THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas
S. Jackson Kimball, Circuit Court Judge

C.A. Nos: 2013-CP-46-00438; 2013-CP-46-00440
Appellate Case Nos: 2016-001272; 2016-001273

Robert Clay Sparrow and Mickey Crowe..... Respondents,

v.

Fort Mill Holdings, LLC and David Baucom..... Appellants.

And

Robert Clay Sparrow and Mickey Crowe.....Respondent,

v.

Maurer Holdings, LLC and David Baucom ..... Appellants.

INITIAL BRIEF OF APPELLANTS

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September 23, 2016

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1. Did the trial court err in enforcing settlement in spite of the fact that Defendants/Appellants David Baucom, Fort Mill Holdings, LLC, and Maurer Holdings, LLC would not have signed the settlement memorandum if they had been advised of the law that governed the underlying actions?

2. Did the trial court err in enforcing settlement when the result achieved by Plaintiff/Respondent Sparrow violates applicable law and public policy?

3. Did the trial court err in failing to consider the substantive, governing law and public policy which applied to the purchase money notes that are the subject of this matter?

4. Did the trial court err in enforcing settlement in spite of the fact that the settlement constituted an impermissible waiver of North Carolina's anti-deficiency statute?

5. Did the trial court err in enforcing settlement in spite of the fact that documents contemplated by the settlement memorandum were never executed?

STATEMENT OF THE CASE

The underlying companion actions, C.A. No. 2013-CP-46-00438 and C.A. No. 2013-CP-46-00438 were filed by Robert Clay Sparrow and Mickey Crowe on February 8, 2013. In the actions, Plaintiffs sought, in part, to foreclose on two adjoining parcels of land in York County ("Subject Property") which were sold by Plaintiffs on December 1, 2011 to Fort Mill Holdings, LLC and Maurer Holdings, LLC for $907,300.00 and $284,500.00, respectively. Plaintiffs also sought to obtain deficiency judgments against both LLCs and David Baucom individually. Defendants timely filed Answers on March 29, 2013. Mediation was held on October 7, 2014, at which time all parties except for Fort Mill Holdings, LLC and Maurer Holdings, LLC signed a Memorandum of Settlement.[1] An agent of Fort Mill Holdings, LLC and Maurer Holdings, LLC, Tracy Goings, did not attend mediation but appears to have signed the Memorandum of Settlement following mediation that day.

The Memorandum of Settlement contemplated the drafting of a formal settlement agreement and contingent confession of judgment. The formal settlement documents and stipulation of dismissal were never drafted or executed. The contingent confession of judgment was never signed. Plaintiff Sparrow filed a Motion to Compel Settlement on December 22, 2015.

The parties exchanged memoranda prior to a consolidated hearing on Plaintiff Sparrow's Motions to Compel Settlement on March 24, 2015 and submitted the same to the Court in advance of the hearing. The trial court filed an Order for Judgment on March 30, 2015 which granted Plaintiff's Motion to Compel Settlement and entered

[1] According to Plaintiffs, Robert Clay Sparrow assigned his entire interest in these proceedings to Robert Clay Sparrow on October 1, 2014.

judgment against all Defendants in the amount of One Million Four Hundred Twenty-Seven Thousand, Three Hundred Forty-Seven and 56/100 Dollars plus interest. Said Order was received by Appellants' counsel on April 5, 2016.

Defendants timely served Motions to Alter or Amend on April 8, 2016, which were filed by the Clerk on April 12, 2016. A hearing on the Motions to Alter or Amend was held on March 10, 2016. The trial court entered an Order Denying the Motions to Alter or Amend on May 23, 2016, written notice of which was received by Appellants' counsel on June 14, 2016. Appellants timely filed a Notice of Appeal in each case on June 14, 2016 and Amended Notices of Appeal on June 21, 2016.

STATEMENT OF FACTS

Prior to Plaintiffs selling the Subject Property in December 2011, Defendant David Baucom leased the Subject Property from Plaintiffs for approximately twelve years and made significant improvements to the same. During the pendency of the lease, Plaintiff Clay Sparrow talked to Mr. Baucom about purchasing the property. Mr. Baucom expressed some reluctance, but Mr. Sparrow assured him that if the purchase did not work out, Mr. Baucom could simply return the Subject Property to him. Based on Mr. Sparrow's representation, the parties were able to reach an agreement for a purchase and sale of the property. (Affidavit of David Baucom, Par. 4-7).

The two parcels were sold within a single real estate closing, which was a seller-financed transaction. Upon the recommendation of Plaintiff Clay Sparrow, the transaction was closed on December 1, 2011 by attorney Jeff Smith at his office in North Carolina. The closing attorney formed two North Carolina LLCs to take title to the two

parcels – Fort Mill Holdings, LLC and Maurer Holdings, LLC. (Affidavit of David Baucom, Par. 7, 9; Affidavit of Tracy Goins, Par. 6).

At its core, the transaction consisted of two purchase money promissory notes and two real estate mortgages. In one of the purchase money notes, Fort Mill Holdings, LLC was the borrower and David Baucom signed as "guarantor." In the other promissory note, Maurer Holdings, LLC was the borrower and David Baucom signed as "guarantor." Both notes expressly provide that they are governed by North Carolina law. The transaction was secured by first-priority real estate mortgages on the Subject Property.[2] (Notes and Mortgages). Defendants only made full monthly payments on the notes for approximately five months and partial payments for a couple of months thereafter. Mr. Baucom notified Plaintiff Sparrow that Defendants could not make the payments and wished to return the Subject Property to Plaintiffs.

On Friday, September 28, 2012, Plaintiffs' attorney, Mr. Smith, contacted Mr. Baucom's daughter, Tracy Goins, who was the managing member of Fort Mill Holdings and who also acted as an agent of Maurer Holdings. In the email, Mr. Smith stated the following:

> "Clay has contacted me about the property in South Carolina off Carowinds Blvd. Clay is concerned as he has learned of David's plans to abandon the property. He is concerned that damage may be done to the property. The loan agreement is in default due to the failure to pay property taxes, maintain insurance and to make the payments required under the promissory notes. David signed the notes as a personal guarantor and is personally liable for any damages to the building and for any losses resulting from his abandoning the propertry [sic]. Please pass this along to David and ask him to contact either Clay or me to discuss this

[2] The mortgages were signed by representatives of Fort Mill Holdings and Maurer Holdings but were not signed by David Baucom.

matter. Clay would like to avoid foreclosure of the mortgages and wants to know if David will deed the property back to him."

(Affidavit of Tracy Goins, Exh. 2; Affidavit of David Baucom, Exh. 2).

Ms. Goins consulted with Mr. Baucom on Monday, October 1, 2012 and then notified Mr. Smith on October 2, 2012 that they would deed the property back to Mr. Sparrow. (Affidavits of Tracy Goins, Exh. 2-3, Affidavits of David Baucom; Exh. 2-3).

Mr. Smith emailed Ms. Goins on November 6, 2012 and notified her as follows:

"Clay is concerned about the possibility of contractor liens attaching to the property since he knows substantial work was done there and wants to make sure any possible lien rights are extinguished as he is going forward with foreclosing on his mortgages."

(Affidavits of Tracy Goins, Exh. 4; Affidavits of David Baucom, Exh. 4).

Plaintiffs filed the two companion actions on February 8, 2013. In the actions, Plaintiffs sought to not only foreclose on the Subject Property but also to obtain deficiency judgments against all Defendants. Such monetary recovery is explicitly prohibited by North Carolina law which governs the promissory notes.

Mediation was held on October 7, 2014. Mr. Sparrow and Mr. Baucom were present along with their counsel. At mediation, Mr. Sparrow and Mr. Baucom signed the memorandum of settlement that is the subject of this matter ("Settlement Memo," Affidavit of David Baucom, Exh. 5; Affidavit of Tracy Goins, Exh. 6). Ms. Goins was not present at mediation, but it appears she likely signed later that day. The Settlement Memo provides in part that "Plaintiffs will consent to and counsel will execute a dismissal, with prejudice, of the referenced action, upon execution of formal documents." (Par. 4, Settlement Memo). The portion that says "upon execution of formal documents" is handwritten whereas the remaining portion is typed.

"Exhibit A" to the Settlement Memo provides that "Counsel will prepare more formal settlement documents and the contingent [confession of judgment], whereupon execution by all parties, the two lawsuits - 46-00438, and 46-00440, will be dismissed." (Par. 5 of Exhibit A to Settlement Memo). No formal settlement documents, confessions of judgment, or stipulations of dismissal were ever executed. (Affidavits of David Baucom, Par. 16-18).

After mediation, Defendants learned for the first time that North Carolina has an "anti-deficiency" law that prohibits Plaintiffs from obtaining a deficiency judgment against them. They did not have the benefit of this information at mediation and would not have signed the Settlement Memo if they had understood their rights under the law and what they were giving up by not proceeding and having the case decided on the merits. (Affidavits of David Baucom, Par. 19).

Based on the information Defendants received following mediation, they refused to consummate the settlement by signing formal settlement documents or confessions of judgment. Due to their refusal to return executed confessions of judgment to Plaintiffs' counsel, Plaintiffs' counsel filed the Motion to Compel Settlement which was granted by the trial court.

SUMMARY OF ARGUMENT

In the trial court, Plaintiff/Respondent Clay Sparrow achieved a judgment against Defendants/Appellants (hereinafter collectively referred to as "Defendants") which was expressly prohibited by governing law and public policy. The judgment arose from a mediated settlement memorandum which was not final. Furthermore, it was signed by Defendants only because they did not understand that North Carolina's anti-deficiency

law limited Mr. Sparrow to a return of the collateral and prohibited further relief against Defendants. By contesting Sparrow's motion to compel settlement, Defendants merely seek to have the case decided on its merits rather than providing Plaintiff Sparrow with a windfall that would never be permitted if the case were litigated to its conclusion. Courts in South Carolina have discretion to refuse to enforce settlements, and in this case an exercise of such discretion required an analysis of North Carolina substantive law, which the trial court did not do. Instead, the trial court found that South Carolina's policy of encouraging settlement of disputes trumps any consideration of North Carolina law that governs the underlying promissory note that Plaintiff is enforcing in this action. The trial court reached its conclusion without considering the substance of North Carolina law. Its failure to do so constitutes an abuse of discretion.

Furthermore, the trial court should have found that a settlement agreement is viewed as a contract, and contracts which violate statutes and/or public policy are void. Here, North Carolina law governed the purchase money note at issue in the case, and the settlement agreement unquestionably violates a North Carolina statute and public policy. North Carolina law must be considered when determining whether to enforce the settlement memorandum, and if considered, it dictates that the settlement agreement must not be enforced.

Finally, the settlement memorandum was preliminary and was not final or binding. Accordingly, the trial court should be reversed.

ARGUMENT

Trial courts are vested with the discretion to enforce – **or refuse to enforce** – settlements between parties. In this case, the trial court abused its discretion by enforcing

the settlement and by failing to consider governing law which rendered the settlement void as a matter of law. The two purchase money notes that give rise to these companion cases are governed by North Carolina law, and North Carolina's "anti-deficiency" law firmly establishes that Plaintiffs are prohibited from seeking a money judgment against Defendants. Furthermore, North Carolina law provides that purchasers, borrowers, and guarantors in seller-financed transactions cannot waive the protections provided to them under North Carolina's anti-deficiency statute. Defendants did not know such North Carolina laws existed until after mediation, and they never would have signed the Settlement Memo if they had that knowledge at the time. In essence, Defendants have had a $1.4 million judgment entered against them in spite of the fact that a legally enforceable monetary obligation has never existed.

The relief that Defendants are seeking is not extraordinary. They are simply requesting that all parties be provided with access to the courts to have their respective positions decided on the merits. Accordingly, Defendants request that the trial court's Orders filed March 30, 2016 and May 23, 2016 be reversed.

I. Standard of Review and Legal Framework

Although a trial court in South Carolina has the power to enforce settlement agreements, "**it has the inherent power to refuse to enforce settlements**." Rock Smith Chevrolet, Inc. v. Smith, 309 S.C. 91, 93, 419 S.E.2d 841, 842 (Ct. App. 1992) (emphasis added). "An abuse of discretion arises when the court issuing the order was controlled by an error of law or when the order, based upon factual conclusions, is without evidentiary support." Melton v. Olenik, 379 S.C. 45, 50, 664 S.E.2d 487, 490 (Ct. App. 2008) (citation omitted). "It is an equal abuse of discretion to refuse to exercise

discretionary authority when it is warranted as it is to exercise the discretion improperly." Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 155, 399 S.E.2d 439, 441 (Ct. App. 1990).

South Carolina courts have held that settlement agreements "are viewed as contracts." Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009). Furthermore, South Carolina courts have held that contracts will not be enforced if they violate a statute or are against public policy. "The general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions. Berkebile v. Outen, 311 S.C. 50, 53–54, 426 S.E.2d 760, 762 (1993) (stating [a]n illegal contract has always been unenforceable); Batchelor v. American Health Ins. Co., 234 S.C. 103, 107 S.E.2d 36 (1959) (noting that contracts violating public policy as expressed in constitutional provisions, statutes, or judicial decisions are void)." White v. J.M. Brown Amusement Co., 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004). "An illegal contract is unenforceable. The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 866–67 (Ct. App. 2002) (citation omitted).

II. The Trial Court Erred in Enforcing a Settlement when Defendants Did Not Understand the Risks and Benefits of Doing So.

Defendants signed a Settlement Memo only because they did not understand their respective rights and obligations which arose from the transactions that are the subject of this matter and what the potential risks and benefits would be of continuing with the

litigation. If the trial court's order is upheld and settlement is enforced, Plaintiff Sparrow will obtain a result that squarely violates governing law and which will provide him with a windfall that they cannot obtain if the case is decided on the merits.

The South Carolina Court of Appeals' decision in Rock Smith Chevrolet case is applicable here. In Rock Smith Chevrolet, the parties' counsel announced to the court immediately before trial that their clients had reached a settlement. Due to confusion that arose regarding the consummation of the settlement, the defendant, Tex Smith, petitioned the court to vacate the settlement and allow the case to proceed to trial. The trial court held a hearing to determine whether to enforce settlement. After hearing the facts and arguments on both sides, the trial judge said that although Mr. Smith had a "preconceived erroneous notion of [his] own making as to what [his] lawyer told [him] the trial judge might do . . . I can understand how Mr. Tex Smith might have misconstrued it and that concerns me somewhat." Id., 309 S.C. at 92-93, 419 S.E.2d at 842. Ostensibly due to Mr. Smith misconstruing his attorney's advice, the trial judge set aside the settlement and allowed the case to proceed on the merits. The Court should reach the same result here, and the trial court's order should be reversed so that the case may be decided on its merits.

In the hearing on Plaintiff's Motion to Compel Settlement, Plaintiff cited Petty v. Timken Corp., 849 F.2d 130, 133 (4th Cir. 1988) which states that "unless the resulting settlement is substantially unfair, judicial economy commands that a party be held to the terms of a voluntary agreement." In that case, the court noted that Mr. Petty, who sought to set aside the settlement had unrealistic expectations about his case and "offer[ed] little argument against the essential fairness of the settlement." The court went on to say "[a]t

most, Petty appears to have had second thoughts about the level of his recovery. That does not, however, establish unfairness or justify setting aside an otherwise valid agreement." That situation is distinguishable from the instant case where Defendants were not aware of the law that governed the case, and the end result is in clear violation of governing law and profoundly unfair to Defendants.

For the specific reasons set forth in more detail below, North Carolina's anti-deficiency law specifically prohibits an action against Defendants for a monetary judgment on the note, and the protections afforded by the anti-deficiency statute cannot be waived. In order to determine whether the settlement that Plaintiffs seek to enforce is fair, the Court must consider the substantive law that governs the promissory notes in these cases. North Carolina unequivocally limits Plaintiffs' recovery to a return of the collateral.

Defendants did not have this information until *after* mediation. Rule 43(k), SCRCP implies that litigants must have the benefit of counsel in order for a settlement to be binding. In part, Rule 43(k) states that a settlement will not be enforced unless it is "reduced to writing and signed by the parties and their counsel." (Emphasis added). Presumably the requirement that the parties and their counsel sign such a settlement agreement is included in order to ensure that parties receive are advised on the risks and benefits of settling or continuing with litigation. Here, Defendants could not possibly know the risks and benefits of settling without understanding the law that governed the transaction. Accordingly, the process and the result are substantially unfair and unjust, and the trial court's Orders should be reversed.

III. The Trial Court Erred in Finding that there is No Evidence Showing Substantial Injustice to Defendants When the Result Achieved by Plaintiff Sparrow Violates Applicable Law and Public Policy.

The purchase money notes that give rise to these cases are governed by North Carolina law. North Carolina law provides that a seller in a seller-financed transaction is limited to a return of the property if the purchaser defaults. North Carolina law also provides that its anti-deficiency protection cannot be waived. The statute was enacted for the protection of purchasers and is broadly construed in their favor. Here, substantive law dictates that Plaintiff is limited to a return of the Subject Property is prohibited from seeking a monetary judgment against Defendants.

North Carolina's anti-deficiency statute provides as follows:

> "In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure to the seller the payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate: Provided, further, that when said note or notes are prepared under the direction and supervision of the seller or sellers, he, it, or they shall cause a provision to be inserted in said note disclosing that it is for purchase money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provisions as herein set out."

N.C. Gen. Stat. Ann. § 45-21.38

There can be no dispute that the notes at issue in this case are purchase money notes. On a number of occasions, the anti-deficiency statute has been interpreted by North Carolina's courts, which have recognized that the following rules apply in the context of seller-financed transactions such as the transaction at issue in this case:

1. The anti-deficiency statute "effects the broad public purpose of abolishing deficiency judgments in purchase money transactions if foreclosure on the security yields an insufficient fund to satisfy the indebtedness secured." Chemical Bank v. Belk, 41 N.C.App. 356, 255 S.E.2d 421 (1979) (citing Ross Realty Co. v. First Citizens Bank & Trust Co., 296 N.C. 366, 250 S.E.2d 271 (1979)).

2. Sellers are prohibited from pursuing an action on personal guaranty. Adams v. Cooper, 340 N.C. 242, 460 S.E.2d 120 (1995).

3. Sellers are prohibited from obtaining expenses such as attorney's fees incurred in foreclosure and are limited to a return of the collateral sold. Merritt v. Ridge, 323 N.C. 330, 372 S.E.2d 559 (1988).

4. The protections provided to purchasers and guarantors under the anti-deficiency statute cannot be waived. Chemical Bank v. Belk, 41 N.C.App. 356, 255 S.E.2d 421 (1979). "The anti-deficiency statute does not allow the buyer 'to deny himself the protection afforded him' by the statute." Barnaby v. Boardman, 313 N.C. 565, 568, 330 S.E.2d 600, 602 (1985). "[B]ecause anti-deficiency legislation is so narrowly tailored to address specific instances of the public's vulnerability to lender overreach, waiver of this statutory protection as a prerequisite to receipt of a mortgage or as a condition of a guaranty agreement would violate public policy." High Point Bank & Trust Co. v. Highmark Properties, LLC, 368 N.C. 301, 308, 776 S.E.2d 838, 843 (2015).

5. The anti-deficiency statute is to be broadly construed in order to give effect to its legislative intent and to prevent evasions of the statute. Adams v. Cooper, 340 N.C. 242, 244, 460 S.E.2d 120, 121 (1995) (citing Realty Co. v. Trust Co., 296 N.C. 366, 250 S.E.2d 271 (1979)).

6. If a purchaser pledges additional collateral in addition to a purchase money mortgage on the property being purchased, the seller is prohibited from foreclosing on the additional collateral. Matter of Foreclosure of Deed of Trust by Goforth Properties, Inc., 334 N.C. 369, 378, 432 S.E.2d 855, 861 (1993).

Based on the language of the anti-deficiency statute and the cases interpreting the same, it is clear that Plaintiff's only recourse in the filing of these actions is to obtain a return of the Subject Property. Plaintiff is barred from pursuing an action and obtaining a judgment against Defendants on the promissory notes or for expenses related to the foreclosures. Furthermore, the protections provided to Defendants under the anti-deficiency statute cannot be waived by them. Any such waiver is void as contrary to the statute and against public policy.

Here, the Settlement Memo is in clear violation of governing law and essentially operates as an invalid and unenforceable waiver of the anti-deficiency statute. If the trial court's order is affirmed and the judgment against Defendants stands, Plaintiff will recover a windfall by obtaining relief that Plaintiff could never receive if the case were decided on the merits. This result is inconsistent with the general principle of alternative dispute resolution, which typically involves a compromise by the parties for the purpose of avoiding the cost and uncertainty of litigation. If enforced, this result does not represent a negotiated compromise but instead represents a lopsided victory for Plaintiff that is impermissible under applicable law.

The fact that the litigation was governed by North Carolina law required the trial court to consider North Carolina law and public policy when determining whether to enforce the settlement. However, the trial court refused to do so (March 30, 2016 Order,

P. 4; May 10, 2016 Hearing Transcript, P. 3, 9; May 23, 2016 Order, P. 3). Furthermore, the court concluded that North Carolina's anti-deficiency statute is contrary to South Carolina law and public policy and that South Carolina law wins.

This is not a situation where a litigant, after entering into a settlement, merely felt that the result was unfair. Instead, this is a situation where the Defendants did not have the information necessary to make an informed decision on whether to settle the case. Defendants did not know that they were agreeing to a result that squarely violated governing law and which Plaintiff could never achieve if the case were taken to its conclusion. For these reasons, the trial court's order should be reversed.

IV. The Trial Court Erred in Enforcing Settlement When the Settlement Memorandum Constituted an Impermissible Waiver of the Anti-Deficiency Statute.

Any cause of action to obtain a monetary judgment against Defendants is governed solely by the promissory notes. By their explicit terms, the notes are governed by North Carolina law. In essence, the Settlement Memorandum operates as a contractual waiver of the North Carolina anti-deficiency statute, but such waiver is prohibited by North Carolina law.

The protections provided to purchasers and guarantors under the anti-deficiency statute cannot be waived. Chemical Bank v. Belk, 41 N.C.App. 356, 255 S.E.2d 421 (1979). "The anti-deficiency statute does not allow the buyer 'to deny himself the protection afforded him' by the statute." Barnaby v. Boardman, 313 N.C. 565, 568, 330 S.E.2d 600, 602 (1985). "[B]ecause anti-deficiency legislation is so narrowly tailored to address specific instances of the public's vulnerability to lender overreach, waiver of this statutory protection as a prerequisite to receipt of a mortgage or as a condition of a

guaranty agreement **would violate public policy**." High Point Bank & Trust Co. v. Highmark Properties, LLC, 368 N.C. 301, 308, 776 S.E.2d 838, 843 (2015) (emphasis added).

In Chemical Bank v. Belk, the real property that secured a purchase money note was sold before the appeal was decided, so the only issue remaining was whether the defendant could waive the anti-deficiency statute and permit the plaintiff to pursue a deficiency judgment against it. The North Carolina Court Appeals determined that the benefits of the anti-deficiency statute cannot be waived. Id., 41 N.C. App. at 365, 255 S.E.2d at 427. Specifically, the court concluded "that the allowance of any waiver would defeat the legislative purpose of N.C. Gen. Stats. § 45-21.38 and would attempt, by private action of parties, to confer upon the courts that jurisdiction over the question that was expressly taken away by the enactment of the statute." Id., 41 N.C. App. at 366, 255 S.E.2d at 428.

In Barnaby v. Boardman, 313 N.C. 565, 330 S.E.2d 600 (1985), the Supreme Court of North Carolina addressed the question of whether the holder of a purchase money promissory note could release the collateral and then sue on the note. The court held that "any such note holder must look exclusively to the property conveyed in seeking to recover any balance owed. He may not sue on the note." Id., 313 N.C. at 566, 330 S.E.2d at 601. The court went on to say that North Carolina's anti-deficiency statute "bars any suit on the note whether before or after foreclosure" and that in seller-financed transactions with a purchase money note, "the creditor simply may not sue upon the note." Id., 313 N.C. at 571, 330 S.E.2d at 603-604.

In the recent case of High Point Bank & Trust Co. v. Highmark Properties, LLC, the Supreme Court reiterated that not only mortgagors, but also non-mortgagor guarantors, receive the protection of the anti-deficiency statute and that a waiver of the anti-deficiency statute would violate public policy. Id., 776 S.E.2d at 841, 843, 368 N.C. at 304, 308.

Here, in order to determine whether to enforce the settlement, an exercise of discretion required the trial court to consider North Carolina law and public policy. Instead, the trial court refused to consider North Carolina law and held that there was "**no evidence** of substantial injustice to Defendants in the enforcement of the agreement." (March 30, 2016 Order, p. 3) (emphasis added). Contrary to the trial court's finding, there is undisputed evidence in the record that Defendants did not have the benefit of understanding the law that governed the case (and therefore the ability to weigh the risks and benefits of continuing with litigation) prior to signing the settlement memorandum. Furthermore, Defendants provided the trial court with a litany of authority showing that governing law would make it impossible for Plaintiff to obtain a monetary judgment against Defendants on the promissory notes. The trial judge's finding of "no evidence of substantial injustice" disregards the aforementioned considerations and is unsupported by the evidence in the record.

Furthermore, as a matter of contract law, if the settlement memorandum would otherwise be enforceable, it is void because it would constitute a contract that violates the applicable North Carolina statute and public policy. The trial court's failure to consider North Carolina law and to recognize that the settlement agreement (if otherwise

enforceable) violates the same constitutes an error of law. Accordingly, the trial court's Orders should be reversed.

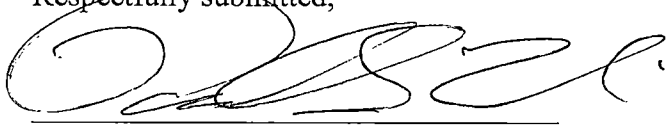
V. The Trial Court Erred in Finding that the Settlement Memorandum was a Final, Binding Settlement.

As an additional or alternative ground for appeal, this Court should find that a settlement was not consummated in this case. The Settlement Memo specifically included conditions precedent to dismissal which were not satisfied. In Paragraph 4 of the first page of the Settlement Memo, it stated ""Plaintiffs will consent to and counsel will execute a dismissal, with prejudice, of the referenced action **upon execution of formal documents**." (emphasis added). In Paragraph 5 of Exhibit A to the Settlement Memo, it stated "Counsel will prepared more formal settlement documents and the contingent confession, **whereupon execution by all parties**, the two lawsuits - 46-00438, and 46-00440, will be dismissed" (emphasis added). No formal settlement document was executed; confessions of judgment were not executed; and no stipulation of dismissal was signed. Accordingly, the Court should find that a settlement was not consummated in this case and reverse the trial court's determination that the settlement agreement was binding.

CONCLUSION

For the reasons set forth herein, David Baucom, Fort Mill Holdings, LLC, and Maurer Holdings, LLC request that the trial court's Orders be reversed and the matter remanded so that the parties may have the case decided on the merits.

Respectfully submitted,



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PROOF OF SERVICE

I certify that on the 23rd day of September, 2016, I served a copy of Initial Brief of Appellants and Designation of Matter in the above-entitled matters by sending a copy of the same by the methods of deliver specified below:

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RE: Robert Clay Sparrow and Mickey Crowe v. Fort Mill Holdings, LLC and David Baucom
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Appellants Case Nos: 2016-001272; 2016-001273

Dear Ms. Kitchens:

Please find enclosed for filing the original and one copy of the Initial Brief of the Appellants and Designation of Matter along with an original and one copy of the Proof of Service. I have provided a self-addressed envelope for return of a filed copy of the Proof of Service.

If you have any questions or concerns, please do not hesitate to contact me.

With kindest regards, I am

Sincerely yours,

Paul S. Landis

cc: James M. Griffin
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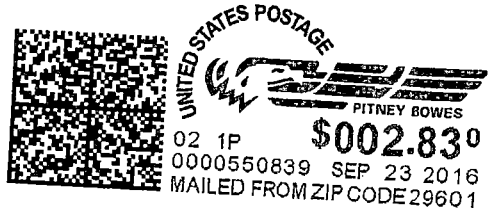

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