , 405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013).....	7,8
<i>Bartles v. Livingston</i> , 282 S.C. 448, 319 S.E.2d 707 (Ct. App. 1984).....	8
<i>Boyd v. Liberty Life Ins. Co.</i> , 399 S.C. 401, 732 S.E.2d 180 (Ct. App. 2012).....	6
<i>Camden Nat. Bank v. Peterson</i> , 957 A.2d 591 (Me. 2008).....	8,9
<i>Edwards v. State Law Enf't Div.</i> , 395 S.C. 571, 720 S.E.2d 462 (2011) .....	6
<i>Jones v. Equicredit Corp. of S. Carolina</i> , 347 S.C. 535, 556 S.E.2d 713 (Ct. App. 2001).....	8,12,13
<i>Lever v. Lighting Galleries, Inc.</i> , 374 S.C. 30, 647 S.E.2d 214 (2007) .....	14
<i>Nichols v. Briggs</i> , 18 S.C. 473 (1883).....	14
<i>Platt v. Carroll</i> , 125 S.C. 493, 119 S.E. 180 (1923) .....	10
<i>Sellars v. First Colonial Corp.</i> , 276 S.C. 548, 280 S.E.2d 805 (1981) .....	11,12
<i>Zinn v. CFI Sales &amp; Mktg., Ltd.</i> , 415 S.C. 93, 780 S.E.2d 611 (Ct. App. 2015).....	7

### STATUTES AND RULES

S.C. Code Ann. § 15-7-10.....	9
S.C. Code Ann. § 29-3-660.....	11
S.C. Code Ann. § 29-3-740.....	10
Rule 56, SCRPC.....	6

## QUESTIONS PRESENTED

1. DID THE LOWER COURT ERR IN CONCLUDING AS A MATTER OF LAW THAT *RES JUDICATA* BARS SUNTRUST'S COUNTERCLAIM FOR FORECLOSURE OF THE ADDITIONAL MORTGAGE WHEN THE COUNTERCLAIM DOES NOT CONCERN THE SAME SUBJECT MATTER AS ANY PRIOR LITIGATION AND THERE HAS BEEN NO ADJUDICATION OF THE ISSUES RAISED BY THIS COUNTERCLAIM IN ANY PRIOR ACTION?
2. DID THE LOWER COURT ERR IN CONCLUDING AS A MATTER OF LAW THAT THE UNAVAILABILITY OF THE STATUTORY APPRAISAL RIGHTS DURING THE FORECLOSURE ACTION WAS RELEVANT TO THE ENFORCEABILITY OF THE ADDITIONAL MORTGAGE?
3. DID THE LOWER COURT ERR IN CONCLUDING AS A MATTER OF LAW THAT SUNTRUST'S WAIVER OF ITS RIGHT TO A PERSONAL JUDGMENT AGAINST DAVID POWELL FOR THE DEFICIENCY OPERATED AS A WAIVER OF ITS RIGHT TO ENFORCE THE ADDITIONAL MORTGAGE?

## STATEMENT OF THE CASE

This appeal concerns whether a secured lender holding a promissory note secured by two mortgages on two different properties must foreclose both mortgages in a single lawsuit if it elects to waive its deficiency judgment rights therein.

On November 30, 2012, Plaintiffs David B. Powell and Carol Ann Powell (“the Powells”) filed this action for violation of S.C. Code Ann. § 29-3-310 (the “Mortgage Satisfaction Statute”) against SunTrust Bank<sup>1</sup> (“SunTrust”). (Compl.) On February 14, 2013, SunTrust filed an Answer. (Answer.) By Consent Order entered on January 21, 2014, the lower court granted SunTrust leave to amend its Answer. (Consent Order.) On January 27, 2014, SunTrust filed an Amended Answer, Counterclaim, and Crossclaim seeking foreclosure of the mortgage at issue in the Powells’ Complaint. (Am. Answer, Countercl., and Crosscl.)

On February 10, 2015, SunTrust filed a motion for summary judgment on the Powells’ Complaint. (Mot. for Summ. J.) On June 18, 2015, the Powells filed a cross-motion for summary judgment on their Complaint. (Pls.’ Mem. in Opp’n. to Mot. for Summ. J. and Cross-Mot. for Summ. J.)

On October 16, 2015, the lower court held a hearing on both summary judgment motions. (Hr’g Tr. Oct. 16, 2015.)

On May 3, 2016, the lower court entered an Order denying SunTrust’s motion for summary judgment and granting in part the Powells’ motion for summary judgment. (Ord.)

---

<sup>1</sup> The Powells originally named “SunTrust Bank a/k/a SunTrust Mortgage, Inc.” as a defendant in the caption. Pursuant to the Consent Order Resolving Various Motions entered on June 23, 2015, the lower court amended the caption to correctly identify the defendant as “SunTrust Bank.”

On May 23, 2016, SunTrust filed a Motion for Reconsideration pursuant to Rule 59(e), SCRC. (Mot. for Recons.) On June 15, 2016, the lower court entered an Order denying the Motion for Reconsideration. (Ord.) This timely appeal from the Orders of May 3, 2016, and June 15, 2016, followed.

### STATEMENT OF THE FACTS

The facts of this case are undisputed. (Hr'g Tr. 2:11-20; Pls.' Mem. in Opp'n. to Mot. for Summ. J. and Cross-Mot. for Summ. J. p. 1.) On March 15, 2006, David B. Powell ("David Powell") borrowed \$720,000 from SunTrust to purchase the vacant real property located at 25 Longmarsh Road, Mt. Pleasant, SC 29466 ("Longmarsh property"). (Ex. 1 ¶ 2 to Mot. for Summ. J.) David Powell gave SunTrust a promissory note for the full loan amount. (*Id.*; Ex. 2-A to Mot. for Summ. J.) As partial security for the debt, the Powells gave SunTrust a mortgage encumbering the Longmarsh property ("Primary Mortgage"). (Ex. 1 ¶ 2(a) and 1-A to Mot. for Summ. J.)

Because David Powell wanted a 100% financing loan to purchase the Longmarsh property and did not want to make the 20% down payment typically required for a conventional loan (Ex. 2 ¶¶ 11-12 to Mot. for Summ. J.), SunTrust required additional loan collateral from the Powells to secure that 20% (\$144,000) as a condition for the loan.

To satisfy this loan condition, the Powells gave SunTrust another mortgage securing up to \$144,000 ("Additional Mortgage") against a different property they owned at 1001 Ocean Boulevard, Isle of Palms, SC 29451 (the "subject property"). (Ex. 1 ¶ 2(b) and Ex. 2-B to Mot. for Summ. J.) The Additional Mortgage was given pursuant to the terms of an Additional Collateral Agreement between the Powells and SunTrust. (Ex. 1-C to Mot. for Summ. J.) The Additional Collateral Agreement provided that:

“In the event the loan for real property in the amount of \$720,000.00 located at 25 Longmarsh Road, Mount Pleasant, SC 29466 actually closes, upon the principal balance thereon having been paid down by \$144,000.00 (that is to \$576,000.00) Lender will satisfy of record the said second mortgage on 1001 Ocean Boulevard, Isle of Palms, SC 29541.”

*Id.*

On November 1, 2008, David Powell defaulted on the payment of the promissory note. (Ex. 1-C ¶ 16 to Mot. for Summ. J.) Prior to defaulting, David Powell failed to pay down the principal balance of the loan by \$144,000.00 as required by the Additional Collateral Agreement. (Ex. 2 ¶ 13 to Mot. for Summ. J.) In fact, he failed to pay down any of the principal of the loan. (Ex. 1-C ¶ 16 to Mot. for Summ. J.) The Powells concede that they failed to satisfy the condition precedent in the Additional Collateral Agreement that would have triggered SunTrust’s obligation to satisfy the Additional Mortgage. (Ex. 2 ¶ 14 to Mot. for Summ. J.)

On August 11, 2009, SunTrust filed civil action # 2009-CP-10-4990 in the Charleston County Court of Common Pleas against the Powells for foreclosure of only the Primary Mortgage on the Longmarsh property (the “Foreclosure Action”). (Ex. 1-C ¶ 2 to Mot. for Summ. J.) In the Foreclosure Action, SunTrust waived its right to a personal judgment against David Powell for the deficiency, but did not waive its right to later pursue the foreclosure of any additional collateral it had for the loan in the event that the foreclosure of the Longmarsh property failed to satisfy the entire debt. (Ex. 1-C ¶ 17, 25 to Mot. for Summ. J.)

On December 10, 2009, the Master in Equity for Charleston County entered a Judgment of Foreclosure and Sale against the Powells in the Foreclosure Action and ordered that the Longmarsh property be sold at a foreclosure sale. (Ex. 1-C to Mot. for Summ. J.) At the foreclosure sale of the Longmarsh property on March 16, 2010, SunTrust was the successful bidder with a credit bid of \$250,000. (Ex. 3 to Mot. for Summ. J.) SunTrust paid \$3,495.24 in

connection with the foreclosure sale (*Id.*) and took a Master's Deed to the Longmarsh property dated March 25, 2010, and recorded in the Office of the Register Mesne Conveyance for Charleston County on March 31, 2010, in Mortgage Book O114 at Page 828.

On January 27, 2011, SunTrust sold the Longmarsh property on the open market to a third party for the purchase price of \$260,000.00. (Ex. 1 ¶ 5 and 1-D to Mot. for Summ. J.) After its transaction costs were subtracted, SunTrust received only \$246,223.54 in proceeds from the sale of the Longmarsh property. *Id.* The rest of the debt remains unsatisfied. (Ex. 1 ¶ 7 to Mot. for Summ. J.)

On November 30, 2012, the Powells filed this action against SunTrust pursuant to S.C. Code Ann. § 29-3-310 for a satisfaction of the Additional Mortgage on the grounds that: 1) the debt owed to SunTrust was satisfied in full through the foreclosure of the Primary Mortgage, and/or 2) SunTrust's waiver of its right to personal judgment against David Powell for any deficiency somehow equated to a satisfaction of the underlying debt. (Compl. ¶¶ 6-8.)

In response, SunTrust denied these allegations and counterclaimed against the Powells for foreclosure of the Additional Mortgage. (Am. Answer, Countercl., and Crosscl. ¶¶ 25-52.)

SunTrust and the Powells both filed motions for summary judgment. (Mot. for Summ. J.; Pls.' Mem. in Opp'n. to Mot. for Summ. J. and Cross-Mot. for Summ. J.) On October 16, 2015, the lower court held a hearing on both summary judgment motions. (Hr'g Tr.) At the hearing, the lower court mainly took issue with the fact that the Additional Mortgage was securing the same promissory note as the foreclosed Primary Mortgage and therefore found that the deficiency judgment waiver during the Foreclosure Action satisfied the debt as a matter of law. (Hr'g Tr. 4:6-6:23.)

The lower court denied SunTrust's motion for summary judgment and granted in part<sup>3</sup> the Powells' motion for summary judgment. (Order p. 1.) The lower court held that SunTrust's attempt to enforce the Additional Mortgage was barred by *res judicata*. (Order pp. 2-4.) The lower court further held that SunTrust's actions in seeking to enforce the Additional Mortgage after waiving its deficiency rights were inequitable as they deprived David Powell of his appraisal rights under S.C. Code Ann. §§ 29-3-680 to 29-3-770 ("Appraisal Statutes") during the Foreclosure Action. (Order p. 3.) The lower court interpreted the Appraisal Statutes as operating to extinguish a mortgage debt to the extent of the appraised value. *Id.* The lower court's ruling rendered the Additional Mortgage unenforceable. (Order p. 4.)

---

<sup>3</sup> While the lower court ruled that the Additional Mortgage should be satisfied, it also ruled that SunTrust's conduct did not amount to a violation of S.C. Code Ann. § 29-3-310 given the circumstances in this case. SunTrust does not appeal from the latter part of the lower court's ruling and the Powells have not filed a cross-appeal concerning that part of the ruling.

## STANDARD OF REVIEW

Summary judgment is appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRCP. “When reviewing the trial court’s decision to grant summary judgment, an appellate court applies the same standard of review applied by the trial court.” *Boyd v. Liberty Life Ins. Co.*, 399 S.C. 401, 406, 732 S.E.2d 180, 183 (Ct. App. 2012).

“When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts.” *Id.* “In such cases, the appellate court owes no particular deference to the trial court’s legal conclusions.” *Id.*

Further, “[i]n a case raising a novel question of law, this Court is free to decide the question with no particular deference to the lower court.” *Edwards v. State Law Enft Div.*, 395 S.C. 571, 575, 720 S.E.2d 462, 464 (2011).

## ARGUMENT

The lower court erred in granting summary judgment in favor of the Powells and denying summary judgment in favor of SunTrust for the following reasons:

- I. **The lower court erred in concluding as a matter of law that *res judicata* bars SunTrust's counterclaim for foreclosure of the Additional Mortgage because the counterclaim does not concern the same subject matter as any prior litigation and there has been no adjudication of the issues raised by this counterclaim in any prior action.**

SunTrust's counterclaim for foreclosure of the Additional Mortgage is not barred by *res judicata* because it does not concern the same subject matter as the Foreclosure Action and there has been no adjudication of SunTrust's rights under the Additional Mortgage or the Additional Collateral Agreement in any prior action.

"Res judicata is shown if (1) the identities of the parties is [sic] the same as a prior litigation; (2) the subject matter is the same as in the prior litigation; and (3) there was a prior adjudication of the issue by a court of competent jurisdiction." *Zinn v. CFI Sales & Mktg., Ltd*, 415 S.C. 93, 105, 780 S.E.2d 611, 618 (Ct. App. 2015). "Our courts, however, have found that the doctrine of res judicata is not an 'ironclad bar' to a later lawsuit." *Id.* at 105-06, 780 S.E.2d at 618.

Neither the facts nor the law supports the lower court's holding that "SunTrust both sought collection on its Note and the foreclosure of its security, and it waived any deficiency judgment; it is barred from continuing to seek the same relief in a second action." (Order p. 3.)

First, the Foreclosure Action was not a collection action or a suit on the note, it was purely a mortgage foreclosure action. "A mortgage and a note are separate securities for the same debt, and a mortgagee who has a note and a mortgage to secure a debt has the option to either bring an action on the note or to pursue a foreclosure action." *Bank of Am., N.A. v. Draper*, 405

S.C. 214, 220-21, 746 S.E.2d 478, 481 (Ct. App. 2013). “An action for foreclosure adjudicates and cuts off the mortgagor’s interest in real property.” *Bartles v. Livingston*, 282 S.C. 448, 454, 319 S.E.2d 707, 711 (Ct. App. 1984). In the Foreclosure Action, SunTrust only pursued its remedy of foreclosure of the Primary Mortgage against the Longmarsh Property rather than suit against David Powell for collection on the promissory note.

Second, SunTrust sought to foreclose only part of its security through the Foreclosure Action, not all of it. The subject matter of the Foreclosure Action included only the foreclosure of the lien of the Primary Mortgage and the extinguishment of the Powells’ interest in the Longmarsh Property. There was no adjudication in the Foreclosure Action as to SunTrust’s other security—the Additional Mortgage.

Unlike SunTrust’s claim in the Foreclosure Action, SunTrust’s counterclaim for foreclosure of the Additional Mortgage in this action concerns the enforcement of a different lien created by a different security agreement against a different property. It also concerns David Powell’s failure to comply with the Additional Collateral Agreement.

In a factually similar and instructive case, the Supreme Judicial Court of Maine<sup>4</sup> considered the applicability of *res judicata* to successive foreclosure actions of different mortgages securing the payment of a single promissory note. *Camden Nat. Bank v. Peterson*, 957 A.2d 591 (Me. 2008). In *Peterson*, the borrower signed a single promissory note and granted the bank two mortgages to secure its payment: a first mortgage for the full debt amount that encumbered the borrower’s primary residence, and an additional mortgage for a smaller portion of the debt that encumbered an abutting parcel of unimproved land also owned by the borrower.

---

<sup>4</sup> “When there is no South Carolina case directly on point, our court may look to other jurisdictions for persuasive authority.” *Jones v. Equicredit Corp. of S. Carolina*, 347 S.C. 535, 542, 556 S.E.2d 713, 717 (Ct. App. 2001).

*Id.* at 592. The bank first initiated a foreclosure action concerning only the first mortgage, and it obtained a foreclosure judgment in that action. *Id.* A year later, the bank filed a different foreclosure action concerning the additional mortgage, to which the borrower asserted a defense of *res judicata*. *Id.*

The Supreme Judicial Court of Maine held that “[a]lthough this foreclosure action involves only one promissory note given by [borrower] to the Bank, it deals with a mortgage contract that is separate and distinct from the mortgage involved in the [first foreclosure] action.” *Id.* “Because this case involves the foreclosure on the second of two mortgages given by [borrower] to the Bank, *res judicata* does not bar the Bank from pursuing the foreclosure.” *Id.* at 592-93.

Like in *Peterson*, SunTrust’s counterclaim in this case seeks the enforcement of a different security agreement than the one that was the subject of the Foreclosure Action. Further, there was no adjudication in the Foreclosure Action that the underlying debt was extinguished by that action. Therefore, *res judicata* does not bar SunTrust from seeking to enforce its rights under the Additional Mortgage or the Additional Collateral Agreement.

The lower court’s conclusion of law that *res judicata* bars successive foreclosures of mortgages on different properties secured by a single promissory note would be unworkable in situations involving mortgages on properties in different counties. Mortgages can be foreclosed only in the county in which the property is located. S.C. Code Ann. § 15-7-10(3)(“An action for the following causes must be tried in the county in which the subject of the action or some part of the property is situated ... for the foreclosure of a mortgage of real property ...”). In that situation, venue rules would prohibit the lender from foreclosing all of the mortgages in a single lawsuit.

For all of these reasons, the lower court erred in finding that SunTrust is barred by *res judicata* from enforcing its rights under the Additional Mortgage.

**II. The lower court erred in concluding as a matter of law that the unavailability of the statutory appraisal rights during the Foreclosure Action was relevant to the enforceability of the Additional Mortgage because the Appraisal Statutes do not operate to extinguish the mortgage debt.**

Whether David Powell could have exercised his statutory appraisal rights or not in connection with the Foreclosure Action is irrelevant to the enforceability of the Additional Mortgage because the Appraisal Statutes operate only to reduce the personal liability for the debt, not the amount of the debt itself. The specific statute at issue, which is entitled “Return of appraisers; effect of return on deficiency judgment,” (emphasis added), reads:

If the value returned after deduction therefrom of the amount of the price at which the property was sold under direction of the court be equal to or exceed the amount of the deficiency remaining upon the judgment after application of the net proceeds of sale the judgment shall be thereupon extinguished and cancelled of record by the clerk and if such returned value, after deduction of the amount of the sale price, be less than the deficiency the latter shall be abated and deemed paid, pro tanto, and be thereafter enforceable for only the remainder...

S.C. Code Ann. § 29-3-740 (emphasis added). By its language, the appraisal statute operates only to limit the amount of the *personal judgment* against a debtor for the deficiency remaining on the debt. It does not speak to the extinguishment of any portion of the underlying debt itself. “The bond is not the debt, nor is the mortgage the debt; the debt is the borrowed money...” *Platt v. Carroll*, 125 S.C. 493, 119 S.E. 180, 185 (1923)(Cothran, J., concurring).

Had David Powell exercised his appraisal rights during the Foreclosure Action, it would have affected only the amount of any personal judgment for the deficiency entered against him after the foreclosure sale. It would not have changed the amount of the remaining debt underlying the Additional Mortgage.

For these reasons, the lower court erred in ruling that it would be inequitable to permit enforcement of the Additional Mortgage due to the statutory appraisal rights being unavailable to David Powell during the Foreclosure Action.

**III. The lower court erred in concluding as a matter of law that SunTrust's waiver of its right to a personal judgment against David Powell for the deficiency operated as a waiver of its right to enforce the Additional Mortgage because a deficiency judgment waiver does not satisfy the underlying debt.**

SunTrust's waiver of its right to a deficiency judgment against David Powell during the Foreclosure Action did not operate as a waiver of its right to enforce the Additional Mortgage because a deficiency judgment waiver does not satisfy the underlying debt.

"In actions to foreclose mortgages the court may adjudge and direct the payment by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage..." S.C. Code Ann. § 29-3-660 (emphasis added). By its very terms, the deficiency judgment statute concerns only the right of the lender to a personal judgment against the borrower.

By waiving its right to a deficiency judgment, a mortgagee does not thereby release or waive its rights in any of the collateral secured by its mortgage. *Sellars v. First Colonial Corp.*, 276 S.C. 548, 551, 280 S.E.2d 805, 806 (1981). "A mortgagee who chooses to forego a deficiency judgment simply elects to rely solely on the mortgage security for satisfaction of his debt; in other words, he relinquishes only his right to pursue assets of the mortgagor over and above those covered by the mortgage." *Id.*

In *Sellars*, the South Carolina Supreme Court dealt with the competing claims of two mortgage companies—one senior mortgagee and one junior mortgagee of the same property—to receivership monies collected from the property during foreclosure proceedings. *Id.* at 550, 280

S.E.2d at 805-06. Both the senior and junior mortgages granted their respective mortgage companies the right to appoint a receiver upon loan default to collect rents and profits from the property. *Id.* at 550, 280 S.E.2d at 805.

The junior mortgagee argued that the senior mortgagee's debt was fully satisfied when the senior mortgagee waived its deficiency rights and purchased the property for a nominal bid at the foreclosure sale. *Id.* at 550, 280 S.E.2d at 806. The Supreme Court disagreed and awarded the receivership monies to the senior mortgagee. *Id.* at 552, 280 S.E.2d at 806. In reaching its conclusion, the Supreme Court noted that the terms of the senior mortgage "provided a two-fold collateral to [the senior mortgagee]"—a mortgage lien on the property and the right to rents and profits from the property. *Id.* at 551, 280 S.E.2d at 806. "By waiving any deficiency judgment, [the senior mortgagee] did not thereby release any of the collateral secured by his mortgage. e.g., his rents and profits." *Id.* The Supreme Court reasoned that the "circumstances herein do not involve an attempt by [the senior mortgagee] to collect a deficiency balance, but merely an assertion by him of his full security interest in all the collateral created by his mortgage." *Id.*

In another relevant case, this Court dealt with the competing claims of a borrower and her mortgage servicer (which was acting on behalf of Fannie Mae, the mortgagee) to fire insurance proceeds where the property at issue burned down between the entry of the foreclosure judgment against the borrower and the foreclosure sale of the property. *Jones v. Equicredit Corp. of S. Carolina*, 347 S.C. 535, 538-39, 556 S.E.2d 713, 714-15 (Ct. App. 2001). The fire insurance policy was required by the terms of Fannie Mae's mortgage. *Id.* at 538, 556 S.E.2d at 715. The borrower and mortgage servicer were the co-payees under the fire insurance policy. *Id.* at 539, 556 S.E.2d at 715.

Prior to the fire, the mortgage servicer had waived Fannie Mae's deficiency judgment rights during the foreclosure. *Id.* at 538, 556 S.E.2d at 714. After the fire, the mortgage servicer went forward with the foreclosure sale, at which it successfully bid on behalf of Fannie Mae. *Id.* at 539, 556 S.E.2d at 715. Thereafter, Fannie Mae sold the property to a third party for an amount insufficient to satisfy the mortgage debt. *Id.* at 539, 556 S.E.2d at 715.

The borrower argued that neither Fannie Mae nor the mortgage servicer had the right to the fire insurance proceeds because 1) Fannie Mae's interest in the insurance proceeds terminated when the property sold at a foreclosure sale without the right to a deficiency judgment, and 2) the mortgage servicer's interest in the proceeds, being derivative of Fannie Mae's interest, likewise terminated upon the foreclosure sale and the waiver of the deficiency judgment rights. *Id.* at 540, 556 S.E.2d at 715-16.

The Court disagreed and affirmed the award of the insurance proceeds to the mortgage servicer. *Id.* at 545, 556 S.E.2d at 718. After first finding that the mortgage servicer had an insurable interest separate and distinct from Fannie Mae's insurable interest, the Court went on to hold that "Fannie Mae did not waive its right to the proceeds ... with its waiver of a deficiency judgment in the foreclosure action." *Id.* at 543, 556 S.E.2d at 717. The Court found that the note underlying Fannie Mae's mortgage was not satisfied despite the foreclosure sale and the deficiency judgment waiver. *Id.* Relying on *Sellars*, the Court held that "[a] mortgagee who waives deficiency "simply elects to rely solely on the mortgage security for satisfaction of his debt .... [b]y waiving deficiency, a mortgagee relinquishes only the right to pursue assets of the mortgagor over and above those covered by the mortgage." *Id.* at 544, 556 S.E.2d at 718.

To summarize this case law, both *Sellars* and *Jones* permitted lenders to enforce their security interests in additional loan collateral after the foreclosure of the primary loan collateral

and after the waiver of their deficiency judgment rights where the first foreclosure failed to satisfy the debt.

These cases lead to the conclusion that a deficiency judgment waiver, by itself, does not operate to satisfy the debt underlying the security instrument. SunTrust is aware of no case law in South Carolina to the contrary. “[N]othing short of an actual payment of the debt or an express release, will operate as a discharge of the mortgage.” *Lever v. Lighting Galleries, Inc.*, 374 S.C. 30, 35, 647 S.E.2d 214, 217 (2007) (quoting *Nichols v. Briggs*, 18 S.C. 473 (1883)). “The lien lasts as long as the debt.” *Id.* “A creditor shall not have two satisfactions for the same debt, but there is no inconsistency in his pursuing two remedies.” *Lever*, 374 S.C. at 35-36, 647 S.E.2d at 217-18 (2007). Only if “one produces satisfaction, [does it become] a bar to the other.” *Id.* at 36, 647 S.E.2d at 218.

SunTrust only agreed to lend \$720,000 to David Powell based on his agreement that SunTrust would have the following avenues for recovery of its money in the event of his default: 1) foreclosure of the Primary Mortgage and sale of the Longmarsh Property, 2) foreclosure of the Additional Mortgage and sale of the subject property (if David Powell failed to pay down the principal by the agreed amount), and 3) a suit on the promissory note to obtain a personal money judgment against David Powell, which, if necessary, SunTrust could then seek to enforce as a judgment lien against other property not already subject to the Primary Mortgage or Additional Mortgage.

Like in *Sellars* and *Jones*, avenue #1 generated insufficient funds to satisfy David Powell’s debt to SunTrust. SunTrust’s waiver of its rights under the deficiency judgment statute concerned only avenue #3—its right to a personal money judgment against David Powell—and nothing more. SunTrust never waived its right to pursue satisfaction of the debt from sources

other than David Powell personally, such as through the foreclosure of additional loan collateral. Under the law set forth in *Lever*, SunTrust did not have to elect only one remedy to recover the debt—it could continue to pursue any and all avenues for relief available until the debt was fully satisfied. The only consequence of first pursuing an alternative remedy that fails to fully satisfy the debt is to eliminate that remedy, not to extinguish the debt or bar the pursuit of additional remedies until the debt is satisfied.

To hold otherwise would establish a bright line rule mandating that lenders in South Carolina who waive their deficiency judgment rights must foreclose against all loan collateral at once or else forfeit their security interest in any additional loan collateral, regardless of whether or not the underlying debt still exists. This would discourage lenders from ever waiving their deficiency rights with respect to loans secured by more than one piece of collateral, regardless of whether the lenders actually want to pursue a personal judgment against the borrowers. This rule would work a hardship not only on mortgage lenders, but also on mortgage borrowers because it could result in the mandatory foreclosure of collateral in excess of what is necessary to satisfy the underlying debt.

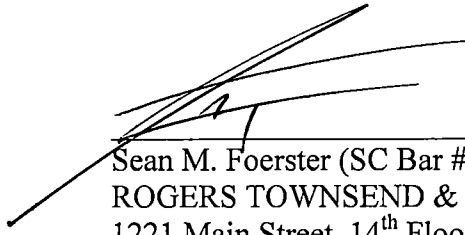
At the time of the initiation of the Foreclosure Action, SunTrust would not have known whether or not the foreclosure sale of the Longmarsh Property would generate sufficient funds to satisfy the debt in full. It would have been premature and unfair to the Powells to foreclose the Additional Mortgage before determining whether it would be necessary to satisfy the debt.

For these reasons, SunTrust's waiver of its statutory deficiency judgment rights had no effect on the underlying debt or the enforceability of the Additional Mortgage.

**CONCLUSION**

For the foregoing reasons, SunTrust respectfully requests that the Court reverse the lower court's partial grant of summary judgment in favor of the Powells and instruct the lower court to grant summary judgment in favor of SunTrust.

Respectfully submitted,



---

Sean M. Foerster (SC Bar # 77466)  
ROGERS TOWNSEND & THOMAS, PC  
1221 Main Street, 14<sup>th</sup> Floor (29201)  
Post Office Box 100200  
Columbia, South Carolina 29202-3200  
(803) 771-7900  
sean.foerster@rtt-law.com

Attorneys for Appellant SunTrust Bank

September 26, 2016

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals  
APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas  
The Honorable R. Markley Dennis, Jr.  
Appellate Case No. 2016-001496

**RECEIVED**  
SEP 26 2016  
SC Court of Appeals

---

David B. Powell and Carol Ann Powell ..... Respondents,

v.

SunTrust Bank, Midland Funding LLC,  
and Pavilion Place Property Owners' Association, Inc. .... Defendants,

Of whom SunTrust Bank is the.....Appellant.

---

**PROOF OF SERVICE**

---

I HEREBY CERTIFY that I have served the Initial Brief of the Appellant on September 26, 2016, by depositing a copy in the United States Mail, postage pre-paid, addressed to the following party of record:

David B. Powell  
273 Forest Trail  
Isle of Palms, SC 29451

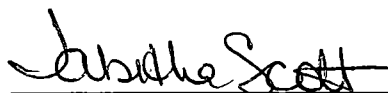
Carol Ann Powell  
273 Forest Trail  
Isle of Palms, SC 29451

David B. Powell  
735 Coleman Blvd., Suite 414  
Mt. Pleasant, SC 29464

Carol Ann Powell  
735 Coleman Blvd., Suite 414  
Mt. Pleasant, SC 29464

Peyre Thomas Lumpkin, Esquire  
Office of Commission Counsel  
1205 Pendleton Street, Suite 333  
Columbia, South Carolina 29201

David A. Collins, Esquire  
7455 Cross County Road  
North Charleston, SC 29418



---

Tabitha Scott  
Paralegal to Sean M. Foerster, Esquire  
ROGERS TOWNSEND & THOMAS, PC

ROGERS TOWNSEND & THOMAS, PC  
POST OFFICE BOX 100200 (29202)  
1221 Main Street, 14<sup>th</sup> Floor  
COLUMBIA, SOUTH CAROLINA 29201  
P 803.771.7900 F 803.343.7017  
W RTT-LAW.COM

Sean M. Foerster  
Sean.Foerster@RTT-LAW.COM  
P 803.744-1855



September 26, 2016

RECEIVED

SEP 26 2016

SC Court of Appeals

**VIA HAND DELIVERY**

The Honorable Jenny Abbott Kitchings  
Clerk of Court for the South Carolina Court of Appeals  
1220 Senate Street  
Columbia, South Carolina 29201

Re: *David B. Powell and Carol Ann Powell vs. SunTrust Bank, Midland Funding LLC, and Pavilion Place Property Owners' Association, Inc.*  
Appellate Case # 2016-001496  
Our File# 19610-12

Dear Ms. Kitchings:

Enclosed are an original and two copies of an Initial Brief of Appellant and Designation of Matter, along with proof of service for each document, in reference to the above matter.

By copy of this correspondence, I am serving copies of these documents upon all parties to this appeal.

Please have your staff file the originals and return clocked copies of these documents to me with the courier.

Thank you for your assistance in this matter.

Very truly yours,



Sean M. Foerster

/tds  
Enclosure

cc:  
David B. Powell  
273 Forest Trail  
Isle of Palms, SC 29451

Carol Ann Powell  
273 Forest Trail  
Isle of Palms, SC 29451

David B. Powell  
735 Coleman Blvd., Suite 414  
Mt. Pleasant, SC 29464

Carol Ann Powell  
735 Coleman Blvd., Suite 414  
Mt. Pleasant, SC 29464

Peyre Thomas Lumpkin, Esquire  
Office of Commission Counsel  
1205 Pendleton Street, Suite 333  
Columbia, South Carolina 29201

David A. Collins, Esquire  
7455 Cross County Road  
North Charleston, SC 29418