

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

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OCT 11 2016

SC Court of Appeals

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.

INDEX OF DOCUMENTS REFERENCED IN MOTION TO DISMISS

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

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

Jayne S. Sellers
CLERK OF COURT C.P. & G.S.
CHESTERFIELD COUNTY, SC

Plaintiff,

vs.

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

Defendants.

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

2012 AUG 6 AM 11 45
CLERK OF COURT
CHESTERFIELD COUNTY, SC

**ORDER GRANTING SUMMARY JUDGMENT ON
BORROWER'S AFFIRMATIVE DEFENSES AND COUNTERCLAIMS**

This matter came before the Court on Plaintiff's motion for summary judgment against Defendant Brown (hereafter, "Borrower") on his affirmative defenses and counterclaims against Plaintiff. Both parties filed memoranda in support of their position. Present at the hearing for Plaintiff were attorneys James W. Sheedy and Susan E. Driscoll, and for Borrower, Martin A. Foster. Borrower was also present at the hearing. Attorney Harry R. Easterling, Jr. was present on behalf of Defendant C.W. Home (Guarantor), but took no position on the Motion. Shortt Auction & Realty Co., Bank of America, N.A. and Jaguar Portfolio, LLC are all in default and did not appear at the hearing.

The evidence filed with the Court by Plaintiff relating to the Motion consisted of transcripts from the depositions of Michael R. Brown, William Clewis (a Senior Vice President of Plaintiff) and C.W. Home; and letters from the South Carolina Department of Health and Environmental Control (SC DHEC) dated March 24, 1997 and January 8, 2010.

In addition to some of the same evidence submitted by Plaintiff, Borrower filed a 2007 Form 1098 issued to Borrower by Plaintiff; a commitment for title insurance issued to Plaintiff on December 21, 2000; a copy of an October 29, 2007 promissory note in the original amount of \$87,400 in the name of Borrower; an assignment of deposit account dated October 29, 2007; the mortgage given by Borrower to Plaintiff dated December 29, 2000, recorded January 2, 2001 in Book 346, at Page 431 in the Office of the Clerk of Court, Chesterfield County, South Carolina, against 106.85 acres along Hartsville-Ruby Road in Patrick, South Carolina (the "Subject Property")¹; and a disbursement request and authorization dated December 29, 2000 executed by Borrower in favor of Plaintiff.

I. Limited Consent to Requested Relief

In his pleading in response to the foreclosure complaint, Borrower alleged that at the time of the closing on the Note secured by the Mortgage, the subject property was environmentally contaminated and Plaintiff concealed that fact from Borrower. (Answer, Counterclaims and Crossclaim, pp. 3-4, 6-7, 9-13.) At the hearing on the Motion, Borrower's counsel conceded there was no evidence of environmental contamination of the subject property. Counsel informed the Court that Borrower would not oppose entry of summary judgment in favor of Plaintiff on the counterclaims for civil conspiracy and fraud (both actual and constructive), or on the affirmative defenses of failure to mitigate damages, equitable estoppel, unconscionability and breach of duty of good faith.

Because Plaintiff's motion for summary judgment as to the counterclaims of civil conspiracy and fraud (both actual and constructive) and the affirmative defenses of failure to mitigate damages, equitable estoppel, unconscionability and breach of duty of good faith is well-

¹ This property is indisputably a closed winery consisting of, among other things, a 63,400+/- square foot manufacturing warehouse space, and a 7,000+/- square foot building with concrete floors and 14' drive-in doors.

supported and there are no genuine issues of material fact as applied to the controlling law, in response to which Borrower has not offered any facts, law or argument to the contrary, the Court grants summary judgment against Borrower on those causes of action and affirmative defenses. That leaves Plaintiff's failure to satisfy a mortgage in accordance with S.C. Code Ann. §29-3-310 and alleged violation of the South Carolina Unfair Trade Practices Act as the remaining counterclaims², and it also leaves waiver (express and implied) as the remaining affirmative defense to be resolved by the Motion.

II. Factual Background

9-3
Borrower executed a promissory note in favor of Plaintiff that obligated Borrower to repay the principal amount of \$150,000 (Note). The Note was secured by a Mortgage granting Plaintiff a first lien against the Subject Property. Both the Note and the Mortgage were executed on December 29, 2000. The Note matured, which Borrower did not expressly deny in his Answer, Counterclaims and Crossclaim dated August 12, 2010 (the "Answer"), nor did his counsel contest at the hearing on the Motion. On February 23, 2010, Plaintiff sent a demand letter to Borrower, to which he did not respond. Plaintiff then filed this foreclosure action to enforce the terms of the Note secured by the Mortgage. The foreclosure seeks entry of judgment against Borrower, including a judicial sale of the subject property.

This Court previously entered an Order Deeming Applicable the C.J. Toal Administrative Order to this Foreclosure Action. In the briefing that preceded entry of the Order, Borrower said he was living on the subject property, with which Plaintiff did not disagree. The Order recites

² The Motion does not seek a ruling on Borrower's Truth-in-Lending (TILA) cause of action, so such cause of action is unaffected by the Court's ruling on the Motion before it.

3 1

that it was undisputed that the property is residential,³and, therefore, the foreclosure intervention procedures were applicable to this case. Thus, this case has been stayed. Prior to the hearing on the Motion, Borrower received a Notice of Right to Foreclosure Intervention. Although Plaintiff and Borrower exchanged information about whether the Note secured by the Mortgage could be rehabilitated by Borrower making payments to amortize the loan, the parties were unable to accomplish a loan modification. Plaintiff has filed a certification with this Court, which operates to lift the stay.

III. Borrower's Dispute

For purposes of the Motion, according to counsel for Borrower, there are three facts set forth in his Answer, purportedly supported by his evidence, that he believes warrant denial of summary judgment on the counterclaims for failure to satisfy a mortgage and UTPA, and the affirmative defense of waiver (express and implied), to wit: i) the Note represents a consumer loan; ii) the extensions and modifications to the Note contain forged signatures; and iii) the 2007 Form 1098 issued by Plaintiff to Borrower is a representation that the Note had been paid in full.

JS
4

IV. Findings of Fact

Based on the Motion, memoranda, evidence and the arguments of counsel given at the hearing, the Court hereby makes the following Findings of Fact dispositive of the Motion.

1. Borrower executed the Note in favor of Bank that obligated Borrower to repay the principal amount of \$150,000. (Depos. Tr. Brown, pp. 14-15.)
2. The Note was secured by the Mortgage signed by Borrower which granted Bank a first lien against the Subject Property. (Depos. Tr. Brown, pp. 18-19.)

³ In the Order, the Court did not rule on whether the loan evidenced by the Note secured by the Mortgage was a consumer or commercial transaction.

3. Both the Note and the Mortgage were executed by Borrower on December 29, 2000. (Depos. Tr. Brown pp. 14, 19.)

4. Borrower has not paid the principal amount owed under the matured Note upon demand by Plaintiff. (Depos. Tr. Brown, pp. 18, 40, 62-63, 83.)

5. Plaintiff has sued for the principal amount of the Note plus interest thereon, attorneys' fees, and costs accruing after the period in the demand letter expired. (Complaint, p.6, ¶23.) Plaintiff has not sued for amounts based on any extension or modification to the Note.

6. Plaintiff never informed Borrower it did not intend to collect the principal amount due and owing on the Note. (Depos. Tr. Brown, pp. 40-41; Depos. Tr. Clewis, pp. 80.)

7. In 2007, Plaintiff issued a Form 1098 Mortgage Interest Statement to Borrower that indicated receipt of \$87,500 in interest payments from Borrower. This Mortgage Interest Statement provides information to the Internal Revenue Service in connection with Borrower's deduction of his mortgage interest on his tax return.

V. Discussion

A. Failure to Satisfy the Mortgage


Under S.C. Code Ann. § 29-3-310 (Cum. Supp. 1999),

[a]ny holder of record of a mortgage who has *received full payment or satisfaction* . . . of his debts, damages, costs, and charges secured by mortgage of real estate shall, at the request by certified mail or other form of deliver with a proof of delivery of the mortgagor or his legal representative . . . within three months after . . . the request is made, enter satisfaction in the proper office on the mortgage which shall forever thereafter discharge and satisfy the mortgage.

S.C. Code Ann. § 29-3-310 requires actual payment of the note secured by the mortgage. *See Dykeman v. Wells Fargo Home Mortg., Inc.*, 381 S.C. 333, 673 S.E.2d 804 (Ct. App. 2009). For the statute to apply, the debt must be paid in full.

The evidence demonstrates clearly and without question that Borrower never paid the \$150,000 he owed to Bank. He admitted he never repaid the principal amount of \$150,000. (Depos. Tr. Brown, p. 18-19, 40, 62-63, 83-84.) His counsel argues that the "Payment" and "Balance" blocks on the 2007 Form 1098 show "Paid" and "-0-"; therefore, his client owes nothing. The 2007 Form 1098 is a Mortgage Interest Statement, and does not say anything about the principal due on the Note. The evidence is indisputable that the principal amount of the Note is still due and owing by Borrower. Because there is no evidence that Borrower paid the Note in full, Plaintiff has no obligation under S.C. Code Ann. § 29-3-310 to satisfy the Mortgage. Summary judgment is granted against Borrower on his counterclaim for failure to satisfy a mortgage.

B. SC UTPA

 On page eleven of his memorandum in opposition, Borrower detailed eight items, listed as "i" through "viii," as factual bases for alleging that Plaintiff violated the SC UTPA. Of these, the item referring to title insurance for an environmental condition was effectively withdrawn by Borrower when he admitted he could not prove there was an environmental condition on the Subject Property. Three additional items, that relate to whether the debt had been satisfied, have been resolved by this Court's ruling above that it is indisputable the principal amount of the Note is still due and owing by Borrower.

Left, then, are four factual bases to be considered. These will be addressed in the order in which they were raised by Borrower, and referred to as listed therein. As for item "i", Borrower has offered no evidence that Plaintiff has deliberately engaged in a pattern or practice of mislabeling consumer loans as commercial, or evidence that if Plaintiff mislabeled Borrower's loan, such mislabeling has the potential for repetition by Plaintiff in the future, as part of a

deliberate pattern of unfair or deceptive practices.⁴ Nor did counsel for Borrower make any argument at the hearing about any other similar loan transactions of Plaintiff. Without making any finding on whether the loan was consumer but treated as commercial, this Court denies item “i.” as a factual basis for a UTPA claim because there is no evidence or argument on other loans by Plaintiff deliberately being mislabeled.


The same reasoning applies to item “ii.” Borrower has offered no evidence that Plaintiff has deliberately engaged in a pattern or practice of not affording borrowers their right to choose counsel on South Carolina consumer loan transactions secured by real estate, or that the allegations in this case have the potential for repetition by Plaintiff in the future, as part of a deliberate pattern of unfair or deceptive practices. Nor did counsel for Borrower make any argument at the hearing about any other similar loan transactions of Plaintiff where Plaintiff deliberately did not afford borrowers their right to choose counsel on South Carolina consumer loan transactions secured by real estate. This Court denies item “ii.” as a factual basis for a UTPA claim because there is no evidence or argument on other loans by Plaintiff where it deliberately denied borrowers their right to choose counsel.

On items “iv.” and “v.,” which pertain to allegations of forged extensions and modifications of the Note in question, assuming, *arguendo*, these allegations are true, such

⁴ Borrower did not produce any evidence “proving that the same kind of actions occurred in the past or [] showing that the procedures employed by [Plaintiff] create a potential for repetition of the deceptive practices.” *Schnellmann v. Roettger*, 368 S.C. 17, 23, 627 S.E.2d 724, 746 (Ct. App. 2006). *See also Regions Bank v. College Ave. Development, L.L.C.*, 2010 WL 973480, *5 (D.S.C. 2010) (No UTPA cause of action for borrower where it “complained of acts only relating to the individual loan transaction involved in [that] case.”). A “simple contract dispute between two parties to a commercial transaction” is not what “the SCUTPA was created to protect against.” *Id.* “The act is not available to redress a private wrong where the public interest is unaffected.” *Noack Enterprise, Inc. v. Country Corner Interiors of Hilton Head Island, Inc.*, 290 S.C. 475, 479, 351 S.E.2d 347, 350 (Ct. App. 1986). “An unfair or deceptive act or practice that affects only the parties to a trade or a commercial transaction is beyond the act’s embrace.” *Id.* Borrower is trying to use the SC UTPA to address a private grievance with Plaintiff. There is no evidence in the record of Plaintiff committing these same alleged acts in transactions with other parties, nor is there any evidence that tends to show Plaintiff will commit the alleged acts in any future transactions. As a result, there is no impact on the public interest as required under the SC UTPA.

forgeries extending the maturity date of the Note do not render unenforceable the original Note and Mortgage. Borrower admits he did not repay the original principal of the Note. Plaintiff is only suing for the original principal amount, plus interest accruing after demand was made upon Borrower on February 23, 2010. (Complaint, p. 6, ¶¶ 23-24; Depos. Tr. Clewis, pp. 71-72, 82-83.) Furthermore, even if Plaintiff did accept the alleged forgeries, there is no evidence that such acceptance damaged Borrower in any way. He borrowed \$150,000, which he has not repaid. Last, the forgeries are also a mere private grievance between Plaintiff and Borrower, so there is again no impact on the public interest as required by the SC UTPA. Thus, this Court denies items “iv.” and “v.” as factual bases for a UTPA claim.

C. Waiver

 Borrower bases his affirmative defense of waiver⁵ on a 2007 Form 1098. The Form 1098 shows that \$87,400 in interest was received by Plaintiff. The Form is clearly labelled “Mortgage Interest Statement.” It makes no mention of payment of principal, nor does it reference how much remains due and owing on the Note.

In addition to the information contained on the Form 1098, Borrower admits he knew the Form 1098 was an interest statement for the Note, not a statement marking the Note paid in full. (Depos. Tr. Brown, pp. 39-41.) He also admits that he knew he had not paid Plaintiff \$87,500 in interest on the Note, nor had he paid any of the principal of \$150,000. (Depos. Tr. Brown, pp. 18, 40-41, 62-63, 83.) Borrower never received anything in writing from Plaintiff that if he failed to repay the \$150,000, Plaintiff would waive its right to foreclose on the Mortgage. (Depos. Tr. Brown, pp. 40-41.) Nothing in Plaintiff’s records indicate that it ever marked the Note paid in full. (Depos. Tr. Clewis, p. 74.) Borrower’s self-serving interpretation of the Form

⁵ Waiver is a voluntary and intentional abandonment or relinquishment of a known right.” *Murdock v. Murdock*, 338 S.C. 322, 333, 526 S.E.2d 241, 247 (Ct. App. 2009).

1098 does not create a genuine issue of material fact that prevents summary judgment from being entered on his affirmative defense of waiver.

VI. Conclusion

If a motion for summary judgment is supported as provided in the Rule, summary judgment will be granted, unless the adverse party presents evidence showing that there is a genuine issue of fact for trial. Rule 56(c), SCRPC. A nonmoving party has to demonstrate at least a scintilla of evidence to defeat a motion for summary judgment, where, as here, the burden is preponderance of the evidence. *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009); and *Shirley's Iron Works, Inc. v. City of Union*, 2010 WL 530195 (S.C. Ct. App. 2010). The scintilla, however, must be of probative value. *Bass v. Gopal, Inc.*, 384 S.C. 238, 680 S.E.2d 917 (Ct.App. 2009); *Lanier Construction Co., Inc. v. Bailey & Yobs, Inc.*, 384 S.C. 275, 681 S.E.2d 909 (Ct.App. 2009); and, *Carolina Renewal, Inc. v. South Carolina Dept. Transp.*, 385 S.C. 550, 684 S.E.2d 779 (Ct.App. 2009). Where, as here, there is no showing of a genuine issue of material fact, the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRPC.

Borrower has not offered even a scintilla of probative evidence to support his counterclaims of failure to satisfy a mortgage and violation of the SC UTPA, nor has he set forth any evidence to support his affirmative defense of waiver. Instead, the evidence shows only that the Note and Mortgage were executed by Borrower, he failed to pay in accordance with the terms thereof, and Plaintiff elected to exercise its remedies. Because there is no evidence to support either the counterclaims of failure to satisfy a mortgage and violation of the SC UTPA or the affirmative defense of waiver, summary judgment is granted as to these issues in favor of Plaintiff.

VII. Procedural Status

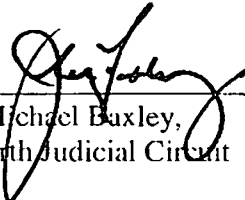
This case now consists of a mortgage foreclosure and a Truth in Lending Act claim on which a jury demand has been made. The Court has not decided as a part of this decision whether the TILA claim is compulsory to which a jury trial right exists, or permissive in which event the right to trial by jury was waived when such claim was lodged in this foreclosure proceeding. *Wells Fargo Bank, N.A. v. Smith et al.*, 2012 WL 2125834 (S.C. Ct. App. June 13, 2012). Because the complaint is equitable and the counterclaim may be compulsory (until decided otherwise upon subsequent motion), the proper procedure is for separate trials of the legal and equitable claims, pursuant to Rule 42(b), SCRPC. Since there are not factual issues common to both the equitable and legal claims, the TILA claim does not have to be tried first. *C&S Real Estate Services, Inc. v. Massengale et al.*, 290 S.C. 299, 302, 350 S.E.2d 191, 193 (1986). Nothing herein limits Plaintiff from referring the foreclosure claim to a special referee under Rule 53(b) and 71(a), SCRPC.

NOW, THEREFORE, it is hereby

ORDERED that the motion of Plaintiff seeking summary judgment in its favor on the counterclaims (except for TILA) and the affirmative defenses is granted.

IT IS SO ORDERED.

July 27, 2012



J. Michael Buxley,
Fourth Judicial Circuit

AMERICAN COMMUNITY BANK vs. MICHAEL BROWN, ET AL.
Transcript of Proceedings on 07/22/2016

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
2 COUNTY OF CHESTERFIELD)
3
4 AMERICAN COMMUNITY BANK,)
A DIVISION OF YADKIN VALLEY)
5 BANK & TRUST)
6 PLAINTIFF,)
7 VS.) C.A. NO. 2010-CP-13-0164
8 MICHAEL BROWN; C. W. HORNE;)
SHORT AUCTION AND REALTY)
9 COMPANY; BANK OF AMERICA, N.A.;)
AND JAGUAR PORTFOLIO, LLC,)
10 DEFENDANTS.)
11
12
13
14 TRANSCRIPT OF PROCEEDINGS
15 CHESTERFIELD, SOUTH CAROLINA
16 JULY 22, 2016
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20
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22 REPORTER - WILLIAM H. WHITE
23
24
25

1 P R O C E E D I N G S
2 BEFORE THE HONORABLE C. HEATH RUFFNER, SPECIAL REFEREE

3 10:01 A.M.
4 * * * * *

5 THE COURT: This is Case Number 2010-CP-13-
6 0164, American Community Bank, a Division of Yadkin
7 Valley Bank and Trust, Plaintiff, versus Michael R.
8 Brown, C.W. Horne, Short Auction and Realty, Inc.,
9 Bank of America, N.A., and Jaguar Portfolio, LLC.

10 I have been appointed as Special Referee to
11 hear this matter. Present this morning on behalf
12 of American Community Bank are its Counsel, James
13 W. Sheedy and Susan Driscoll. Also present are
14 Defendant Michael R. Brown and his attorney, Martin
15 Foster, and C. W. Horne with his Counsel, Harry
16 Easterling, Jr.

17 My understanding is the other defendants, Short
18 Auction and Realty, Bank of America, Jaguar Portfolio
19 are all in default, are all junior lienholders,
20 against which no relief is really being sought
21 anyway. So, who is going to proceed? Mr. Sheedy?

22 MR. SHEEDY: I'll proceed, your Honor. And if
23 you don't mind I will stand.

24 THE COURT: Sure.

25 MR. SHEEDY: That way I can hand things to you.

1 THE COURT: Whatever is more comfortable.

2 MR. FOSTER: Not to interrupt the other
3 counsel, but I do have a procedural point to raise.
4 I can do that before or after the counsel is
5 finished.

6 MR. SHEEDY: Well, if it is a procedural matter
7 which affects the substantive portion of this
8 hearing, let's --

9 THE COURT: Yes. Let's go ahead and get it
10 out of the way.

11 MR. FOSTER: If I may, I will stand also. Here
12 is what I understand we are operating under. I am
13 sure counsel will agree. Judge Baxley's order, in
14 its final section, discusses procedural status.
15 Reading aloud here, (As read) Because the
16 complaint is equitable, the Counterclaim --, this is
17 the Truth in Lending Counterclaim, -- may be
18 compulsory until decided. Otherwise, upon
19 subsequent notice, motion, -- which motion has not
20 been made, that is my comment, -- the proper
21 procedure is for separate trials of the legal and
22 equity claims pursuant to Rule 42 B SCRPC. Since
23 there are not factual issues common to both
24 equitable and legal claims, the TILA claim does not
25 need to be tried and does not have to be tried

1 first. And a citation. (As read) Nothing herein
2 limits the plaintiff from pursuing any other claims
3 before a Special Referee under Rule 53 B and 71 A
4 SCRCF. I can hand a copy of that --

5 MR. SHEEDY: I've got one.

6 THE COURT: What is the date of that order?

7 I've got the file here.

8 MR. FOSTER: I believe it was July 27, 2012.

9 With counsel's permission I am handing the Referee a
10 copy of the relevant section. It is my
11 understanding, of course, that on that basis the bank
12 is proceeding today with a claim on the foreclosure
13 action alone, and I will say for the record with
14 respect to the Referee, I am informed -- Of course, I
15 received his letter informing me of this action. I
16 have not been served with the order appointing him.
17 I do not have a problem with that, but I do note it.
18 I have been served with a copy of the proposed order,
19 but not the order appointing him.

20 THE COURT: Okay.

21 MR. FOSTER: My concern, sir, and the reason I
22 am raising this, Rule 71 A, which governs
23 foreclosure partition, reads in relevant part, I
24 believe, (As read) Actions before -- This is from
25 Section A, if I did not say so. (As read)

1 Actions to foreclose lien or liens or obtain
2 partition of real property shall be tried by the
3 Court and shall ordinarily be referred to a Master
4 pursuant to Rule 53. In foreclosure, the Judge or
5 Master shall compute the amount due to the
6 Plaintiff and any other claimants, which amounts
7 full when determined shall be the total debt due to
8 each. The total debt shall set forth clearly the
9 principal due upon default, the rate of interest,
10 the interest from the date of default to the
11 hearing date, any other relevant interest charged,
12 any amounts due to be credited on escrowed items,
13 the taxable cost of collection prior to the
14 hearing, and the amount of allowable attorneys fees
15 due and anticipated through a conclusion of the
16 action. I have brought my untidy rule book which
17 I can pass up, but I believe it's not
18 controversial.

19 We have here today a trial of one issue alone.
20 I do not understand how it's possible for this
21 Court to issue a final order assuming as the proof
22 on the part of the bank that will give a final
23 figure of the amount owed without trial of the
24 counterclaim. I note that in the case of C&S Real
25 Estate Services versus Massengill. I am handing a

1 copy to Counsel.

2 MR. SHEEDY: I have read it.

3 MR. FOSTER: Well, let me hand you a copy
4 nevertheless, and a copy I am handing up to the
5 Court, if I may. The Court goes in to a discussion
6 of how the issue should be treated. They
7 specifically state, and I am looking at the
8 discussion on the second page under 4 A -- I am
9 summarizing. The trial judge should determine that
10 they are going to order a separate trial.

11 Well, I understand that that has been done. The
12 order Judge Baxley issued, that portion which I
13 quoted, was not appealed. It is the order of the
14 case and the law in the case. It goes on to
15 state that the judge has to determine which issue is
16 to be tried first. I believe the order leaves
17 that up to the bank's discretion. If I am
18 incorrect on that I can be corrected.

19 If there are factual issues common to both
20 claims, absent the most precarious circumstances,
21 the at-law claim must be tried first. Well, if the
22 language of the case is the language of the Court's
23 order disposing of this by holding the TILA claim
24 contains matter that has no relevance to the
25 foreclosure, so be it. My point is simply this. In

1 order to issue a foreclosure this Court is required
2 to say, here's the amount of money that is owed by
3 Mr. Brown, presuming Mr. Brown alone, not by Mr.
4 Horne. If you wish to retain your property, this
5 is what you owe the bank. I am at a loss to
6 understand how that is possible in the absence of a
7 determination of what is owed on the counterclaim.

8 In short, I do not see under the language of
9 Rule 71 A how it is possible for the Court to issue a
10 final order today, though it can certainly try the
11 claim, awarding the relief of a foreclosure until
12 or if the counterclaim is tried. That was my
13 procedural point, and I thank the Court for its
14 patience.

15 THE COURT: How do you square that with Judge
16 Baxley's order of July 27, 2012, now?

17 MR. FOSTER: Well, to the extent that Judge
18 Baxley's order says the matter being tried -- that
19 the matter being tried does not go to the issue of
20 the relief being asked in my understanding, and
21 that is the point I am raising under 71 A here
22 before the Court. It is, of course, the Court's
23 decision.

24 THE COURT: Okay.

25 MR. SHEEDY: May I --

1 THE COURT: Sure.

2 MR. SHEEDY: Judge Baxley issued an order.
3 Judge Baxley bifurcated the TILA claim. Judge
4 Baxley found the facts of the TILA claim are
5 separate and distinct from the facts of the
6 foreclosure case. The TILA claim goes to the
7 closing and whether Truth in Lending was met at the
8 closing. The TILA claim is an affirmative
9 counterclaim for a separate relief and a judgement.
10 It's not an action in set-off, and there is no
11 assertion of set-off.

12 Judge Baxley's order went up on appeal.
13 Judge Baxley's order was affirmed first by the
14 Court of Appeals; on Motion for Reconsideration it
15 was affirmed again; on Petition for Cert it was
16 affirmed; and then the Supreme Court kicked back Mr.
17 Brown's counsel's request for a reconsideration of
18 the Denial of Cert. Judge Baxley's order has
19 been thoroughly adjudicated at this point, and if Mr.
20 Brown's counsel had wanted to assert a set-off,
21 that whatever may be ultimately owed on the TILA
22 claim should reduce the judgement on foreclosure, he
23 should have pled it, and he didn't plead it, and he
24 didn't assert it, and we now have umpteen years in
25 this case without him doing so.

1 Mr. Brown is fully protected on his TILA
2 claim. It's before the Circuit Court. This Court
3 has no jurisdiction over that TILA claim, per Judge
4 Baxley's order, and I am a little surprised that
5 Mr. Foster didn't share this with Your Honor,
6 there's a Motion For Summary Judgement pending as
7 to the TILA claim which the Circuit Court will need
8 to clear and which, of course, we on behalf of the
9 bank think is meritorious and should dispose of it.

10 Judge Baxley effectively said in an order that
11 was examined and affirmed twice by the Appellate
12 Courts the TILA claim is extrinsic. It belongs in
13 Circuit Court. Brown may pursue the TILA claim in
14 the Circuit Court. He may get a judgment
15 against the bank, a very solid entity, but it does
16 not go to the foreclosure, and that the two are
17 really distinct from each other, and that the
18 foreclosure may proceed first. Inherent in
19 saying that the foreclosure may proceed first is
20 that we may finish the foreclosure and get a
21 Judgement of Foreclosure and sell the property.

22 I appreciate that -- and I don't know how much
23 background Your Honor has been afforded before
24 arriving here today --

25 THE COURT: None.

1 MR. SHEEDY: And I think it might be worthwhile
2 to just do a quick scanning on this case, just an
3 overview.

4 This is a foreclosure action, and in response
5 to the core question, Mr. Foster, on behalf of his
6 client asserted pages of affirmative defenses and
7 counterclaims. Judge Baxley heard all of those
8 affirmative defenses and counterclaims and he
9 dismissed them, with the exception of the TILA
10 claim. The Court of Appeals and the Supreme Court
11 has upheld Judge Baxley's order.

12 We are before you this morning, Your Honor, on
13 a qualified denial, which is in Mr. Foster's
14 pleading on behalf of Mr. Brown. It is a very
15 short qualified denial. It really doesn't even
16 contain any factual averment. It simply calls for
17 the bank to prove its debt. And in that regard, on
18 appeal, the Court of Appeals in its decision at
19 numbered Paragraph 2 said, (As read) Brown
20 admitted he never paid off the mortgage. We find
21 the bank did not fail to satisfy his mortgage.

22 So we really already adjudicated the default
23 in the Court of Appeals case. But I -- To the
24 extent that I do agree with Mr. Foster, I think the
25 issue, and it's a shame that it's a contested

1 issue, although we are here today with a witness if
2 that's the route we need to take, we are also here
3 today with the typical statutory foreclosure papers
4 if we can do that more efficiently -- I think the
5 only thing to adjudicate is really the interest,
6 because Mr. Brown has already admitted under oath
7 that he never paid anything on this 150,000
8 principal. And we've already conceded throughout
9 the course of this case and through the appeal that
10 we are not claiming any accrual of interest prior
11 to the time that we sent our demand letter and the
12 cure expired on our demand.

13 So we are looking at the interest during the
14 pendency of this case, essentially, plus the
15 original principal amount. So we are prepared to
16 go forward on that narrow issue, but the idea that
17 we can't get a foreclosure order, we can't sell the
18 property, we can't reduce this to a deficiency
19 because there is a TILA claim pending -- I don't
20 think so. If he had wanted to assert set-off, he
21 should have pled set-off, and set-off is a defense,
22 and all the defenses in this case with the
23 exception of the TILA counterclaim and the
24 qualified denial are now gone. Thank you.

25 THE COURT: Any response to that, Mr. Foster?

1 MR. FOSTER: I believe we have stated our
2 point, which is that we do not dispute their right --
3 If I may, sir, we do not dispute their right to go
4 forth with foreclosure. We dispute their right to
5 the relief sought under what I believe is the clear
6 language of 71 A. I don't believe we are required
7 to see the language of 71 A; I believe it controls
8 this Court. That would be all I would say.

9 THE COURT: Mr. Easterling, do you have
10 anything to offer on this issue?

11 MR. EASTERLING: No, Your Honor. Thank you.

12 MR. FOSTER: One more point, sir, if I may? I
13 apologize for standing out of order. I do notice
14 that our pleading does claim TILA as both a defense
15 and a set-off.

16 MR. SHEEDY: To the extent that it affects
17 Judge Baxley's ruling on that, to the extent that
18 it doesn't further the claim for relief, Judge
19 Baxley has preserved Mr. Brown's right to prosecute
20 that, and I think that the language on Page 10 of
21 Judge Baxley's order is pretty clear.

22 THE COURT: I would tend to agree. I am also
23 now reviewing Judge Baxley's -- It's a Form 4 order
24 that was issued in response to defendant Brown's
25 Motion For Reconsideration denying that Motion For

1 Reconsideration on November 5 of 2012. And I
2 believe it clarifies that issue as it was ruled
3 upon in the order of July 27, 2012. I don't see
4 where Mr. Brown is prejudiced by allowing the
5 foreclosure to go forward. He can pursue his claim
6 under Truth In Lending Act in the Circuit Court.

7 If he gets a judgment on that claim certainly he
8 can collect that judgement. But based on our
9 review of Judge Baxley's July 27, 2012, order, as
10 well as his Form 4 order dated November 5, 2012, I
11 find that the foreclosure action can go forward
12 today and can go forward through conclusion and the
13 sale of the property if that's necessary in order
14 to satisfy the judgement.

15 MR. SHEEDY: And, Your Honor, it may be gilding
16 the lily but for the record, for the benefit of the
17 court reporter, and I think this was the language
18 that Your Honor was considering, I will read it in to
19 the record. In the Rule 51 A ruling which Judge
20 Baxley penned, and I quote, (As read) Any
21 consideration of this claim --, referring to the
22 TILA, -- in Defendant Brown's Motion to Reconsider
23 would be inappropriate, and such claim is
24 unaffected here as well.

25 THE COURT: That's correct. That's the

1 language I was looking at. I had not looked at
2 either of those orders before coming in here today.
3 So that would be my ruling on that issue. Any
4 other preliminary matters before we move on to the
5 case?

6 MR. SHEEDY: We are ready to proceed.

7 MR. FOSTER: None for me, Your Honor.

8 MR. SHEEDY: Your Honor, if we could have maybe
9 a two minute recess?

10 THE COURT: Certainly.

11 MR. SHEEDY: And I have no problem telling the
12 court and the court reporter what I am going to do.
13 I am going to talk with Mr. Foster for a moment to
14 see if we really have to put up any testimony on
15 this question.

16 THE COURT: Sure. We will be in recess.

17 WHEREUPON: A recess was taken.

18 MR. SHEEDY: Your Honor, we are ready to proceed.

19 THE COURT: We are back on the record. Call
20 your first witness.

21 MR. SHEEDY: A few preparatory remarks in
22 advance of offering this witness on a limited
23 issue. This case was filed on May 4, 2010, so it
24 is six years old. We have already talked about the
25 counterclaims and affirmative defenses and Judge

1 Baxley's order, and the dismissals of those
2 affirmative defenses and counterclaims except for
3 the TILA claim. We are here today on the qualified
4 denial for the foreclosure. If I may zero in on
5 that qualified denial for a moment, for it's only
6 two numbered paragraphs?

7 THE COURT: Okay.

8 MR. SHEEDY: Paragraph 2 sets forth what is not
9 being contested: venue, identity, terms of the
10 mortgage and note, breach, expenditure of monies,
11 rights to recover monies expended on the
12 liabilities of the defendant, existence and
13 priority of recorded liens. There is an admission
14 of all matters which are evidenced by public
15 record, and then the sole denial in this qualified
16 denial is the allegation that Mr. Brown is without
17 sufficient information, knowledge and belief as to
18 any factual allegations. Not denying them, just
19 saying he lacks sufficient information.

20 THE COURT: I am sorry. Which paragraph is
21 that?

22 MR. SHEEDY: I am looking at the very end of
23 numbered Paragraph 2, where it says, (As read) --
24 alleges without sufficient information. That
25 really is the limit of the context that appears in

1 the plea. Subsequent to this pleading, certain
2 facts have been adjudicated in Judge Baxley's
3 order. I am not going to go through what we just
4 said.

5 Mr. Brown executed a promissory note; the
6 note is secured by the mortgage; the note has
7 matured; Mr. Brown has not paid the note upon
8 maturity. And as I said just a moment ago the
9 Court of Appeals has said that Mr. Brown admitted
10 he never paid off the mortgage.

11 So those issues are here today on this
12 qualified denial, and really shouldn't be in
13 dispute as factual matters. I think the sole issue
14 before the Court this morning ought to be just the
15 interest calculation, and the interest calculation
16 really is not necessarily a matter for testimony.

17 The law draws a distinction between liquidated
18 and unliquidated claims. Unliquidated claims
19 require Notice of Hearing, evidence of attorneys
20 fees, and they require some proof; liquidated
21 claims are liquidated because they are clearly
22 self-evident on the face of the instrument and are
23 capable of determination. So we are happy to put
24 up a witness with respect to the interest rate and
25 the accrual of interest, but I don't want us to

1 forget, I am certainly not going to forget, that
2 the promissory note's been admitted and the
3 interest rate is on the face of the note. So I am
4 really putting up a witness to perform math that is
5 capable of being performed without any testimony at
6 all.

7 Having said that, and understanding that I
8 need to do that, I call as a witness Mr. Danny
9 Hunter.

10 Whereupon - Daniel Hunter, was called as a witness and
11 first being duly sworn, testified as follows:

12 Examination: (By Mr. Sheedy)

13 Q. State your name?

14 A. Danny Hunter.

15 Q. Where do you work?

16 A. Yadkin Bank.

17 Q. What do you do with the Yadkin Bank?

18 A. I am Assistant Vice President in the Special Assets
19 Department.

20 Q. As Assistant Vice President in the Special Assets
21 Department, are you familiar with the loan that was
22 made by American Community bank to Mr. Michael
23 Brown?

24 A. I am.

25 Q. Would you briefly explain the relationship between

1 Yadkin Bank and American Community?

2 A. American Community bank was bought by Yadkin Valley
3 Bank and Trust, which later merged in to Yadkin
4 Bank.

5 Q. So today as we sit here American Community Bank is
6 owned by Yadkin Bank?

7 A. Correct.

8 Q. And in your capacity with Yadkin Bank, you have been
9 responsible for the American Community Bank's loan
10 to Mr. Brown?

11 A. Yes.

12 Q. Okay. Give us one second. Mr. Hunter, I am going
13 to show you a promissory note, and it is dated
14 December 29, 2000. I represent to the Court that
15 it is appended to the Complaint as part of the
16 record on appeal. Take a second while you review
17 that note.

18 A. Okay.

19 Q. Okay. Now, what is the interest rate that is
20 stated on the face of that note. I think you will
21 find it near the top.

22 A. Ten percent.

23 Q. Now, you have signed an Affidavit of Debt in this
24 case. Right?

25 A. Yes.

1 Q. Okay. I am going to show you a copy of the
2 Affidavit of Debt. If you would, turn to page 2?

3 A. Okay.

4 Q. Is that your signature which appears on Page 2?

5 A. Yes, sir.

6 Q. Now if you will, flip back to Page 1, numbered
7 Paragraph 3. What is the amount that recited there
8 as due after July 22, today?

9 A. \$246,924.42.

10 Q. Now, I am doing math on the fly and that's a
11 dangerous thing. The principal amount of this note
12 is 150,000. Is that correct?

13 A. Yes.

14 Q. Okay. So if the amount shown is 246,000 and change
15 today, that's roughly 94,000, 96,000 --

16 A. 96,924.42.

17 Q. In accrued interest?

18 A. Yes, sir.

19 Q. And what is the per diem interest based on the
20 rate?

21 A. \$41.67.

22 Q. As you sit here today, is that the amount that you
23 calculated based upon what's due on the note?

24 A. Yes.

25 MR. SHEEDY: We'd offer both the note, although

1 I think the note's already in evidence, and the
2 affidavit.

3 Q. As I understand it, Mr. Hunter, the amount that's
4 due the bank today on this promissory note is
5 \$246,924.42?

6 A. Yes, sir.

7 Q. Okay. Now --

8 MR. FOSTER: I would say, without objection.

9 MR. SHEEDY: What?

10 MR. FOSTER: Without objection.

11 THE COURT: I want to ask -- what is -- have
12 those been marked, Mr. Court Reporter?

13 COURT REPORTER: Not yet, sir. Are they
14 offered as one exhibit, or as two?

15 MR. SHEEDY: I would say as two. And I don't
16 care if it's 1 or 2 in what order.

17 COURT REPORTER: I will mark the promissory
18 note Exhibit Number 1, and the Affidavit of Debt
19 Exhibit 2.

20 WHEREUPON - Documents marked as Plaintiff's
21 Exhibit 1 and Plaintiff's Exhibit 2.

22 THE COURT: Any objection to those being
23 admitted, Mr. Easterling?

24 MR. EASTERLING: No, sir.

25 THE COURT: They are admitted.

1 By Mr. Sheedy: (Resuming)

2 Q. With respect to the calculation of interest, was
3 any interest calculated prior to the expiration of
4 the time when the demand expired?

5 A. No.

6 Q. So the interest calculation of roughly 96,000 began
7 after a demand was sent and after the time to cure
8 had expired?

9 A. Yes.

10 Q. Is that your understanding?

11 A. Yes.

12 Q. So as you sit here today the amount the bank is
13 seeking in this foreclosure is the 246,000 number
14 that we just recited?

15 A. Yes, sir.

16 MR. SHEEDY: Thank you, Mr. Hunter. Please
17 answer any questions other counsel may have of you.

18 THE COURT: Mr. Foster?

19 Examination: (By Mr. Foster)

20 Q. Mr. Hunter, Mr. Sheedy was quite thorough. I just
21 need some clarification. The figures that you
22 recited are based upon your knowledge of the
23 regularly-kept records at your bank?

24 A. Yes, sir.

25 Q. And they go back, as I understand it, to the date of

1 the original transaction?

2 A. Yes, sir.

3 Q. And do they reflect any payments whatsoever by Mr.
4 Brown?

5 A. Not to my knowledge.

6 Q. They do not reflect a payment of some \$12,000 the
7 first year?

8 A. Not to my knowledge, no. I am not saying it
9 didn't happen, but not to my knowledge.

10 MR. FOSTER: Thank you.

11 MR. EASTERLING: No questions, Your Honor.

12 MR. SHEEDY: Your Honor, I have no further
13 questions.

14 THE COURT: You may step down. Any other
15 witnesses?

16 MR. SHEEDY: Well, I am debating. May I --

17 THE COURT: You are off the record.

18 (Off the record)

19 MR. SHEEDY: Your Honor, as a result of the
20 sidebar conducted off the record my understanding
21 is that there is no assertion that the original
22 \$150,000 has been paid, and the interest that's
23 accrued was after the demand was sent. So any
24 payments in the interim would not have reduced the
25 150,000.

1 Okay. Let me see where we are. Here's where
2 I think we are. The Affidavit of Debt has been
3 introduced into evidence through testimony. I
4 have a number of documents to hand up to the Court
5 that have not been evidenced by testimony, but
6 given that this is a contested proceeding let me
7 provide explanation where appropriate.

8 There is a governing law clause in this note.
9 The law in the note is North Carolina law. Under
10 the North Carolina Statute, North Carolina 6-2122,
11 Subsection 2, whenever it says reasonable attorneys
12 fees that is a deemed 15 percent. So that is a
13 matter of law, not a matter of fact, and we have
14 prepared the Affidavit of Attorneys Fees
15 accordingly with respect to the 15 percent.

16 Now, should Mr. Foster desire to litigate that
17 point, I might be very quick to run through the
18 statute because quite honestly we have spent
19 \$63,608.44 and the 15 percent is, as they say at K-
20 Mart, a Blue Light Special. So I have the Affidavit
21 of Attorneys Fees to tender to the Court.

22 There are also minutes of the reference. I
23 don't know that those are entirely necessary, but I
24 am going to hand them up. I suspect, given that
25 there was testimony, that we really don't need to

1 enter minutes, but they are there should the Court
2 have a desire to do that. I also have a Special
3 Referee's Proposed Order and Notice of Sale. The
4 Notice of Sale calls for an initial sale on
5 September 7 at 11:00 A.M. Since deficiency is not
6 waived at this time, the final sale will, of course,
7 be 30 days later on October 7.

8 Ms. Driscoll is reminding me, and very
9 appropriately, that the order we have drafted for
10 the Court does not recite that Mr. Hunter testified
11 and that Mr. Easterling and Mr. Horne made
12 appearances here this morning, and in the interest
13 of fairness that should probably reflect both of
14 those.

15 THE COURT: Yes, and I would ask that the order
16 also reflect that the TILA issue, that this hearing
17 and this order in no way affect Mr. Brown's TILA
18 claim.

19 MR. SHEEDY: Happy to do so. Would Your Honor
20 prefer that we just hold these papers until we have a
21 chance to revise them or should I tender them
22 with the other things we will be revising?

23 THE COURT: I think it would be best just to
24 hold them.

25 MR. SHEEDY: So that completes the presentation

1 by the plaintiff, Your Honor. And not to be
2 obvious but plaintiff would request that upon
3 tender of the revised papers to the Court, that a
4 Judgement of Foreclosure be entered and that this
5 matter proceed to sale. Thank you.

6 THE COURT: Mr. Foster, do you have anything to
7 offer into evidence?

8 MR. FOSTER: I believe we made our point, Your
9 Honor.

10 THE COURT: Mr. Easterling?

11 MR. EASTERLING: Nothing, Your Honor.

12 THE COURT: Based on the evidence and testimony
13 presented, I will grant the relief requested by the
14 plaintiff and we will schedule a sale of the
15 property for September 7, 2016 here at Chesterfield
16 County Court House at 11:00 A.M.. Given that a
17 deficiency is not being waived at this time the
18 bidding will remain open for 30 days after that
19 date. Do you want to include in your Notice of
20 Sale that that provision may be waived prior to the
21 sale?

22 MR. SHEEDY: Yes, and I remain hopeful that
23 that is a possibility.

24 THE COURT: All right. Anything from any other
25 parties or counsels? Then we stand adjourned.

1 COURT REPORTER: Gentlemen, may I inquire
2 about transcripts?

3 MR. SHEEDY: Yes. Original and a copy.

4 MR. FOSTER: Yes, a copy for me.

5 COURT REPORTER: Thank you.

6 Whereupon - Hearing was concluded at 10:42 A.M.

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