

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

C. Heath Ruffner, Special Referee

Case No. 2010-CP-13-0164
Appellate Case No.: 2016-001838

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

vs.

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

of whom Michael R. Brown is the Appellant.

MOTION TO DISMISS APPEAL

Pursuant to Rule 240, SCACR, Respondent (Bank) hereby moves to dismiss this appeal (Motion).

On August 6, 2012, the Honorable J. Michael Baxley granted summary judgment in favor of Bank as to all of Appellant's affirmative defenses and counterclaims against Bank, with the exception of Appellant's claim under the Truth in Lending Act (TILA). In the Order Granting Summary Judgment, Judge Baxley allowed Bank to proceed with its equitable foreclosure action and ruled that Appellant's legal TILA claim did not have to be heard prior to the foreclosure.

RECEIVED

OCT 10 2016

S.C. SUPREME COURT

RECEIVED

OCT 11 2016

SC Court of Appeals

(Order Granting Summary Judgment on Borrower's Affirmative Defenses and Counterclaims (SJ Order), p. 10.) On August 21, 2012, Appellant filed a Rule 59(e) motion seeking reconsideration of the SJ Order, which was denied on November 7, 2012. Appellant filed a Notice of Appeal as to the SJ Order on December 12, 2012, which created Appellate Case No.: 2012-213587 (Prior Appellate Case). In the Prior Appellate Case, Appellant argued that "the trial court erred in granting the Bank's motion for summary judgment because the evidence showed a genuine issue of material fact existed as to whether the Bank (1) waived its rights to enforce its mortgage lien and collect the outstanding balance on its loan to Brown, (2) improperly failed to satisfy Brown's mortgage, and (3) violated the South Carolina Unfair Trade Practices Act (SCUTPA)." (Unpublished Opinion No. 2015-UP-320, p.1.) Those were the only issues raised by Appellant in the Prior Appellate Case. No mention was made by Appellant of Judge Baxley separating the TILA claim from the foreclosure and allowing Bank to proceed with its foreclosure action prior to any ruling on the TILA claim.

On July 1, 2015, the South Carolina Court of Appeals entered an opinion affirming the grant of summary judgment in favor of Bank. On July 15, 2015, Appellant filed a Petition for Rehearing, which was denied on September 18, 2015. On October 15, 2015, Appellant filed a Petition for Writ of Certiorari, which was denied by the Supreme Court on May 5, 2016. Appellant filed a Petition for Reconsideration, which was denied by the Supreme Court in accordance with Rule 221(a) of the South Carolina Appellate Court Rules, which prevents any petition for rehearing from an order denying a petition for writ of certiorari under Rule 242, SCACR. A Remittitur was issued on May 11, 2016. The SJ Order is now a final order that is the law of the case.

The law of the case doctrine precludes a party “from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court.” *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). *See also In re Morrison*, 321 S.C. 370 n.2, 468 S.E.2d 651 (1996) (noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal). “Any unappealed portion of the trial court's judgment is the law of the case, and must therefore be affirmed.” *Rumpf v. Massachusetts Mut. Life Ins. Co.*, 357 S.C. 386, 398, 593 S.E.2d 183, 189 (Ct. App. 2004). “Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. The unchallenged ruling, right or wrong, is the law of the case and requires affirmance.” *First Union Nat. Bank of South Carolina v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998).

At the foreclosure hearing, counsel for Appellant raised a single issue: whether it was possible for the trial court to “issue a final order assuming as the proof on the part of the bank that will give a final figure of the amount owed without trial of the counterclaim.” (Foreclosure Hearing Transcript, p.6.) That issue was decided by Judge Baxley in the SJ Order when he ruled that the “TILA claim does not have to be tried first” and Bank could proceed with a trial of its foreclosure action. (SJ Order, p. 10.)

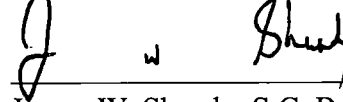
Appellant did not appeal that ruling in the Prior Appellate Case and cannot do so now, because it is the law of the case. Had he disagreed with the ruling, Appellant had the opportunity to have this Court rule on that issue in the Prior Appellate Case. He did not. This Court cannot consider his argument on a previously unchallenged ruling contained in a prior affirmed order. Because there were no other issues raised at the foreclosure hearing, the appeal should be dismissed and the case should be remanded to the trial court to allow the judicial sale to move

forward. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

WHEREFORE, Bank respectfully requests this Court grant the Motion and dismiss the appeal with prejudice.

Date: 10/6/16

Respectfully submitted,



James W. Sheedy, S.C. Bar No. 5052
Susan E. Driscoll, S.C. Bar No. 71447
Driscoll Sheedy, P.A.
11520 N. Community House Road
Suite 200
Charlotte, N.C. 28277
(704) 341-2101 - Telephone
(704) 341-2015 - Facsimile
jimsheedy@driscollsheedy.com
sdriscoll@driscollsheedy.com

Attorneys for Respondent Bank

Hopkins, Debbie

From: Hopkins, Debbie
Sent: Monday, October 10, 2016 11:29 AM
To: Carter, Elizabeth A.
Subject: 2016-001838 American Community Bank v. Michael Brown

Morning Elizabeth,

We have received a Motion to Dismiss via Fed Ex in this case. I will place in the interagency mail for you. Note: I called Mr. Sheedy (left a voice mail) to advise him this motion should have been filed with your Court.

Thanks,

Debbie Hopkins



*South Carolina Supreme Court
PO Box 11330
Columbia, South Carolina 29201
803-734-1080*

RECEIVED

OCT 11 2016

SC Court of Appeals

Driscoll SHEEDY

A PROFESSIONAL ASSOCIATION | ATTORNEYS AT LAW

James W. Sheedy
Lic. in NC & SC
Direct: 704 341 2102
Fax: 704 341 2105
jimsheedy@driscollsheedy.com

Ballantyne: 11520 N. Community House Road
Suite 200 | Charlotte, NC 28277
South Carolina Office: 331 E. Main Street
Fountain Park Business Center
Suite 235 | Rock Hill, SC 29730
PO Box 4589 | Rock Hill, SC 29732
www.driscollsheedy.com

RECEIVED

October 6, 2016

OCT 10 2016

Via Federal Express

Honorable Daniel E. Shearhouse
Clerk of Court
Supreme Court of South Carolina
1231 Gervais Street
Columbia, S.C. 29201

RECEIVED S.C. SUPREME COURT

OCT 11 2016

SC Court of Appeals

**Re: American Community Bank, a division of Yadkin Valley Bank & Trust v.
Michael R. Brown, et al.
Appellate Case No. 2016-001838**


Dear Mr. Shearhouse:

Enclosed please find the original and seven (7) copies of the Motion to Dismiss Appeal, Index of Documents Referenced in Motion to Dismiss and a Certificate of Service in the above captioned matter. Please return a filed copy to me in the enclosed envelope. I have also enclosed a check in the amount of \$25.00 for the motion filing fee.

With kindest regards, I remain

Respectfully,

DRISCOLL SHEEDY, P.A.


James W. Sheedy

cc: Danny Hunter
J. Martin Foster, Esq.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

C. Heath Ruffner, Special Referee

Case No. 2010-CP-13-0164
Appellate Case No.: 2016-001838

American Community Bank, a division of Yadkin Valley
Bank and Trust, Respondent,

vs.

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

Of which Michael R. Brown is the Appellant.

CERTIFICATE OF SERVICE

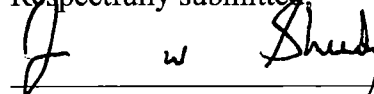
The undersigned hereby certifies that on the date indicated below he served counsel for Appellant with a copy of the *Motion to Dismiss Appeal and the Index of Documents Referenced in Motion to Dismiss* by mailing a copy of the same via First Class, U.S. Mail, postage-paid on the date set forth below.

RECEIVED
OCT 11 2016
SC Court of Appeals

John Martin Foster, Esq.
The Guardian Building
223 East Main Street, Suite 520
Rock Hill, SC 29730

Date: 10/6/16

Respectfully submitted,



James W. Sheedy, S.C. Bar No. 5052
Susan E. Driscoll, S.C. Bar No. 71447
Driscoll Sheedy, P.A.
11520 N. Community House Road
Suite 200
Charlotte, N.C. 28277
(704) 341-2101 - Telephone
(704) 341-2015 - Facsimile
jimsheedy@driscollsheedy.com
sdriscoll@driscollsheedy.com

Attorneys for Respondent

Driscoll SHEEDY

PERSONAL ASSOCIATION 1 ATTORNEYS AT LAW
11520 N. Community House Rd. Ste 200
Charlotte, NC 28277

Susan E. Driscoll
Driscoll Sheedy, P.A.
11520 N Community House Rd., Ste 200
Charlotte, NC 28277



02 1P \$ 002.620
0001785968 OCT 06 2016
MAILED FROM ZIP CODE 28277