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13 (INDEX AT REAR OF TRANSCRIPT)  
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1 (PLF. EXH. #1, Proposed Order, was marked for  
2 identification.)

3 (PLF. EXH. #2, Lease to Buy, was marked for  
4 identification.)

5 (PLF. EXH. #3, Tax Receipts, was marked for  
6 identification.)

7  
8 P R O C E E D I N G S

9  
10 THE COURT: This is the case of Allen  
11 Livingston as the Plaintiff versus Harold Simmons as  
12 the Defendant. The case is numbered 2014-CP-10-1635.  
13 Present today for the Plaintiff is Mr. Bruce  
14 Berlinsky of the Charleston County Bar, and for the  
15 Defendant, Mr. Seth Whipper also of the Charleston  
16 County Bar.

17 Gentlemen, I've had a chance to review the  
18 file, including the underlying order that is  
19 referenced in the Complaint by the Plaintiff, and I  
20 have been provided with a list of proposed exhibits  
21 for trial which includes, I assume, that order. Is  
22 that the order?

23 MR. BERLINSKY: Yes.

24 THE COURT: It looks like Judge Nicholson had  
25 previously issued this order 2/20/13. It was filed

1 2/27/13. There's been some disagreement since that  
2 time as to what's been paid or not paid. That's why  
3 we're here today. That's what I see. Does that  
4 sound correct from the Plaintiff and the Defense  
5 perspective?

6 MR. WHIPPER: That's correct, Your Honor.

7 THE COURT: Very good.

8 MR. WHIPPER: I think also, Your Honor, we may  
9 need to take up a matter. I think the jurisdiction  
10 of the Court -- there's some questions as to the  
11 jurisdiction of this Court. If I might be heard,  
12 Your Honor, I'll state my concerns.

13 THE COURT: All right.

14 MR. WHIPPER: This order is an order that  
15 controls an executory contract and an ongoing  
16 relationship. I think that because of the nature of  
17 the order, the nature of the remedies that have been  
18 proposed means that what we have here instead of a  
19 foreclosure is a matter of failure to comply with the  
20 order.

21 As such it would be properly heard as a Rule  
22 to Show Cause in the Court of Common Pleas before  
23 Judge Nicholson. It is an executory order, an  
24 executory contract. It is still under the  
25 supervision of the Court. So I think that this just

1 occurred as you were speaking, Your Honor, as well as  
2 I looked at the paperwork this morning that this is,  
3 in fact, a case that really should be before Judge  
4 Nicholson as a Rule to Show Cause, and I think that  
5 therefore this Court lacks jurisdiction to hear this  
6 Complaint is more in the nature of a Rule to Show  
7 Cause for failure to follow the order.

8 I think that this matter has to be dismissed  
9 as a foreclosure and remanded to the Court, to Judge  
10 Nicholson, as a Rule to Show Cause.

11 THE COURT: Let me hear from you,  
12 Mr. Berlinsky.

13 MR. BERLINSKY: I disagree, Your Honor. If  
14 you read Judge Nicholson's order it was determined  
15 that this lease to buy was to be treated and  
16 interpreted as an installment sales contract. The  
17 Supreme Court has ruled repeatedly that installment  
18 sales contracts would be treated like mortgages and  
19 must be foreclosed upon because there may be some  
20 equity as a result of a foreclosure sale and the  
21 Plaintiff may be entitled to it.

22 Judge Nicholson's order just said, It's an  
23 installment sales contract, and this is what he's got  
24 credit for, and this is what the future payments are  
25 supposed to be. I'm not seeking to put him in jail

1 for Contempt of Court. He's made no attempt to make  
2 any payments since this order other than the three  
3 payments that he has proof that my client  
4 acknowledges. He has memory of three payments.

5 Seth has shown me receipts of three payments.  
6 I don't think it's a Rule to Show case. Once he  
7 ruled it's an installment sales contract I'm entitled  
8 to foreclose.

9 THE COURT: This may help me. What has  
10 transpired since the order was issued? It looked  
11 like it might have bounced up on appeal and got --

12 MR. BERLINSKY: It went up on appeal, and the  
13 appeal was dismissed. What has transpired since then  
14 is starting after this February order, which it's  
15 been 18 months since. The order is February of 2013.  
16 It's been 18 months since then.

17 Judge Nicholson found in the last paragraph of  
18 the order that the Defendant was giving Mr. Simmons  
19 credit of 87,540 towards the purchase price of  
20 125,000 with a balance of 37,460 to be paid on the  
21 installment contract at a rate of 500 a month until  
22 the balance is paid.

23 The Defendant was to obtain an amortization  
24 schedule supplied to the Plaintiff, and he was  
25 required to pay by money order or check with a

1 notation mark on the amortization schedule on behalf  
 2 of the parties. Since that my client -- because the  
 3 payments were being made to Mr. Barnwell's office,  
 4 and if you recall he died in July of 2013.

5 Between this order and July of 2013, my client  
 6 recalled that I received at least three payments. It  
 7 could have been possibly four. I only really  
 8 actually remember the three. Mr. Simmons has  
 9 provided Postal money orders, or Seth has, for me to  
 10 review. They're not in evidence yet, but there are  
 11 three money orders dated after this order  
 12 (indicating).

13 There has been no amortization schedule  
 14 provided by the Plaintiff to the Defendant or to  
 15 Mr. Barnwell to my knowledge. There's no notations  
 16 on any payment of amortization schedule payments, but  
 17 we certainly acknowledge receiving three payments,  
 18 but in 18 months that's three leaving 15 months  
 19 unpaid for and no explanation for it.

20 THE COURT: Okay. Mr. Whipper?

21 MR. WHIPPER: Again, Your Honor, it's our  
 22 position that this order is still under the  
 23 jurisdiction of Judge Nicholson. It is an executory  
 24 order that tells what should be done, how it is  
 25 supposed to be done, so the Court, in fact, has kept

1 jurisdiction of this case.

2 Once the appeal was completed it was  
3 dismissed, and it was sent back to the Circuit Court.  
4 Clearly --

5 THE COURT: Well, he didn't say that in his  
6 order, did he?

7 MR. WHIPPER: That he would keep jurisdiction?

8 MR. BERLINSKY: No. It is not anywhere in  
9 this order.

10 MR. WHIPPER: He did not say that in the order  
11 per se. The essence of the order is that it is a  
12 supervisory order with the ongoing conditions that  
13 have to be established and satisfied. So in fact,  
14 this is still within the purview of Judge Nicholson  
15 and this Court order. We're not saying there's not a  
16 forum. We're just saying that this is the wrong  
17 forum or the wrong proceeding.

18 MR. BERLINSKY: Your Honor, my client doesn't  
19 seek to rule him into Court to throw him into jail  
20 for a contempt order. We either want payment or we  
21 want the property back. It's simple.

22 THE COURT: All right.

23 MR. BERLINSKY: He's done nothing. This case  
24 has been floating around now for months, and he's  
25 made no attempt to even reinstate.

1 MR. WHIPPER: Our position again, Your  
2 Honor -- this again, should be argued before Judge  
3 Nicholson to decide from this point what happens next  
4 for any alleged failures in performance. That's who  
5 should make the final order. That's where it was to  
6 begin with.

7 THE COURT: I can acknowledge the argument.  
8 Why is it just now being presented to me, though?

9 MR. WHIPPER: Well, because Your Honor, in  
10 fact, as we read information over the weekend in  
11 preparing we realized -- wait a minute -- we're  
12 not -- I was wondering -- I generally don't do  
13 foreclosure cases. This isn't a foreclosure.

14 I'm here because I was a lawyer involved in  
15 obtaining this order. This order requires that he do  
16 certain things. He hasn't done any of these certain  
17 things as alleged by the Plaintiff, but this order is  
18 signed by Judge Nicholson. It's his order, and it's  
19 his prescription of what's going to be happening, so  
20 it should be before Judge Nicholson as a failure to  
21 follow the order. It's not in the nature of a  
22 straight foreclosure. Again, it has to be raised now  
23 because it's essentially a subject-matter  
24 jurisdiction. Does this Court have subject matter  
25 jurisdiction of this order? It doesn't.

1 THE COURT: Let me go back. So then what  
2 relief -- the Plaintiff gets to pursue the relief  
3 they want. What's the relieve that the Plaintiff  
4 seeks, Mr. Berlinsky?

5 MR. BERLINSKY: Judge Nicholson's order  
6 specifically defines this as an installment sales  
7 contract.

8 THE COURT: I see that.

9 MR. BERLINSKY: The relief we seek is  
10 foreclosure of the Installment Sales Contract for  
11 failure to make any payments.

12 THE COURT: All right. Then I think --

13 MR. BERLINSKY: Notwithstanding that -- even  
14 Seth's argument -- a Rule is not required to go back  
15 before the Judge who initially hears it. Any Judge  
16 can hear a Rule for not complying.

17 THE COURT: Let's restate the question. Are  
18 you here on a Rule?

19 MR. BERLINSKY: I'm not here on a rule.

20 THE COURT: You're here on a Complaint, right?

21 MR. BERLINSKY: I'm here on a Complaint.

22 THE COURT: Complainant seeks foreclosure of  
23 installment sales contract, nonjury.

24 Mr. Whipper, I acknowledge that your argument  
25 has some merit, but I don't find that the Plaintiffs

1 are seeking the remedy that would require them to go  
2 in front of Judge Nicholson. What they seek is to  
3 follow the law that Judge Nicholson has set forth in  
4 that order which gives your client equitable interest  
5 in the property meaning -- I think when it was in  
6 front of him the question was, What type of agreement  
7 do they have: Leasehold or installment sales  
8 contract?

9 He found, I believe as a matter of law, that  
10 it was an installment sales contract. So now the  
11 Plaintiff seeks to foreclose under that installment  
12 sales contract I assume having lost that argument in  
13 front of Judge Nicholson. I can't really tell, but  
14 that's what it seems to me to be. So it would appear  
15 to me that this is a matter of equity, and that's  
16 what the Plaintiff's are seeking today is equity, not  
17 some contemptuous powers under a Rule to Show Cause.  
18 The Plaintiff gets to choose how they wish to proceed  
19 in that fashion.

20 MR. WHIPPER: I don't think so, Judge, with  
21 all due respect. They have -- they're still in front  
22 of Judge Nicholson. They go back to Judge Nicholson  
23 and allege what they claim the problem is here, and  
24 then it's up to Judge Nicholson to turn them down.

25 THE COURT: I think if they were saying that

1 he's not complied with the Judge's order --

2 MR. WHIPPER: That's really what they're  
3 saying.

4 MR. BERLINSKY: That's not what we're saying,  
5 not even close to what we're saying.

6 THE COURT: I'm going to deny the motion. I  
7 don't think that's what they're seeking. I'm going  
8 to deny the motion, and I'm going to allow the  
9 Plaintiffs to proceed. Okay?

10 MR. WHIPPER: Thank you, Your Honor.

11 THE COURT: Any other matters to take up  
12 before we start?

13 MR. BERLINSKY: Nothing, Your Honor.

14 THE COURT: The Plaintiff may proceed.

15 MR. BERLINSKY: I call Allen Livingston to the  
16 stand.

17 MR. WHIPPER: Your Honor, one other thing. We  
18 will put up evidence that we feel might indicate that  
19 we have experienced any harm or damage. We want to  
20 put that up.

21 THE COURT: Very good. I'll let the Plaintiff  
22 go first, and the Defendant can go after that.

23 MR. WHIPPER: That's right.

24 THE COURT: Mr. Livingston, come on up.

25 ALLEN LIVINGSTON,

1 being first duly sworn, testified as follows:

2 THE COURT: If you would, please state your  
3 full name and address for the record.

4 THE WITNESS: Allen R. Livingston, 6046 Hyde  
5 Park Road, Ravenel, South Carolina, 29470.

6 THE COURT: Thank you, sir. You may proceed,  
7 Mr. Berlinsky.

8 EXAMINATION

9 BY MR. BERLINSKY:

10 Q. Mr. Livingston, are you familiar with the  
11 obligations of the Defendant, Mr. Simmons, also known  
12 as Harold Simmons, Junior in this matter?

13 A. Yes, sir.

14 Q. Did you and Mr. Simmons enter into a-- I'm  
15 going to show you a document entitled, Lease to Buy.  
16 Did you and Mr. Simmons enter into this document  
17 which has been premarked?

18 A. Yes, sir.

19 MR. BERLINSKY: I move to admit the Lease to  
20 Buy or now the Installment Sales Contract admitted as  
21 Plaintiff's No. 2.

22 THE COURT: Any objection to that order of  
23 Judge Nicholson?

24 MR. BERLINSKY: No. That's the lease  
25 document.

1 MR. WHIPPER: I think that's what you gave  
2 him. No objection.

3 THE COURT: That's No. 2?

4 MR. BERLINSKY: That's No. 2. I gave him that  
5 out of order.

6 THE COURT: I'm sorry.

7 MR. BERLINSKY: I'm sorry.

8 THE COURT: Exhibit 2 in evidence then.

9 Q. (BY MR. BERLINSKY) And thereafter did you and  
10 Mr. Simmons engage in litigation involving this  
11 document?

12 A. Excuse me?

13 Q. After you entered into that with Mr. Simmons  
14 did you and he enter into litigation about that  
15 document?

16 A. Yes, sir.

17 Q. And as a result of that litigation was a Court  
18 order issued?

19 A. Yes, sir.

20 Q. Is this document the order that was forwarded  
21 to you as a result of that hearing?

22 A. This (indicating)?

23 Q. Yes.

24 A. Yes, sir.

25 MR. BERLINSKY: I move to introduce Judge

1 Nicholson's order as Plaintiff's 1.

2 MR. WHIPPER: No objection, Your Honor.

3 THE COURT: Without objection. Very good.

4 Thank you.

5 Q. (BY MR. BERLINSKY) And did that order set  
6 forth the total sums that were due and owing in the  
7 last paragraph of the order?

8 A. Yes, sir.

9 Q. Can you read that last paragraph?

10 A. "I further find that the Defendant is given  
11 credit for \$87,540 towards the purchase price of  
12 \$125,000 with a balance of \$37,460 to be paid in an  
13 installment contract at the rate of \$500 a month  
14 until the balance is paid. The Defendant will obtain  
15 an amortization schedule and supply a copy to the  
16 Plaintiff. The Defendant will either pay by money  
17 order or check with a notation of payment and marked  
18 from the amortization schedule by both parties."

19 Q. Okay. Pursuant to that Court Order did the  
20 Defendant ever provide an amortization schedule to  
21 you?

22 A. No, sir.

23 Q. Since that February order have you received  
24 any payments from Mr. Simmons, or has your lawyer  
25 received any payments from Mr. Simmons?

1 A. The payments were made through the lawyer,  
2 Barnwell. The money orders were made out to Barnwell  
3 Law Firm and me. Mr. Barnwell would get the  
4 payments, send the money order to me to sign, I would  
5 send them back to him, and he puts it in an escrow  
6 account.

7 Q. Do you recall how many payments you received  
8 in that manner?

9 A. The only ones I can remember are about three.

10 Q. Okay. Now, since Mr. Barnwell's death in July  
11 of 2013, has Mr. Simmons made any payments directly  
12 to you?

13 A. No, sir.

14 Q. Has he contacted you?

15 A. No, sir.

16 Q. Has he made any attempt to discuss this debt  
17 with you prior to your filing the lawsuit?

18 A. No, sir.

19 Q. Okay. Now, I'll call your attention to  
20 Plaintiff's No. 2, and on Page 2 what does the next  
21 to the last paragraph provide?

22 A. "Terms of payment, buyer, Harold Simmons  
23 agrees to pay first year \$500 beginning"...

24 Q. No. The next to the last sentence, not the  
25 last.

1 A. "During the duration of the lease term Allen  
2 Livingston has to notify Harold Simmons"...

3 Q. That's two from the end. The second paragraph  
4 from the bottom.

5 A. "Buying the property, Harold Simmons is  
6 responsible for all taxes beginning 6/15/2000."

7 Q. Okay.

8 MR. WHIPPER: Objection, Your Honor. This is  
9 irrelevant. It's irrelevant, Your Honor.

10 MR. BERLINSKY: It's in the document.

11 MR. WHIPPER: It --

12 THE COURT: Go ahead.

13 MR. WHIPPER: Well, what is the relevancy of  
14 this particular line of questioning? It's not  
15 relevant. The allegation in the Complaint is that  
16 Mr. Simmons has not made his mortgage payment or his  
17 purchase payment. That's all we're doing. The  
18 allegations have been that he's made none at all  
19 since the order. That's all we're doing.

20 THE COURT: All right. Let me ask this  
21 question. Are you trying to get into anything prior  
22 to Judge Nicholson's order, or are you just working  
23 since Judge Nicholson's order of February of '13?

24 MR. BERLINSKY: Judge Nicholson's order didn't  
25 address any tax issues. If it goes -- if Your Honor

1 rules in my client's favor and it goes to a sale, my  
2 client may be entitled to reimbursement. I just want  
3 to introduce into evidence -- you can rule as to what  
4 is reimbursable or not. I want to establish that  
5 taxes pursuant to this document have not been paid.

6 MR. WHIPPER: Your Honor, I don't see this is  
7 relevant at all to what we're here for.

8 MR. BERLINSKY: An installment sales contract  
9 is just like a mortgage.

10 MR. WHIPPER: It's not a mortgage either.

11 THE COURT: It's a little bit different from a  
12 mortgage I agree, but as an installment sales  
13 contract, the terms, I think this is the document  
14 that Judge Nicholson determined was an installment  
15 sales contract.

16 MR. BERLINSKY: That's correct.

17 THE COURT: I'm going to allow it. I'm going  
18 to overrule the objection. I'll allow it.

19 Q. (BY MR. BERLINSKY) Since 2000 has Mr. Simmons  
20 paid the taxes for this property to your knowledge?

21 A. No, sir.

22 Q. Who has paid those taxes?

23 A. I did.

24 Q. Okay. Are those tax receipts from the  
25 treasurer's office?

1 A. Yes, sir.

2 Q. That's for the property in question?

3 A. Yes, sir.

4 MR. BERLINSKY: I move to introduce into  
5 evidence Plaintiff's 3, which is a printout from the  
6 tax office of all the taxes that have been paid on  
7 the property since the year 2003 because that's as  
8 far back as they could go. Excuse me, 2002. That's  
9 as far back as they could go. That's the third thing  
10 I gave you, Seth.

11 MR. WHIPPER: Am I looking at the right --

12 MR. BERLINSKY: See. There's '02 and the next  
13 one is '03.

14 MR. WHIPPER: Okay. Your Honor, same  
15 objection. It's not relevant.

16 THE COURT: Noted and overruled.

17 MR. WHIPPER: Your Honor, I'm insisting on  
18 that objection. Not waived.

19 THE COURT: Noted. Noted. Do you have a  
20 figure that totals that or not?

21 MR. BERLINSKY: The total on that is  
22 \$16,540.54.

23 THE COURT: Very good.

24 Q. (BY MR. BERLINSKY) Are you declaring the  
25 entire indebtedness due and payable to you at this

1 time?

2 A. Excuse me?

3 Q. Are you declaring the entire indebtedness as  
4 set forward in Judge Nicholson's order of \$37,460  
5 minus the three \$500 payments that you are aware of  
6 payable in full at this time?

7 A. All he paid was three payments.

8 Q. What now?

9 A. All he paid from three payments.

10 Q. What I'm asking you is, are you declaring the  
11 \$37,460 minus the three \$500 payments, the amount due  
12 and payable to you at this time?

13 A. Yes, sir.

14 Q. Have you incurred any costs in the institution  
15 of this action?

16 A. No, sir. Excuse me. Can I say something?

17 Q. No.

18 A. No? Okay.

19 MR. BERLINSKY: I don't have anything further  
20 at this time. If you'll answer anything that  
21 Mr. Whipper or the Court may have?

22 THE COURT: Mr. Whipper?

23 MR. WHIPPER: Just a few questions if it  
24 please the Court.

25 THE COURT: Yes, sir.

## EXAMINATION

1  
2 BY MR. WHIPPER:

3 Q. It's my understanding, Mr. Livingston, that  
4 you, according to your testimony, you paid property  
5 taxes on this property; is that -- am I understanding  
6 that correctly?

7 A. Yes.

8 Q. And then you also as a part of your business  
9 operations you claim the appropriate deductions on  
10 your tax return for these property taxes; is that  
11 correct?

12 A. I don't understand.

13 Q. You use these property taxes --

14 MR. BERLINSKY: I would object, Your Honor.  
15 The deduction is irrelevant. The document is who is  
16 responsible for paying it, not who is responsible for  
17 a deduction.

18 THE COURT: He's on Cross. I'm going to give  
19 him some latitude. Go ahead.

20 Q. (BY MR. WHIPPER) So you turned this  
21 information over to your bookkeeper, and you had your  
22 tax deductions registered, accordingly paying the  
23 property taxes. In other words, you would provide  
24 your normal deductions on the property taxes; is that  
25 correct?

1 A. Yes.

2 Q. And as a matter of fact, during the time that  
3 you were doing this, you have never written  
4 Mr. Simmons or anybody on his behalf and asked for  
5 any taxes to be paid, have you?

6 A. I have asked Mr. Simmons personally.

7 Q. Now, you've had two lawyers: Mr. Berlinsky  
8 and Mr. Barnwell?

9 A. Yes, I had two. I've got one now. One's  
10 dead.

11 Q. And so are you telling me that you had to talk  
12 to Mr. Simmons about taxes and not your lawyer?

13 A. Excuse me. Mr. Barnwell has requested the  
14 money from him through the Court.

15 Q. Until today Mr. Berlinsky has never raised the  
16 issues of taxes to anybody, has he?

17 A. Mr. Berlinsky just started as my attorney  
18 after Mr. Barnwell died.

19 Q. This lawsuit was filed on the 13th of March of  
20 this year; is that correct?

21 A. I don't know the exact date.

22 Q. And until today -- we've been in Court two or  
23 three times already. This is the first time you've  
24 heard about tax requests; is that correct?

25 A. No, you're wrong.

1 Q. Let me ask you this then. So you are asking  
2 for -- Mr. Barnwell began representing you sometime  
3 in 2007 or 2006; is that correct? That's when this  
4 matter started?

5 A. I'm not sure of the exact date.

6 MR. WHIPPER: I'm trying to move quickly, Your  
7 Honor. May I approach the witness, Your Honor?

8 THE COURT: Yes, sir.

9 Q. (BY MR. WHIPPER) Take a look at that document  
10 right there, Mr. Livingston. Do you recognize it?

11 A. I don't recognize the document. I recognize  
12 what'S in it.

13 Q. There's a signature on that document?

14 A. Excuse me?

15 Q. There's a signature on that document that's  
16 real important.

17 A. There's all kinds of signatures.

18 Q. How about that one right there? Do you see  
19 that one over the word, Plaintiff?

20 A. That's mine.

21 Q. Thank you, sir. Would you agree with me that  
22 there's some writing on the upper right-hand corner  
23 of this document? Mr. Livingston, do you need  
24 glasses?

25 A. Which one are you talking about?

1 Q. I just want to make sure now that if you need  
2 glasses that you have some.

3 A. I need glasses, right.

4 Q. Right here. This writing right here  
5 (indicating).

6 A. Rule to Vacate or Show Cause.

7 Q. And there's a date under there. What is that,  
8 October 9, 2007?

9 A. Yes.

10 Q. So on October 9, 2007 you started this action,  
11 and then somewhere in 2007 you hired Mr. Barnwell;  
12 isn't that correct?

13 A. Yes, Mr. Barnwell.

14 MR. WHIPPER: All right, sir. I would like to  
15 offer this as Defendant's Exhibit 1.

16 THE COURT: Any objection?

17 MR. BERLINSKY: No objection, but I don't know  
18 how it's relevant. It has nothing to do with what we  
19 are here for today. It predates Judge Nicholson's  
20 order. The fact that he applied for --

21 THE COURT: What is the relevance? Where are  
22 we going?

23 MR. WHIPPER: Well, Your Honor, we want to  
24 establish that this matter has been going on since  
25 2007. This application of ejectment shows that he's

1 asking for back rent and not taxes.

2 THE COURT: Isn't that well established in  
3 Judge Nicholson's order? That's exactly what Judge  
4 Nicholson -- isn't that the whole case that Judge  
5 Nicholson ended up hearing, and that's how he ended  
6 up with his ruling?

7 MR. WHIPPER: Yes, sir. That's correct.

8 THE COURT: I'll acknowledge that.

9 MR. WHIPPER: This is relevant also to some  
10 issues that would come up regarding these tax  
11 payments.

12 THE COURT: All right. I'm going to keep it  
13 limited to tax payments. Let's do that. I don't  
14 have a problem. You can mark it as Defendant's 1.  
15 That's fine. We'll cross that bridge.

16 (DFT. EXH. #1, Affidavit and application for  
17 Ejectment and Rule to Vacate or Show Cause,  
18 was marked for identification.)

19 Q. (BY MR. WHIPPER) So you have continued to pay  
20 taxes as you say --

21 A. Excuse me?

22 Q. You have continued to pay taxes through this  
23 time; is that correct?

24 A. I pay the taxes?

25 Q. Yes, sir.

1 A. Yes. I already told you that.

2 Q. Now, you don't have -- Mr. Barnwell would send  
3 you these payments, and you would sign these money  
4 orders and send them back?

5 A. Excuse me?

6 Q. Mr. Barnwell would sign the money orders, send  
7 them to you, and you would send them back to him; is  
8 that right?

9 A. Yes.

10 Q. That is my understanding.

11 A. Yes.

12 Q. All right. And you had no arrangements with  
13 Mr. Barnwell of any kind to use these money orders to  
14 pay his attorney's fees?

15 A. Pay his attorney's fees?

16 MR. BERLINSKY: Your Honor, that's irrelevant.  
17 His contract with Mr. Barnwell is attorney/client  
18 privilege. He acknowledged that he got the payments  
19 and gave him full credit for them.

20 THE COURT: I'm going to sustain that one. Go  
21 ahead.

22 MR. WHIPPER: Your Honor -- Your Honor, if I  
23 might be heard on that?

24 THE COURT: You can. Go ahead.

25 MR. WHIPPER: We're talking about where this

1 money went and how this money was being used. It's  
2 my understanding that Mr. Livingston didn't always  
3 receive his money directly and didn't always know  
4 where it went.

5 THE COURT: I'll be glad to hear from you on  
6 that, Mr. Berlinsky. Let me tell you something as  
7 I'm going through the pleadings here. I see that in  
8 the answer that was submitted there were payments  
9 that were shown to have been made prior to Judge  
10 Nicholson's order that he seeks -- the Defendant  
11 seeks credit for. I cannot do that. I cannot give  
12 him credit for that. That case has been tried and is  
13 over. Judge Nicholson has given him credit, so I've  
14 got to start with the number that Judge Nicholson  
15 starts with in his order. That case -- that's the  
16 law of the case. That case is over.

17 This is a whole new case. I'm not -- I'm  
18 going to let you go into any payments made since  
19 February 20, 2013, but I can't let you go into the  
20 ones prior to that. I just don't see how I can do  
21 that.

22 MR. WHIPPER: Your Honor, you have to. Here's  
23 why. The case was heard in September. Judge  
24 Nicholson took the case under advisement.

25 THE COURT: September of '12?

1 MR. WHIPPER: September of '12. He took the  
2 case under advisement. There were payments that were  
3 made because that was the understanding. As long as  
4 this case was active he would have to make those  
5 payments so he made payments to Mr. Barnwell. Those  
6 payments that he made are not a part at all of Judge  
7 Nicholson's deliberations because that's not what  
8 they were for. They were to continue his payments as  
9 the case was being processed. His case is -- so  
10 these monies that were paid -- I understand what  
11 you're saying, but my point to you is that as a  
12 matter of fact and practicality these monies were  
13 paid, but they were not paid under the considerations  
14 of Judge Nicholson because he was already considering  
15 what was presented to him in September. So he was  
16 only rooting on what was presented to him in  
17 September and not anything else that was presented.  
18 So these payments have to be considered.

19 THE COURT: Do you want to be heard on that?

20 MR. BERLINSKY: Yes, sir, Your Honor. Again,  
21 this was taken up on appeal. They allowed this to be  
22 the final order. Mr. Whipper was Mr. Simmons' lawyer  
23 at the time. The debt was established. If there  
24 should have been -- I don't know what was presented  
25 or what was not presented at that point, but I've got

1 a final order that's unappealed from that's  
2 established what the debt is and what the payment is  
3 to be going forward, so I think from that February  
4 12th order that's the debt.

5 Any payments since then, the three that we've  
6 acknowledged, we give him full credit for. We didn't  
7 say we're not taking it because it applies to  
8 Mr. Barnwell's attorneys' fee or whatever the  
9 arrangement was, or whether that was or wasn't the  
10 arrangement. The fact is that three payments have  
11 been made. We acknowledge those three payments have  
12 been made, and from the \$34,767.40, \$1,500 should be  
13 deducted. If he made other payments it should have  
14 been taken care of at that order, or there should  
15 have been a supplemental order or a supplemental done  
16 to give additional credits. That's never been asked  
17 for. It's never been done. As far as I'm concerned  
18 a full and complete accounting was done as of the  
19 date of that order.

20 THE COURT: Let me make sure I'm clear on  
21 this. You were not counsel of record at the time of  
22 trial, and Mr. Whipper you were?

23 MR. WHIPPER: (Nods head).

24 THE COURT: Does it show in the order that the  
25 trial was in September of '12?

1 MR. WHIPPER: I should have something.

2 THE COURT: It came before the Court in  
3 September.

4 MR. WHIPPER: Hold on.

5 MR. BERLINSKY: Unfortunately this order does  
6 not state what date the hearing took place.

7 THE COURT: It doesn't.

8 MR. BERLINSKY: It was a two-day trial. It  
9 does state that.

10 THE COURT: Do you have something showing a  
11 trial date in September?

12 MR. WHIPPER: This is my notes, Your Honor.

13 THE COURT: September 4, '12?

14 MR. WHIPPER: Yes.

15 THE COURT: Are you agreeable to let that be  
16 the date? I'm assuming it went on for two days,  
17 right?

18 MR. WHIPPER: It did, Your Honor.

19 THE COURT: So let's go back. I'll give you  
20 back to September 4th of '12. I'll allow that. I'm  
21 going to assume evidence was in and that was it.

22 MR. WHIPPER: I believe that was it.

23 THE COURT: I'll go back to September 4 of  
24 '12. Okay?

25 Q. (BY MR. WHIPPER) So now Mr. --

1 MR. WHIPPER: I think that's all the questions  
2 I have at this time. We do reserve the right to call  
3 this witness in our case in chief.

4 THE COURT: Anything in follow-up?

5 EXAMINATION

6 BY MR. BERLINSKY:

7 Q. From September forward of 2012 through Judge  
8 Nicholson's order, do you recall Mr. Barnwell  
9 forwarding you any money orders or checks to endorse  
10 over to him?

11 A. I'm sorry. I didn't understand that.

12 Q. From the date of the first trial, September 4,  
13 2012, until Judge Nicholson's order in February of  
14 2013, did Mr. Barnwell forward you any money orders  
15 or checks to endorse back over?

16 A. No, sir.

17 MR. BERLINSKY: Thank you. I don't have  
18 anything further at this time.

19 MR. WHIPPER: I do have some Recross.

20 Q. (BY MR. WHIPPER) Now, Mr. Livingston, you  
21 don't keep any records at all, do you, of payments  
22 being made?

23 A. Excuse me?

24 Q. You don't keep any records of Mr. Simmons'  
25 payments to you, do you?

1 A. Mr. Barnwell did.

2 Q. But you don't?

3 A. Mr. Barnwell was my attorney.

4 Q. But you don't know what Mr. Simmons may have  
5 paid, do you?

6 A. Yes.

7 Q. You only know what you may have gotten from  
8 Mr. Barnwell, but you don't know what he paid. Isn't  
9 it true that you keep no records at all?

10 A. I keep records sometimes.

11 Q. Sometimes.

12 A. I trust people, too.

13 Q. But between you and Mr. Simmons you kept no  
14 records; isn't that true? Do you remember when we  
15 talked in a deposition in this case back in December  
16 of '09; do you recall that when you were at  
17 Mr. Barnwell's office and we talked about that?

18 A. I don't remember that.

19 Q. You don't recall?

20 A. No.

21 Q. Do you recall at all that I asked you about  
22 this question, about this issue, about your  
23 recordkeeping? I asked you, did you keep any records  
24 at all? I asked you, Mr. Livingston, do you have in  
25 your possession any ledger or other kind of records

1 that list how Mr. Simmons made his payments to you?  
2 Your answer, No. Then I asked you, Do you have in  
3 your possession any documents or communications,  
4 letters from Charleston County Government or the  
5 State of South Carolina that indicate any problems  
6 with the building at North Carolina Avenue, any that  
7 are from the State or the County? I don't have them  
8 in my possession but yes, I've had numerous letters?  
9 And do you have those in your possession now? No.  
10 Do you have them in your office? No. Do you have  
11 them at your home? No. Are there any in your car or  
12 the trunk of your car? No. Do you drive a truck?  
13 Sometimes. Do you have them in your truck? No. You  
14 just don't have them? Right, I don't have them.

15 So you don't keep any records about anything,  
16 do you?

17 A. Yeah, I keep records about stuff.

18 Q. Isn't it true that you -- look at what we  
19 marked as Defendant's Exhibit 1, right here. When  
20 you sought to eject Mr. -- or do something, you said  
21 that over \$7,000 was owed in back rent from '05 until  
22 October of '07?

23 A. Yes, sir.

24 Q. And then in Judge Nicholson's order,  
25 Mr. Simmons' primary proof of his position that he

1 has made payments is the example where Plaintiff  
 2 alleges a default in payments between the year of  
 3 2000, yet the evidence indicates that Mr. Simmons  
 4 paid \$500 beyond what was required for the period  
 5 alleged. So you, in this document here, you said he  
 6 owed you \$7,000, and in fact he had paid you \$7,500?

7 A. No. No.

8 Q. The Judge was mistaken? The evidence was  
 9 wrong?

10 A. (No verbal response.)

11 MR. WHIPPER: I have no further questions.

12 MR. BERLINSKY: I have nothing.

13 THE COURT: I don't have any questions. Thank  
 14 you, Mr. Livingston. You may step down.

15 (Witness excused.)

16 THE COURT: Anything further, Mr. Berlinsky?

17 MR. BERLINSKY: Nothing further, Your Honor.

18 THE COURT: Plaintiff rests?

19 MR. BERLINSKY: Plaintiff rests.

20 THE COURT: Mr. Whipper?

21 MR. WHIPPER: Your Honor, we would ask for a  
 22 directed verdict. They have shown nothing at all  
 23 except that Mr. Livingston thinks that he hasn't  
 24 received money. He doesn't even know what he may  
 25 have received, and he's pulling figures out of the

1 air. That's number one. Number two, what we're  
2 doing here today -- it should be on a Rule to Show  
3 Cause before Judge Nicholson. Third, Your Honor, the  
4 total that they have expressed is just totally  
5 incorrect in terms of that. I think it was \$1,500.

6 THE COURT: Okay. Mr. Berlinsky?

7 MR. BERLINSKY: Your Honor, I move for a  
8 directed verdict. The debt is established by Judge  
9 Nicholson's order.

10 THE COURT: Well, let me stop you. Let's  
11 respond first, and then you can make your motion.  
12 This is his motion. I think we're in at his point to  
13 make that, but go ahead.

14 MR. BERLINSKY: The debt was established by  
15 Judge Nicholson's order. He acknowledges receiving  
16 three payments. They provided no proof of any more  
17 than three payments to this date. Summary judgment  
18 is only allowable where there's no issue of fact.  
19 There is issue of fact as to what the debt is. There  
20 is an issue of fact as to what's been received and  
21 what hasn't been received. He testified as to what  
22 he received.

23 Again, I would move for a directed verdict on  
24 the debt as established by Judge Nicholson's order.  
25 There's no issue of fact as to what the debt is.

1 There's no issue of fact that it's to be considered  
2 an installment sales contract. There's no issue of  
3 fact as to how the Supreme Court has ruled  
4 installment sales contracts are to be treated.

5 THE COURT: All right. Thank you. Very good.  
6 I'm going to deny both Motions for Directed Verdict.  
7 There has been some proof at this point in time.  
8 It's in evidence in the record that there's been  
9 nonpayment of debt on the amount that was set by  
10 Judge Nicholson's order and then of course on the tax  
11 issue.

12 I've already ruled on the jurisdictional  
13 question. I think this is the proper Court for the  
14 issue of foreclosure of an installment sales contract  
15 because our law is such that it's treated as if it is  
16 a foreclosure of an equitable interest in property.  
17 I find there is some evidence.

18 As to the Plaintiff's Motion for Directed  
19 Verdict, I don't think that's proper at this point in  
20 time. I will deny that one as well. All right? I  
21 will state that I think Judge Nicholson's order is  
22 the law in the case, in the 2010 case I think it was.  
23 So it set the amount of the debt. What I have done  
24 and what I'm willing to do would be to entertain any  
25 evidence from the time of the trial, which you-all

1 have established to my satisfaction as the date of  
2 September 4, 2012 forward. Okay? That I'm willing  
3 to entertain. All right. So denied, denied.

4 Defense case, Mr. Whipper?

5 MR. WHIPPER: Thank you, Your Honor. I call  
6 to the stand Mr. Harold Simmons.

7 THE COURT: Mr. Simmons, come on up to the  
8 stand.

9 HAROLD SIMMONS,

10 being first duly sworn, testified as follows:

11 THE COURT: If you would give me your full  
12 name and address, please, sir?

13 THE WITNESS: Harold Simmons, 1182 King  
14 Street, Charleston South Carolina.

15 THE COURT: What ZIP is that?

16 THE WITNESS: 29403.

17 THE COURT: Thank you, sir. Mr. Whipper?

18 MR. WHIPPER: May it please the Court?

19 THE COURT: Yes, sir.

20 EXAMINATION

21 BY MR. WHIPPER:

22 Q. Mr. Simmons, on the figure of payment that was  
23 determined by Judge Nicholson on that \$87,000 payment  
24 figure, does that figure represent \$500 per month  
25 from the time that this contract started until the

1 time you went to Court?

2 A. Yes.

3 Q. How is that?

4 A. .Because the payment was supposed to be \$500 a  
5 month from the time the contract started, but we were  
6 supposed to be paid \$500 a month until the \$125,000  
7 paid out in full. There were times when I made more  
8 than just the \$500 a month payment to Mr. Livingston,  
9 which the reason I done that was in order for me to  
10 stay paid up in advance just in case something went  
11 wrong like I got hurt on my job, I take ill, I would  
12 still be in good standing with my payment.

13 Q. So when you look at the figure of -- if you  
14 look at the figure of \$87,540 how far into your  
15 payment term does that go?

16 A. That would go from the beginning of the  
17 contract up until the end of 2014.

18 Q. You said the end of 2014?

19 A. Yes.

20 Q. So then you were surprised when you received  
21 this Complaint about foreclosure?

22 A. Yes.

23 Q. Because it was received when? When was it  
24 received?

25 A. I know it was filed) in March of -- it was

1 filed in March of 2014.

2 Q. And so the payments -- then again you felt  
3 like -- your understanding on what you paid you were  
4 covered through the end of 2014?

5 A. Yes.

6 Q. What did you think about this when you got  
7 this lawsuit?

8 A. I think was harassment. It was a frivolous  
9 lawsuit, a prematurely filed lawsuit. Other than the  
10 87,000 I've already paid I also gave Mr. Barnwell  
11 \$4,500 and a \$500 money order.

12 Q. Tell me now, how did you do that?

13 A. What I did is in September I went to  
14 Barnwell's office and dropped off \$1,500. At that  
15 same time I spoke with Mr. Barnwell, and we  
16 established the fact that he had not received the  
17 Court Order yet. From my understanding from my  
18 conversation with him is that the money I gave him,  
19 he would go ahead and apply it to the Court order  
20 once he received the Court order. In September of  
21 2012 I think around to --

22 Q. Let me show you something. It might help with  
23 your recollection. Would that be something that you  
24 would need to happen if you saw some documents?

25 A. Yes. I try to keep everything in writing. I

1 do keep everything in writing.

2 MR. WHIPPER: I'm approaching, Your Honor.

3 Q. (BY MR. WHIPPER) Let's take a look at these  
4 items (indicating).

5 A. Okay.

6 Q. Tell me what they are, and give us the dates  
7 that are relevant on those documents?

8 A. There are three \$500 money orders totaling  
9 \$1,500.

10 Q. What dates are those?

11 A. I purchased this on the ninth month, tenth  
12 day, 2012. I delivered it to Barnwell on the ninth  
13 month, 11th day of 2012. That's for the 1,500.

14 Q. I need you to go through each one,  
15 Mr. Simmons.

16 A. Okay.

17 Q. Can you give us the money order numbers?

18 A. The money order number is 20206481714.

19 Q. What date was that purchased?

20 A. Ninth month, tenth day, 2012.

21 Q. Next one?

22 A. The next money order was numbered 2020 --

23 Q. Mr. Simmons, make sure you -- the Court,  
24 Reporter is trying to get this.

25 A. The second money order is 20206481703, and

1 that money order was purchased on the ninth month,  
2 tenth day, 2012.

3 The third money order is 20206481692, and that  
4 was purchased on the ninth month, tenth day, 2012.

5 Q. When were those delivered to Mr. Barnwell?

6 A. The previous money order was delivered the  
7 ninth month, 11th day, 2012.

8 Q. And how do you know that? How do you know  
9 that? What is it that you're reading up there?

10 A. Excuse me?

11 Q. How do you know that they were delivered to  
12 Mr. Barnwell on that date?

13 A. I took it to him, on that same day I spoke  
14 with Mr. Barnwell. I gave him this first \$1,500.

15 Q. Did Mr. Barnwell give you a receipt?

16 A. Yes.

17 Q. Do you have the receipt there?

18 A. Yes. The receipt number for the first money  
19 order is 8874081. The receipt number for the second  
20 money order is 887402. The receipt number for the  
21 third money order is 887403.

22 Q. Okay. Now, the other ones, you have a few  
23 more there, don't you?

24 A. Yes.

25 Q. Can you give us the date they were purchased

1 and the date they were delivered, please, sir?

2 A. Okay. On the fourth money order this money  
3 order I purchased on the tenth month, 22nd day, 2012.  
4 This money order is No. 20216408534. The second  
5 money order -- well, this would be the fifth money  
6 order -- the date purchased was tenth month, 22nd  
7 day, 2012. This money order is numbered 20216408545.  
8 The sixth money order, the day purchased is the tenth  
9 month, 22nd day, 2012. The money order number is  
10 20216408556. I delivered these three money orders to  
11 Mr. Barnwell on the tenth month, 22nd day, 2012.

12 Q. Okay. Are there any more?

13 A. Yes. I have another set of money orders,  
14 three \$1,500 in money orders that I purchased on the  
15 fifth month, fourth day of 2013.

16 Q. Let me make sure now. How much is each money  
17 order worth?

18 A. 500 apiece. The seventh money order purchase  
19 date is the fifth month, fourth day, 2013. Money  
20 Order No. 21080419470. The eighth money order  
21 purchased day, fifth month, fourth day, 2013, Money  
22 Order No. 21080419457. The ninth money order  
23 purchase date, fifth month, fourth day, 2013, Money  
24 Order No. 21080419468.

25 Q. So that totals how much?

1 A. \$4,500.

2 MR. BERLINSKY: Let me look at them. I don't  
3 have any objection to the money order itself. As to  
4 the receipts I don't know who these people are who  
5 signed it, whether they're employees of Mr. Barnwell  
6 or not or whether they actually were received.

7 THE COURT: All right. Mr. Simmons, your  
8 testimony is you delivered those to his office; is  
9 that correct?

10 THE WITNESS: Yes, Your Honor.

11 THE COURT: And whoever that was that signed  
12 off on it was an employee of his?

13 THE WITNESS: Secretary.

14 THE COURT: I'll allow it.

15 MR. WHIPPER: Your Honor, this will be  
16 Defendant's Exhibit -- I'd like to do it all as one.

17 THE COURT: That's fine. Let's just do  
18 Defendant's 1.

19 MR. WHIPPER: That will be Defendant's 2.

20 (DFT. EXH. #2, Receipts for Money Orders, was  
21 marked for identification.)

22 Q. (BY MR. WHIPPER) Mr. Simmons, how much  
23 contact have you had with Mr. Livingston since  
24 Judge Nicholson's order?

25 A. Not much.

1 Q. Now, in trying to make sure about what -- what  
2 did you do in order to figure out what was paid and  
3 what was on record with Mr. Livingston and  
4 Mr. Barnwell? What steps did you take?

5 A. I purchased the Post Office copies of the  
6 money order, the cancelled money orders that had  
7 already been signed and delivered through the Post  
8 Office.

9 MR. BERLINSKY: No objection.

10 MR. WHIPPER: We would like to offer this, but  
11 I would like for Mr. Simmons to tell me --

12 Q. (BY MR. WHIPPER) What are these, Mr. Simmons?

13 A. They're --

14 Q. Count them and tell me what they are?

15 A. Six money orders.

16 Q. You just read off about nine. Why don't you  
17 have nine?

18 A. Well, the Post Office only goes back two years  
19 in being able to retrieve a copy of the signed,  
20 canceled money order. Three of the money orders I  
21 could not get a copy off of it. They sent me  
22 statements saying that those three money orders was  
23 cashed.

24 Q. How do those match up with what you read over  
25 here?

1 A. Well, the Post Office serial number matches up  
2 with the receipts.

3 Q. Okay. You have six of those; is that correct?

4 A. Yes.

5 MR. WHIPPER: Now, we are going to offer these  
6 as Defendant's Exhibit 3 without objection.

7 (DFT. EXH. #3, Receipts, were marked for  
8 identification.)

9 Q. (BY MR. WHIPPER) Now, I'm going to show you  
10 three other documents. What are those?

11 A. These are statements from the Post Office  
12 letting me know that they could not -- they were  
13 unable to get me -- more like a copy of the original  
14 money order, but they did state that the money order  
15 was cashed and they also gave me the serial numbers  
16 of the money order that was cashed.

17 Q. Which matches your receipts?

18 A. Yes. It matches my serial number on my  
19 receipts.

20 Q. Do you have those three documents?

21 A. Yes.

22 MR. WHIPPER: I would like to mark this as  
23 Defendant's Exhibit 4.

24 (DFT. EXH. #4, Letters, were marked for  
25 identification.)

1 Q. (BY MR. WHIPPER) So when you read the  
2 Complaint about the foreclosure what thoughts came to  
3 your mind?

4 A. I didn't think that was fair for them to file  
5 a foreclosure on me due to the fact that I've  
6 overpaid my payments since the year 2004. Even in  
7 Court in September they established at that time that  
8 I overpaid \$16,040, more than what was required at  
9 the time. When I sat back and started calculating  
10 from the time my contract started up to the amount of  
11 money that the Court's stated that I had already  
12 paid, and I matched those figures up with the monthly  
13 payment, it showed from the time the contract started  
14 up to the end of 2014. I was paid all the way up to  
15 the end of 2014.

16 Then I turned around and looked at the date in  
17 September when the order came down in February, and  
18 it was filed February 27, I believe, of 2012.

19 Q. The order was filed in 2013.

20 A. Are you talking about --

21 Q. Judge Nicholson's order?

22 A. Yes.

23 Q. That was 2013 -- February of 2013. I'm only  
24 saying it could be more. That's fine.

25 A. It was for February of 2013. I had already

1 given \$4,500. I was looking at it like -- okay.  
2 Let's say we do it based on 20 -- February of 2013, I  
3 already gave you \$4,500. If you calculate that  
4 \$4,500 I was paid up all the way up to the month they  
5 filed the foreclosure just on the \$4,500. So that  
6 makes the foreclosure prematurely filed.

7 Q. What was your thinking -- you were  
8 representing yourself during this with the Board of  
9 Appeals. What were you working on on that appeal?

10 A. When they filed the appeal?

11 Q. That's right.

12 A. Okay. Well, the only -- when I found out  
13 about the appeal is when I got a letter from the  
14 Appeal Court stating that they were requesting  
15 Mr. Livingston's attorney to provide a transcript and  
16 that caused me to start looking to the Appeal Court.  
17 I didn't know that they had filed an appeal.

18 When I started looking into it, then I found  
19 that right after Judge Nicholson made his order -- in  
20 June Mr. Livingston filed an appeal. They allowed  
21 the appeal to run from June all the way up to  
22 December and then they turned around -- when the  
23 appeal was dismissed like two or three months after  
24 the appeal was dismissed they filed a foreclosure.

25 So I'm thinking that once a case goes into a

1 higher court that the order that is made by the lower  
2 court is not enforceable until it comes out of that  
3 higher court. So again, I'm thinking, okay. You've  
4 got \$4,500 of my money. You applied that to the time  
5 that the case up on the Appeal Court, that would have  
6 you paid up until September of this year, which would  
7 be six months past the foreclosure filing. So once  
8 again, I'm thinking this is another premature filing.

9 Q. Do you recognize this document?

10 A. Yes, I do.

11 Q. What is it?

12 A. A Motion of Dismissal with the Appeal Court  
13 filed December 3rd, 2015. I remember -- the remitter  
14 went back to the lower court. It was also filed  
15 December 3rd, 2013.

16 Q. So December 3, 2013, that's the stamp from the  
17 Charleston County clerk's office?

18 A. Yes.

19 Q. And there's something here. This order was  
20 filed, the order dismissing the appeal was filed  
21 when?

22 A. November 8, 2013.

23 Q. Okay. And then the remittitur was dated when?

24 A. December 3, 2013.

25 Q. No. That's when it was --

1 A. It was filed December 2, 2013.

2 Q. That's when it was typed?

3 A. Typed up, right.

4 Q. And it filed on the 3rd.

5 MR. WHIPPER: We would like to enter these as  
6 Defendant's Exhibit No. 5.

7 (DFT. EXH. #5, Order and Letter, were marked  
8 for identification.)

9 Q. (BY MR. WHIPPER) What did Mr. Livingston do  
10 to make this situation look like you were not paying?  
11 What were some of the things he did?

12 A. Well, I noticed on the money order, after I  
13 got copies from the Post Office, that instead he  
14 would take the money order and cash it himself. He  
15 signed it over to his attorney, and his attorney used  
16 it, I guess, for whatever need he wanted to use it  
17 for.

18 It kind of made me think that that last case  
19 we had when we subpoenaed his bank account that -- my  
20 thought is when we subpoenaed his bank account it  
21 showed that the money appeared and was deposited in  
22 his account. And then when I saw that he signed it  
23 over to his attorney -- then I'm thinking like if he  
24 assigned it to his attorney he didn't want -- if we  
25 subpoenaed his bank account it wouldn't show that I

1 actually paid him his money because the money --

2 MR. BERLINSKY: Your Honor, objection. That's  
3 pure speculation on his part.

4 THE COURT: Sustained.

5 MR. WHIPPER: Your Honor, on that  
6 particular -- I think that was his response. My  
7 question didn't elicit speculation.

8 THE COURT: Do you want to restate the  
9 question then?

10 MR. WHIPPER: I'll be happy to do that.

11 Q. (BY MR. WHIPPER) What did you notice about  
12 the endorsements on the back?

13 A. They were endorsed by Mr. Livingston.

14 Q. And who else, or how else were they handled?

15 A. I saw the stamp, Barnwell Escrow Account.

16 Q. Was that on all of these?

17 A. All of the money orders.

18 Q. So then again, so what you're thinking was --

19 A. -- that he signed --

20 MR. BERLINSKY: Again, pure speculation.

21 Objection. The document speaks for itself. It's  
22 irrelevant what he thinks it is.

23 MR. WHIPPER: I'll withdraw the question.

24 THE COURT: All right.

25 Q. (BY MR. WHIPPER) What other tactics, or what

1 other strategies did Mr. Livingston use to make it  
2 seem like you were not making the payments?

3 A. Well, if we go from the beginning he just made  
4 accusations that I didn't make any payments. He kept  
5 the records so if I paid him a sum or didn't pay  
6 him -- I kept records. There were times when I gave  
7 him receipts and he never even produced them in Court  
8 as evidence. As far as I know now, the only thing I  
9 see is that the money was transferred to his  
10 attorney.

11 MR. BERLINSKY: The lease, Plaintiff's 1, has  
12 been introduced into evidence. It's the same thing.  
13 I don't care.

14 Q. (BY MR. WHIPPER) Take a look at this  
15 document, Mr. Simmons. What is that?

16 A. This was supposed to have been a contract  
17 submitted by the Plaintiff but this contract --

18 Q. Hold on a second. Would you use the name?

19 A. The contract.

20 Q. Tell me who is who. Don't use Plaintiff and  
21 Defendant.

22 A. Mr. Livingston submitted this Lease to Buy  
23 contract agreement as his evidence and this evidence  
24 that he submitted was altered to make it look like --

25 Q. What is the problem with that?

1 A. The address to the property that I'm  
2 purchasing from Mr. Livingston changed the number,  
3 the street address which is 3042. He changed it to  
4 3049 North Carolina Avenue. This was his evidence.  
5 On the third page, it shows where the second term of  
6 the contract was erased and the witness's name on the  
7 third page was erased off this contract (indicating).

8 Q. What do you think Mr. Livingston was doing?

9 A. Mr. Livingston was trying to convince the  
10 Court that the property that I'm purchasing from  
11 him -- what I'm thinking is that the property that  
12 I'm purchasing from him is not the property signed on  
13 the contract to make it look like we signed an  
14 agreement on some other property.

15 Q. Was that contract offered as the real thing?

16 A. Yes.

17 Q. Was it compared to what was put into evidence  
18 today? Was it compared? Can we let the Judge look  
19 at both of them and make a decision on them?

20 A. Yes. He found that my contract that I had,  
21 which was the authentic contract, was the real  
22 contract.

23 MR. WHIPPER: I'm going to offer this as  
24 Defendant's 6 without objection.

25 (DFT. EXH. #6, Lease to Buy, was marked for

1 identification only.)

2 MR. BERLINSKY: I object. We never claimed  
3 that's the contract. The contract he claims is the  
4 real contract is what we marked as Plaintiff's 2, and  
5 that's what we claim to be the real contract. He  
6 just testified that the one we marked is the real  
7 contract, so I don't know where this is relevant. So  
8 they made a typographical error, a Scribner's error.  
9 Nobody's trying to foreclose under that one.

10 THE COURT: I'm not sure I do understand the  
11 relevance of this one, Mr. Whipper.

12 MR. WHIPPER: Well, the relevance is again  
13 showing that Mr. Livingston has put Mr. Simmons  
14 through extreme measures just to maintain the status  
15 as a timely payer of this first agreement which has  
16 caused him -- he's gone to lengths to misrepresent  
17 the deal. He took off the terms of that contract  
18 initially. The Judge ruled against him on that, so  
19 this is just evidence and foundation for what we see  
20 happening here again. There's been no accurate  
21 accounting at all, and we're in this Court fighting  
22 on nonpayment when this gentleman has paid in  
23 advance. I'm here because of what Mr. Livingston has  
24 done. I wouldn't even be here if he had just counted  
25 what he should have counted and added it up.

1 THE COURT: Doesn't this predate Judge  
2 Nicholson's trial?

3 MR. WHIPPER: No, sir.

4 THE COURT: It does not?

5 MR. BERLINSKY: Yes, it does.

6 THE COURT: It does not?

7 MR. WHIPPER: No, it does not. It can't  
8 because it was offered at that particular trial.

9 THE COURT: It doesn't come into evidence.  
10 I'm going to sustain the objection. You can testify  
11 about it, but it doesn't come into evidence as hard  
12 evidence.

13 MR. WHIPPER: I understand.

14 THE COURT: If you want to proffer it and just  
15 mark it for ID purposes we can do that. It wouldn't  
16 be evidence I don't think. We can mark it as 7 for  
17 ID; is that what it is?

18 COURT REPORTER: No. 6.

19 THE COURT: 6 for ID.

20 MR. WHIPPER: That will be fine.

21 Q. (BY MR. WHIPPER) Mr. Simmons, how much have  
22 you indebted yourself on attorney's fees so far  
23 during this situation?

24 A. Within the neighborhood of 70,000 or 75,000.

25 Q. How long have I been representing you?

1 A. Since 2007.

2 Q. Was I representing you at the time of the  
3 Affidavit of Ejectment?

4 A. Yes.

5 Q. Through the Application of Ejectment all the  
6 way to the Court of Common Pleas?

7 A. Yes.

8 Q. And in preparation for that trial?

9 A. Yes.

10 Q. And then a two-day trial?

11 A. Yes.

12 Q. And motions?

13 A. Yes.

14 Q. Discovery?

15 A. Yes.

16 Q. Do you think that Mr. Livingston should have  
17 to pay those fees?

18 MR. BERLINSKY: Your Honor, I object. Any  
19 addressing of attorney's fees for this prior case  
20 should have been addressed in that order and wasn't.  
21 The document doesn't provide for the recovery of  
22 attorney's fees. That's why we didn't seek it.

23 MR. WHIPPER: Your Honor, we are seeking  
24 attorney's fees to the extent -- our position has  
25 been all along that he's had to put up with this and

1 he's had to put up a defense each time. We think he  
2 should be allowed attorney's fees at this time.

3 THE COURT: I usually deal with that in the  
4 form of an affidavit if you would like to submit it.  
5 He's given me an amount and he says he's paid it, but  
6 if you-all want to submit it in the form of an  
7 affidavit I'll consider it.

8 MR. WHIPPER: I understand.

9 THE COURT: Usually it's got to be either in  
10 the contract or in the statute, so I'll be looking  
11 for either one of those. Okay?

12 MR. WHIPPER: I understand.

13 Q. (BY MR. WHIPPER) Mr. Simmons, you filed some  
14 documents yourself, some motions?

15 A. Yes.

16 Q. And you have some costs outstanding on that?

17 A. Yes.

18 Q. Do you know the amount?

19 A. Not exactly. This went from me being accused  
20 of not paying the money. I overpaid. I went to the  
21 point of -- they're trying to do a 25(sic)-eviction  
22 on me for money I was trying to pay to the Court, and  
23 then I found out later on -- the only reason the  
24 Court didn't accept my money at that time is they  
25 didn't have an order that came down from the Court to

1 accept my money, my payments towards the property.  
2 We had to turn around and go to the Court and have  
3 the Clerk of Court write up a statement saying they  
4 do remember me coming and trying to make the payment  
5 and could not accept it. I feel as though  
6 Mr. Barnwell at that time, before trying to do a  
7 25-eviction on me is he should have checked with the  
8 Court to see if there was an order in place. If I  
9 anticipated an order then I could see them trying to  
10 do a 25-eviction on me. He didn't even perform that  
11 duty. They just went out and tried to do a  
12 25-eviction on me.

13 Q. You mean 24 hour?

14 A. A 24-hour eviction. We had to have that  
15 overturned. Then when we went to Court to find out  
16 about the forged documents and --

17 MR. BERLINSKY: Your Honor, we're not here for  
18 an eviction. I don't know how that's relevant.

19 MR. WHIPPER: It's costs.

20 MR. BERLINSKY: It all predates Judge  
21 Nicholson's order.

22 THE WITNESS: It causes me emotional distress,  
23 and it's keeping me from being able to live a normal  
24 life because I'm constantly being harassed for things  
25 I have done to try to comply to this order. It's

1 saying I haven't done it.

2 MR. WHIPPER: No other questions for the  
3 witness at this time, Your Honor.

4 EXAMINATION

5 BY MR. BERLINSKY:

6 Q. Mr. Simmons, what's been marked Plaintiff's  
7 (sic) 3, these money orders that you were able to get  
8 copies of, who are they made payable to?

9 A. Allen Livingston and Barnwell.

10 Q. Who?

11 A. Allen Livingston and Barnwell.

12 Q. So it's made payable to both of them?

13 A. To both of them, Allen and his attorney.

14 Q. And those copies match up to some of these  
15 receipts?

16 A. Yes.

17 Q. And so they're the same things?

18 A. Yes.

19 Q. So what we've got here is nine receipts?

20 A. Yes.

21 Q. The earliest is dated 9/12 and 10/12 and then  
22 the last group of three are all 5/9/13? That's  
23 correct?

24 A. (No verbal response).

25 Q. So since Mr. Barnwell died in July of 2013

1 where have you made your payments?

2 A. None.

3 Q. You haven't made any payments since  
4 Mr. Barnwell died?

5 A. No.

6 Q. Over a year ago? Okay. Do you have any  
7 receipts for any payment of any property taxes?

8 A. No. I never received a property tax bill  
9 anyway.

10 Q. Can you show me where in that order that any  
11 payment is a prepayment?

12 A. In other words, you want to know if any money  
13 was paid in advance?

14 Q. No. I want to know where in that order it  
15 says money was paid in advance?

16 A. You want to know if money was paid in advance  
17 from the first time Mr. --

18 Q. No. I want to where in that order does it say  
19 that the money that Judge Nicholson gave you credit  
20 for was for payments made in advance?

21 A. He doesn't say that.

22 Q. What does the last paragraph of his order say?

23 A. I further find that Defendant is given credit  
24 for 87,540 toward the purchase price of \$125,000 with  
25 a balance of \$37,460 to be paid in the installment

1 contract at the rate of \$500 a month until the  
2 balance is paid.

3 Q. Those are the only receipts you have?

4 A. Those receipts cover me all the way up to the  
5 day you-all filed a foreclosure.

6 Q. I asked you, Do you have any other receipts  
7 since Judge Nicholson's order than those nine?

8 A. No, I don't.

9 Q. Okay. The order also provides that the  
10 Defendant -- you are the Defendant in this case --  
11 will obtain an amortization schedule? Did you obtain  
12 an amortization schedule?

13 A. I don't even know what that is.

14 MR. BERLINSKY: Okay. I don't have anything  
15 further, Mr. Simmons.

16 MR. WHIPPER: Short.

17 EXAMINATION

18 BY MR. WHIPPER:

19 Q. Mr. Simmons, you asked about whether or not  
20 there is any issue about prepayment?

21 A. Yes.

22 Q. He asked you about did the order say anything  
23 about prepayment or credit for prepayments; do you  
24 recall that question?

25 A. Yes.

1 MR. BERLINSKY: I object to that.

2 Q. (BY MR. WHIPPER) If I showed you something  
3 would it help you remember and understand what a  
4 prepayment is? Something that was prepared?

5 A. Yes.

6 Q. Let's take a look at this (indicating). Now,  
7 is that something that you prepared?

8 A. Yes.

9 MR. BERLINSKY: Your Honor, I object to the  
10 document as well as him testifying from it. It's  
11 something that was done before this order. It  
12 predates this order. Whatever was done, it's already  
13 been adjudicated.

14 MR. WHIPPER: Your Honor, if he objects that  
15 it was done in a previous order -- in his question he  
16 never established about this document. He can't  
17 object to that basis.

18 THE COURT: I will allow -- I think you handed  
19 it to him for refreshing his memory, right?

20 MR. WHIPPER: To refresh his memory.

21 THE COURT: Go ahead. You can ask him a  
22 question.

23 Q. (BY MR. WHIPPER) Do you recollect that  
24 document there?

25 A. Yes.

1 Q. Why did you prepare that document?

2 A. So the Court can better understand how my  
3 payments were made.

4 Q. So now during the time of the appeal what  
5 payments were made?

6 A. None.

7 Q. And so what payments, according to your  
8 understanding, were due at the time of the appeal?

9 A. The 4,500.

10 Q. So while the appeal was going on, how often  
11 were you supposed to make payments?

12 A. My thinking is once the case goes to an appeal  
13 and is moved into a higher Court everything comes to  
14 a standstill until the Court makes their decision on  
15 whether they are going to honor the lower Court's  
16 decision or change it.

17 Q. And what document sets out what you did?

18 A. I don't understand what you're talking about.

19 Q. Which document --

20 A. This document right here (indicating) says  
21 that on the bottom -- actually, it states where --  
22 can I read the whole thing?

23 Q. Well, let me see what you're trying to read.

24 A. It says, Trial date September 4, 2012 at

25 2:00 p.m. Two days. Case No. 2010-CP- --

1 THE COURT: Let me stop you right there,  
2 Mr. Simmons. The purpose of that document is to  
3 refresh your memory about something, and he asked a  
4 specific question. I don't need you to read the  
5 document to me. Tell me what -- this was something  
6 you did in preparation for the prior trial?

7 THE WITNESS: Yes. I --

8 MR. WHIPPER: Hold on one second, Your Honor.  
9 The prior words --

10 THE COURT: I'll let you ask the question, but  
11 if the document itself is not going to come in it's  
12 not admissible. The substance of it may come in, but  
13 would have to come in through him, but not by reading  
14 the document. Just tell me what it says.

15 Q. (BY MR. WHIPPER) What case did you prepare  
16 that document for?

17 A. I prepared it for this case.

18 Q. When did you prepare it?

19 A. Last week.

20 Q. And what is it supposed to help you tell the  
21 Court?

22 A. Tell the Court that when the order was filed,  
23 when there was a motion filed in between the time the  
24 order was filed and the time -- between when the  
25 order was filed and the foreclosure and appeal time

1 was -- the motion was filed in between the time of  
2 when the order was filed and the order was denied on  
3 May 16th, which led down to a 30-day appeal time.

4 From that appeal time I established my payment plan  
5 which shows how the \$4,500 applied to the order right  
6 after the appeal time had ran and the motion was  
7 denied.

8 Q. All right. Take a look at that, and see if  
9 that helps you.

10 A. Well, the second page establishes the fact  
11 that when the case went to the Appeal Court and was  
12 dismissed I applied the payment after it came out of  
13 the Appeal Court which listed the payment arrangement  
14 to how that \$4,500 should apply to the case after it  
15 came out of the Appeal Court.

16 Q. All right.

17 A. And it came out of the Appeal Court in  
18 December, so I kind of figured -- okay. It came out  
19 of the Appeal Court in December. They could appeal  
20 it to the Supreme Court which would have a 30-days  
21 appeal time, which I would feel as though it would  
22 land right there in January of 2014, which that  
23 payment -- those payments would have taken me from  
24 January of '14 down to March of 2014. We have nine  
25 payments.

1           So those payments -- after they filed the  
2 foreclosure, they still had six more payments that  
3 were unused.

4 Q.       So in other words, you had paid ahead of time?

5 A.       Yes.

6 Q.       Do you understand that when you pay ahead of  
7 time that means that you have prepaid?

8 A.       Yes.

9           MR. WHIPPER: Thank you. No other questions.

10          MR. BERLINSKY: I don't have anything further.

11                           EXAMINATION

12 BY THE COURT:

13 Q.       Mr. Simmons, since the June appeal date, there  
14 have been no payments made; is that correct?

15 Notwithstanding what you thought, I'm just trying to  
16 establish a date. Since the June of 2013 appeal date  
17 no payments have been made? That's my question.

18 A.       I think my last payment -- can I look at the  
19 receipts?

20 Q.       Yes. The last payment down there is May 9th.  
21 I can tell you that. I've been back through those a  
22 couple of times.

23 A.       May 9, 2013?

24 Q.       Yes, sir. You had three from September of  
25 '12, three from October of '12, and then three from

1 May of '13. So my question to you is --

2 A. Those are the last payments I've made right  
3 there.

4 Q. And those are the \$4,500 we're talking about,  
5 correct?

6 A. Yes.

7 Q. Very good. And then as to the amount of  
8 taxes, have you been presented with a tax bill up  
9 until now?

10 A. No.

11 Q. So today is the first day you've seen the  
12 taxes?

13 A. Yes.

14 Q. Very good. Do you acknowledge if you're going  
15 to be the owner of property you have to pay the  
16 taxes?

17 A. Yes.

18 THE COURT: Okay. I've got it. That's all  
19 the questions I've got. Thank you. Any follow-up?

20 MR. BERLINSKY: No follow-up.

21 MR. WHIPPER: You may step down.

22 THE COURT: All right, Mr. Simmons. Thank  
23 you, sir.

24 (Witness excused.)

25 THE COURT: All right.

1 MR. WHIPPER: Your Honor, may I have a short  
2 recess?

3 THE COURT: Sure.

4 (A recess transpired.)

5 MR. WHIPPER: There's one document that was  
6 signed and prepared by Mr. Simmons for today, and we  
7 would like to offer that as Defendant's Exhibit. --

8 COURT REPORTER: -- 7.

9 MR. BERLINSKY: I object. The money orders  
10 are in evidence. What he paid is what he paid since  
11 the date of the Court Order.

12 MR. WHIPPER: This is in addition to what was  
13 paid and how he looked at it on the appeal.

14 THE COURT: Is that the document you talked  
15 about marking for ID, or is that something different?

16 MR. BERLINSKY: That's a different one.

17 MR. WHIPPER: It's a different one, Your  
18 Honor. The one for ID was the lease.

19 THE COURT: All right. We'll just mark it for  
20 ID as No. 7 or 8?

21 COURT REPORTER: 7.

22 MR. WHIPPER: Your Honor, we would like to  
23 have it in evidence for the record. He prepared this  
24 one for today's case.

25 THE COURT: That makes it past recollection

1 recorded which makes it hearsay, and he's here to  
2 testify, and he has testified. So if he wants to  
3 testify materially different it might come in as  
4 impeachment material, but it isn't evidence in chief.

5 MR. WHIPPER: It's evidence in chief of our  
6 case.

7 THE COURT: It's evidence in chief of what  
8 he's testifying to, yes, sir. Agreed.

9 MR. WHIPPER: So it comes in as an Exhibit.

10 THE COURT: All right. It's number what?

11 COURT REPORTER: 7.

12 (DFT. EXH. #7, Ledger, was marked for  
13 identification.)

14 THE COURT: Anything further?

15 MR. WHIPPER: Nothing further from the  
16 Defendant, Your Honor, except for a summation.

17 THE COURT: Very good. Mr. Berlinsky, any  
18 reply?

19 MR. BERLINSKY: No reply just a quick closing  
20 argument if Your Honor will indulge us.

21 THE COURT: Do I have to? I'll take a look at  
22 this document. Hold on a second.

23 Yes, he's starting in January.

24 There are two things that are coloring my  
25 decision today. Okay? The case comes into Court

1 presenting as a foreclosure under the Installment  
2 Sales Contract. I understand that. Mr. Whipper, I  
3 still think I am correct that I have jurisdiction  
4 over that question. Okay?

5 I don't doubt that there may be an opportunity  
6 for this matter to go back in front of Judge  
7 Nicholson on the question of whether or not there's  
8 contempt for failure to do certain things under the  
9 order, but that's not really the question before me  
10 today. Okay?

11 So the question before me today is, I see it  
12 based on the testimony and the evidence in the  
13 record. It's significant, and the significant  
14 question for the Court is under Code Section  
15 29-3-630. That is this: The debt secured must be  
16 established before the sale by the mortgagee. All  
17 right?

18 So the gist of Judge Nicholson's ruling was  
19 that Mr. Simmons has an equitable interest in the  
20 property, that it was not a simple lease agreement.  
21 It was more than a lease. It was an installment  
22 sales contract. As an installment sales contract  
23 Mr. Simmons received an equitable interest in the  
24 property by virtue of the payments which he made.  
25 Okay? That decision was made and the Judge set a

1 debt at that time. This Court is not free, I don't  
2 believe, to go behind that figure.

3 I think that case is over, and I think that  
4 case was evidently on appeal, but it came back by  
5 agreement. So the figures were set. So the Court  
6 starts with the balance sum that Judge Nicholson put  
7 in there. That was 37,460. All right.

8 MR. WHIPPER: Yes, sir.

9 THE COURT: So I have to figure out what the  
10 debt is. It would appear to me, based on the  
11 testimony of Mr. Simmons, I understand what he says,  
12 but he's incorrect. He is incorrect in his  
13 understanding of the law. He's not a lawyer, but  
14 he's still held to the standard of a lawyer. All  
15 right? He's still held to the standard of what the  
16 law is, is probably what would be proper to say.

17 So his statement to me under my question was,  
18 Have any payments been made since the appeal was  
19 filed? The answer was, No. The appeal was filed in  
20 June of 2013. Okay?

21 When I go back and I credit the payments that  
22 Mr. Simmons made that he provided proof of today,  
23 which I did open up the record for that purpose -- we  
24 went back to the date, and in fact, gentlemen, I  
25 found in the record in the 2010 record,

1 Mr. Barnwell's Motion to Reconsider stated that the  
2 trial date was September 4, 5, and 6 of 2012. So  
3 it's in conformity with what evidence you-all have  
4 presented to me today:

5 Clearly, he's entitled to go back, I think,  
6 and get credit for the payments that he would have  
7 made since then, which Mr. Simmons has, in fact,  
8 done. That's what Defendants Exhibit 2, the  
9 receipts, and Defendants Exhibit 3, which is the  
10 recognition of the receipts. Okay? So I have been  
11 able to match those up identical. So it does show  
12 that \$4,500 of payments was made off of the balance  
13 that was then due. Okay?

14 So that figure, 37,460, minus 4,500 is 32,960,  
15 after crediting for the \$4,500. Okay? 32,960. That  
16 may impact where we go with this thing. I'm going to  
17 propose a solution to you is what I'm going to do.  
18 I'm going to cite you to some additional law.

19 My calculation of math is this: Since June of  
20 2013, which was when the appeal was filed and for  
21 which no credit can be given by the Court, is that  
22 the sum of \$9,500 is now due. Okay? That is as of  
23 today. That's the figure of \$500 a month from June  
24 of 2013, so there's seven months in '13 and now 12  
25 months in '14, so that's 19 months at \$500. My math

1 tells me that's \$9,500. Okay?

2 MR. WHIPPER: That's through December of --

3 THE COURT: Of '14. That's the current amount  
4 due. Okay? So here is my solution. Here is my  
5 proposal to you. The Defendant would have the option  
6 to reinstate his mortgage, because that's what this  
7 is now is a mortgage, for the sum of \$9,500. That  
8 figure is going to be good for 30 days, but in 30  
9 days it's going to be the sum of \$10,000. Okay?  
10 Because January is coming due.

11 So the debt can be reinstated for \$10,000.

12 Okay?

13 MR. BERLINSKY: Okay.

14 THE COURT: And then that would be a credit.  
15 That then gets treated as a credit, okay, on the  
16 balance due. Here's where we have an issue that we  
17 have to resolve between the two of you, and that is  
18 on the taxes.

19 The contract says that the buyer is  
20 responsible for taxes. The Judge's Order says that  
21 the buyer's responsible for the payment of taxes and  
22 the arrangements for insurance. We didn't have any  
23 evidence about insurance today. We did have evidence  
24 about taxes. I haven't run the math, but the figure  
25 that was given to me was \$16,540.54. Okay?

1 MR. WHIPPER: Your Honor, that figure --

2 THE COURT: I'm not going to address it today.  
3 I'm going to suggest a solution to you. Okay? I'm  
4 going to suggest a solution to you. This is what  
5 that is. Under Code Section 29-3-30, the  
6 mortgagee -- and the mortgagee in this case is  
7 Mr. Livingston -- is entitled to pay the taxes and  
8 have a lien upon the property. It's considered to be  
9 a first lien even before the mortgage to be satisfied  
10 upon the sale of the property in the event the  
11 property is sold. Okay?

12 I'm telling you-all right now, I'm not setting  
13 you up for a sale. I'm setting Mr. Simmons up with  
14 an opportunity to redeem the property, but if it  
15 doesn't get redeemed, if this redemption is not done  
16 then I'm going to turn to the Plaintiff and say,  
17 we've set the debt figures, and you can send me a  
18 foreclosure decree. Okay?

19 So we have two orders coming out of this  
20 hearing today. One is going to be a recitation of  
21 what I'm ruling right now as to what the debt is and  
22 how to clean it up, and if that's not done then we  
23 can go forward with the foreclosure decrease.

24 Here what I propose to you, and you-all can  
25 talk about this as to what you want to do. I came up

1 with roughly, when I first did the math, roughly five  
2 more years of payments. Okay? Five years times 12  
3 months is 60 months. That may or may not be correct.  
4 Okay?

5 When I took the past due tax payment and  
6 divided that by 60 I came up with the figure of 275  
7 and some change. What I propose to do, if the  
8 Defendant can reinstate his debt come January of  
9 2015, that you-all discuss the option of paying \$500  
10 a month as agreed under the agreement, and then  
11 rather than paying an additional lump sum -- you can  
12 pay an additional lump sum if you want, but rather  
13 than paying an additional lump sum you pay the figure  
14 of 275.68, let's say, a month is what I came up with  
15 for roughly 60 months. I haven't done the finite  
16 math on this. Okay? I have not verified the number.  
17 All I've done is taken round numbers and come up with  
18 something.

19 In other words, the payment would then adjust  
20 to 500 plus 275, which is towards the arrearage of  
21 taxes and the ongoing \$500 a month until paid in full  
22 under an accounting situation. Then that takes care  
23 of the past due taxes, future taxes, and then  
24 insurance would become Mr. Simmons responsibility as  
25 any potential owner would be. Okay?

1           To further certify that, we're going to need  
2           to talk about how payments are going to get made and  
3           transpired so they get properly credited. Okay?  
4           They should be paid monthly. Mr. Simmons, I'm  
5           assuming your income adjusts, goes up and down like  
6           most peoples does because the payment receipts you've  
7           given me have been three months' payments in one lump  
8           sum payment. One was in September, one was in  
9           October, and one was in May. Okay? It's easier if  
10          it comes in monthly, but it needs to be credited  
11          properly. We still don't have the amortization  
12          schedule and we still don't have application of the  
13          debt.

14                 What I'm trying to do here is to keep it so  
15          that you can retain this property because you've  
16          already spent 80,000 to \$90,000 on it on a \$125,000  
17          purchase. I'm trying to recognize that fact. So  
18          that having been said, Mr. Berlinsky have you  
19          followed what I've said so far?

20                 MR. BERLINSKY: Yes. I'll get an amortization  
21          schedule done giving credit for the \$9,500; and then  
22          when I receive the 10,000 we'll give him credit for  
23          that, and then I'll do a new amortization schedule at  
24          \$500 a month off of that.

25                 THE COURT: Okay.

1 MR. WHIPPER: Your Honor, I'm still at -- I  
2 was hoping that you would mull this over. We still  
3 have --

4 THE COURT: Well, I haven't put pen to paper  
5 yet, but I'm telling you, the number one thing I've  
6 got to do is I've got to determine what the debt is.  
7 Okay? I didn't find any interest being payable, so  
8 any amortization schedule is not that significant to  
9 our cause.

10 MR. WHIPPER: Your Honor, here's what we also  
11 think. You've acknowledged it by saying that we  
12 recognize that Mr. Simmons has paid "X" amount of  
13 dollars toward this purchase price.

14 THE COURT: Correct.

15 MR. WHIPPER: That's significant. He's down  
16 to the last 20 something percent of getting this  
17 thing done.

18 THE COURT: Correct.

19 MR. WHIPPER: I also have to deal with the  
20 fact that to make a claim on these taxes you still  
21 have to do these things in a timely fashion. The  
22 further we can go back on these taxes is maybe 2011  
23 at the most, maybe even just 2012. There's a statute  
24 of limitation on that.

25 THE COURT: Well, the contract calls for

1 payment from June of 2000. They've only given me  
2 information from actually, 2001, so they're probably  
3 entitled to a half year's payments on top of that. I  
4 hear what you're saying on a demand figure, but  
5 that's contractual. That's what we're looking at the  
6 contract on. So I'm trying to come up with a way  
7 that makes that affordable, because what I'm hearing  
8 you say is, we didn't get demand for it. That's what  
9 I hear.

10 MR. WHIPPER: Number one you need a demand for  
11 it; and then number two, this is the first time  
12 they've actually come into Court and claimed for a  
13 figure. At that point -- as a matter of fact we even  
14 made it an issue. So at that point we have to look  
15 at, what does timely mean?

16 THE COURT: I'm certainly willing to let  
17 you-all discuss that one. The only thing I'm doing  
18 right now that I see that I have to do is to set a  
19 debt figure. Okay? So what I'm saying is I'm taking  
20 Judge Nicholson's figure as being gospel. I'm giving  
21 your client credit for the \$4,500 that he clearly has  
22 paid since that trial date, and I cannot give him  
23 credit or extension for the time period that he  
24 didn't think he owed because he still owed it. Okay?  
25 In his mind he may not have owed it because it was on

1 appeal, but significant to your analysis,  
2 Mr. Simmons, is in the event a foreclosure decree  
3 does get filed, in order to stop the operation of  
4 that decree you'll have to file a bond. Okay? You  
5 don't want to get that far. I'm not issuing that  
6 order. That's what I'm saying to you-all.

7 MR. BERLINSKY: I understand what you're  
8 saying.

9 THE COURT: I'm giving you-all a figure that  
10 is a reinstatement figure that allows him to get back  
11 into the driver's seat as the ongoing payor so  
12 provided he keeps making that payment, and then  
13 you-all need to come up with a solution as to how the  
14 taxes are going to get paid. You're either going to  
15 agree, or you're not going to agree. If you don't  
16 agree then I'm going to have to come and make another  
17 decision. Okay?

18 MR. WHIPPER: I understand. I understand,  
19 Your Honor. Here is what we need to have the Court  
20 say, because our position has been that he didn't  
21 understand the question I don't think clearly -- the  
22 question from Mr. Berlinsky was did he make  
23 prepayments. He prepaid.

24 THE COURT: I find he made no prepayments.

25 MR. WHIPPER: Your Honor --

1 THE COURT: Actually, let me restate that. He  
2 did make -- he got ahead at one time -- just one  
3 second. When he made the September of 2012 payments  
4 he paid September late, October and November early.

5 MR. WHIPPER: Are you sure, Judge? Because  
6 his payments under the contract are not made until  
7 the end of the month.

8 THE COURT: End of the month?

9 MR. WHIPPER: Yes, sir.

10 THE COURT: Okay.

11 MR. WHIPPER: That's by the contract.

12 THE COURT: So they're due at the end of the  
13 month like a mortgage payment would be. Okay. So  
14 then he paid September and he was 9, 10, and 11,  
15 paid. He paid in October, and that was for December  
16 of '12, January and February of '13. So he was ahead  
17 at that time. Then when he paid it in May he paid  
18 for March, April and May of '13. So he was current  
19 as of the time that the appeal was filed, but the  
20 filing of the appeal didn't stay his payments, not by  
21 operation of law, not by agreement, not by anything  
22 other than his own perception. I understand  
23 perception, but that's not the law, and that's why  
24 I've got to deal with that.

25 So I find him current, not as of the date of

1 the filing of the foreclosure, which was the  
2 contention, but as of the date of the filing of the  
3 appeal which he was the respondent anyway. He wasn't  
4 the appellant. The time period has run since then,  
5 and it's clear to this Court that there has been no  
6 payment since then. That's the question that I think  
7 is ultimately before me today.

8 What's the amount that's due today. So it's  
9 from June -- from what I can see -- it's fairly clear  
10 in my book, from June of 2013 until today's date,  
11 that's 19 months at \$500 a month.

12 MR. WHIPPER: Your Honor, it's our contention,  
13 respectfully -- when you look at what he's paid it is  
14 prepaid, so when you take the \$500 a month -- I don't  
15 think it's limited. I don't think Judge Nicholson's  
16 order says that he wasn't paid in advance. It just  
17 says how it has been paid, and our position is  
18 that --

19 MR. BERLINSKY: And how much to be paid going  
20 forward, Seth.

21 THE COURT: Let him finish. Let him finish.  
22 I'm trying to follow.

23 MR. WHIPPER: I'm going to tell your mama on  
24 you.

25 You know, in other words, he intentionally

1 paid in advance. We think this Court is in a  
2 position to recognize that.

3 THE COURT: I want to make sure we're talking  
4 on the same wavelength. What do you mean by paid in  
5 advance?

6 MR. WHIPPER: In other words, when you look at  
7 that figure of 87,500, if you apply it to the  
8 calendar chronologically, as of February of 2013  
9 those actual -- that actual amount took his payments  
10 out to the end of 2013 or maybe even beyond. I did  
11 not bring in that actual ledger.

12 THE COURT: Well, therein lies one of I've  
13 never seen an amortization schedule. Judge Nicholson  
14 put the onus on your client to come up with one.  
15 I've never seen one.

16 MR. WHIPPER: That's a fact. This figure that  
17 was credibly established is there. Remember, we  
18 are -- Mr. Berlinsky and I did not draft this  
19 document.

20 THE WITNESS: The parties drafted the  
21 document. That's what we're dealing with. He  
22 testified to the fact that he knew there would be  
23 times when he might not be able to make monthly  
24 payments so he paid in advance. He dumped money in.  
25 That money came to \$87,000 plus. If you look at that

1 and compare that to 2013 starting from when the  
2 contract started, you can find that that figure  
3 brings you way into 2013. All this is paid for, too,  
4 in terms of paying -- because of what we're dealing  
5 with, a contract drafted by two lay people, we're  
6 seeing that the parties really are in a position to  
7 get what they bargained for. He's not out any money.  
8 Mr. Livingston is not out any money according to what  
9 the payment amount should be. We're asking the Court  
10 to take that into consideration because that's a  
11 fact. That's where we are. That's why the Court  
12 does have some wrestling to do with how to deal with  
13 the situation.

14 THE COURT: I can't find the term of years in  
15 that contract either. That's a dilemma I've got. Go  
16 ahead, Mr. Berlinsky.

17 MR. BERLINSKY: Again, Your Honor, I disagree  
18 wholeheartedly. The debt is established, whether he  
19 prepaid or not, Judge Nicholson said that as of the  
20 date of my order, this is what it is, and he's to pay  
21 \$500 a month from the date of my order.

22 MR. WHIPPER: On what was remaining. It  
23 didn't say --

24 MR. BERLINSKY: At \$500 a month.

25 MR. WHIPPER: It's not what was paid. It was

1 what's remaining.

2 MR. BERLINSKY: That's what he did, though.

3 THE COURT: I further find -- this is the last  
4 paragraph -- the Defendant is given credit for  
5 \$87,550 towards the purchase price of \$125,000 with a  
6 balance of \$37,460 to be paid on the installment  
7 contract at the rate of \$500 a month until the  
8 balance is paid in full. That is whatever it is. So  
9 I give him credit. I'm not -- I understand what your  
10 argument is. If you would like to submit an order as  
11 to why that is what it is -- what it is, and whether  
12 or not taxes have been paid in that \$87,540 figure --  
13 all that's going to end up doing is increasing the  
14 amount of your balance due on the obligation. Are  
15 you with me?

16 MR. WHIPPER: I understand.

17 THE COURT: I don't see where taxes were  
18 addressed in here previously. I'm with you. He's  
19 taken -- I'm assuming what he's done is he's taken  
20 the payments that Mr. Simmons has made and he  
21 deducted them from the total purchase price of  
22 \$125,000.

23 He had to make -- I can tell from the order  
24 that he had to make some decisions on credibility and  
25 payments and that type of thing. When he did that he

1 came up with this figure. All I'm doing -- what I'm  
2 telling you is I'm taking his figure -- I don't  
3 believe I'm at liberty to go behind that figure --

4 MR. WHIPPER: I would concur.

5 THE COURT: -- and I am applying those  
6 payments that were made to that figure that we  
7 acknowledge -- everybody has acknowledged has been  
8 received -- that's \$4,500, or at least I find they've  
9 been received, and then working from that number  
10 forward. I don't know any other way to do that. I  
11 understand your client's understanding or perception  
12 that maybe he had prepaid, but I don't see a 20-year  
13 pay schedule in here. I don't see a 15-year pay  
14 schedule in here.

15 MR. WHIPPER: The only pay schedule -- of  
16 course, Judge. I understand your position on that.  
17 From this set I determine payment is set under this  
18 agreement. He has up until a certain year to pay.

19 MR. BERLINSKY: The order -- it was appealed.  
20 Everybody dropped the appeal. They let it become the  
21 final order of the Court.

22 THE COURT: It's roughly a 20-year period if  
23 you just do the math.

24 MR. WHIPPER: It's set out here anyway. It  
25 has here --

1 THE COURT: We must be pretty close because  
2 it's 2015, and I think it's about five years due. We  
3 must be about all right on that.

4 MR. WHIPPER: 4/15/2021 is the date we have of  
5 the term.

6 THE COURT: 4/15 what?

7 MR. WHIPPER: 2021.

8 THE COURT: Where are you finding that?

9 MR. WHIPPER: On Plaintiff's Exhibit 1 or 2.

10 MR. BERLINSKY: The contract itself,  
11 Your Honor.

12 THE COURT: I see it. I'm now looking at  
13 Plaintiff's 2 ending 4/15/2021. Okay. That's  
14 different from Defendant's 6 for ID, and therein  
15 lies -- one of things Judge Nicholson did was he  
16 decided one of these was valid and one of these was  
17 not.

18 MR. WHIPPER: That's correct.

19 THE COURT: I don't know which one he did, but  
20 anyway 4/15/21.

21 MR. WHIPPER: That's what he decided.

22 THE COURT: That's about right. We're about  
23 five and a half years out.

24 MR. BERLINSKY: We're pretty close.

25 THE COURT: I'm with you.

1 MR. WHIPPER: Judge, I'll be --

2 THE COURT: I'm going to ask Mr. Berlinsky to  
3 prepare me an order along the lines of what I just  
4 described and run that by you. You-all don't have to  
5 agree on anything I do. The number one thing I've  
6 got to do is figure out what the debt is. Okay?  
7 I've done that today. All right?

8 I'm going to give that time frame -- I'm going  
9 to get that time period that's in the nature of a --  
10 you-all sat in here this afternoon. You see what I  
11 do. You give somebody a reinstatement period in  
12 which to bring the thing current so that they're no  
13 longer in default so they're no longer subject to a  
14 foreclosure. Okay? That's what I would like to do.  
15 I want to give Mr. Simmons that opportunity to bring  
16 himself current, and then what we really need to work  
17 for with these two parties is how we can get them to  
18 agree and come together so that he properly gets  
19 credit for the payments that he makes. Okay? I  
20 would like you-all to work on that. I think you-all  
21 can work together well on that, too. Okay?

22 MR. WHIPPER: Judge, we think that -- what  
23 Mr. Simmons has been through it --

24 THE COURT: It may be compensable. You're  
25 welcome to submit your order. All right? Very good.

1 All right, folks.

2 (The proceedings were concluded at 5:12 p.m.)

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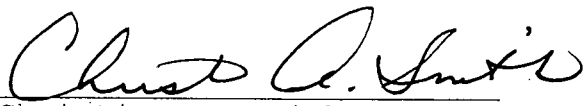
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State of South Carolina) )  
County of Charleston ) C E R T I F I C A T E

I, Christine A. Smith, Court Reporter and  
Notary Public for the State of South Carolina at  
Large, do hereby certify that the foregoing  
transcript is a true, accurate, and complete record.

I further certify that I am neither related to  
nor counsel for any party to the cause pending or  
interested in the events thereof.

Witness my hand, I have hereunto affixed my  
official seal this 21st day of July, 2016 at  
Charleston, Charleston County, South Carolina.

  
Christine A. Smith  
Notary Public  
My Commission Expires  
May 12, 2021

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# The South Carolina Court of Appeals

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October 12, 2016

Harold Simmons, Jr.  
1182 King St.  
Charleston SC 29403

Re: Allen Livingston v. Harold Simmons  
Appellate Case No. 2016-001201

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Dear Mr. Simmons:

Our records indicate that the transcript in the above matter should have been delivered. As of today's date, we have not received any information indicating that the court reporter has been granted an extension. Further, you have not notified us that you have failed to receive the transcript, nor have we received your initial brief.

If you have not yet received the transcript, Rule 207 of the South Carolina Appellate Court Rules requires you to contact the Office of Court Administration. The address for Court Administration is as follows:

South Carolina Office of Court Administration  
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Columbia, SC 29201

Be sure to copy the Court and opposing counsel with all correspondence concerning the transcript.

Please advise the Court of the status of the transcript within ten (10) days of

the date of this letter, or your appeal will be dismissed.

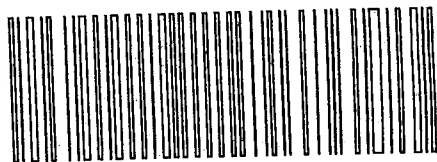
Very truly yours,

*V. Claire Allen, Deputy*

CLERK

cc: Bruce Alan Berlinsky, Esquire

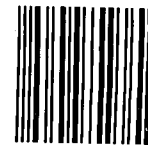
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