

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM YORK COUNTY  
Court of Common Pleas

S. Jackson Kimball, Master in Equity

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Appellate Case No. 2016-001344

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**RECEIVED**

JAN 25 2017

**SC Court of Appeals**

YADKIN BANK, ..... Respondent,

v.

J.W. NEAL CONSTRUCTION, LLC,  
JOSHUA WILFRED NEAL, and  
THE WALKERS RIDGE HOMEOWNERS ASSOCIATION, INC.

Of Whom

J.W. NEAL CONSTRUCTION, LLC,  
JOSHUA WILFRED NEAL, are the ..... Appellants.

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INITIAL BRIEF OF APPELLANTS

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John Martin Foster  
Post Office Box 106  
Rock Hill, South Carolina 29731  
(803) 324-8100  
Attorney for Appellants

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CASES: SOUTH CAROLINA COURT OF APPEALS

- Gordon Farms, Inc. v. Carolina Cinema Corp.*,  
294 S.C. 158, 363 S.E.2d 235 (Ct.App. 1987)  
*Southern Atlantic Financial Services, Inc. v. Middleton*,  
349 S.C. 77, 562 S.E.2d 482 (Ct.App. 2002) .....

OTHER AUTHORITIES

- 17A AM.JUR.2D *Contracts* § 610 (2002)  
17A AM.JUR.2D *Contracts* § 612 (2002)

## STATEMENT OF ISSUES ON APPEAL

- I. THE UNAMBIGUOUS LANGUAGE OF THE MORTGAGE REQUIRES THAT A NOTICE OF DEFAULT AND DEMAND BE GIVEN AS A PRECONDITION TO FORECLOSURE.
- II. EVEN IF THE LANGUAGE OF THE MORTGAGE IS FOUND TO BE AMBIGUOUS, THE RULES OF CONSTRUCTION REQUIRE THAT A NOTICE OF DEFAULT AND DEMAND BE GIVEN AS A PRECONDITION TO FORECLOSURE.

## STATEMENT OF THE CASE

By Complaint filed November 16, 2015, the Respondent YADKIN BANK sought the foreclosure of its Note and Mortgage held on real property in York County, with deficiency judgment demanded..

By their Answer, the Appellants J.W. NEAL CONSTRUCTION, LLC and JOSHUA WILFRED NEAL plead a general defense and, secondly, deficiency in the Notice of Default and Demand supplied by the Respondent.

This matter came on for trial before the Honorable S. Jackson Kimball, III sitting without a jury on May 3, 2016. Judgment was entered for the Respondent in the Order of Foreclosure and Sale dated May 17, 2016. The amount of judgment recited in the said Order, including costs and attorneys' fees, was \$60,858.17. The Foreclosure sale followed on June 6, 2016.

The Respondents received to written notice of the Order of Foreclosure and Sale on May 24, 2016. The Appellants' Notice of Appeal was served on June 20, 2016.

## STATEMENT OF FACTS

By Complaint filed November 16, 2015, the Respondent YADKIN BANK sought the foreclosure of its Note and Mortgage held on real property in York County, with deficiency judgment demanded..

By their Answer, the Appellants J.W. NEAL CONSTRUCTION, LLC and JOSHUA WILFRED NEAL plead a general defense and, secondly, deficiency in the Notice of Default and Demand supplied by the Respondent.

It is undisputed that Notices were sent to addresses specified in the Guaranty; the Promissory Note does not contain a requirement for notice.

This matter came on for trial before the Honorable S. Jackson Kimball, III sitting without a jury on May 3, 2016. Judgment was entered for the Respondent in the Order of Foreclosure and Sale dated May 17, 2016. The amount of judgment recited in the said Order, including costs and attorneys' fees, was \$60,858.17. The Foreclosure sale followed on June 6, 2016.

The Respondents received to written notice of the Order of Foreclosure and Sale on May 24, 2016. The Appellants' Notice of Appeal was served on June 20, 2016.

#### ARGUMENT:

I. THE UNAMBIGUOUS LANGUAGE OF THE MORTGAGE REQUIRES THAT A NOTICE OF DEFAULT AND DEMAND BE GIVEN AS A PRECONDITION TO FORECLOSURE.

The foreclosure herein is premised upon that Mortgage executed by the Appellant J.W. NEAL CONSTRUCTION, LLC to the Respondent Bank's Assignor, on September 12, 2008. [RECORD ON APPEAL, p.--.] The provision thereof dealing with Notices states, in relevant part, provides as follows:

NOTICES. Any notice required to be given under this Mortgage, including without limitation any notice of default and any notice of sale shall be given in writing, and shall be effective when actually delivered, when actually received by telefacsimile (unless otherwise required by law), when deposited with a nationally recognized overnight courier, or, if mailed, when deposited in the United States mail, as first class, certified or registered mail postage prepaid, directed to the addresses shown near the beginning of this Mortgage. . . . Any party may change its address for notices under this Mortgage by giving formal written notice to the other parties, specifying that the purpose of the notice is to change the party's address. For notice purposes, Grantor agrees to keep Lender informed at all times of Grantor's current address. . . .

[RECORD ON APPEAL, p.--.]

In its Complaint, the Respondent Bank alleges that it has complied with the above-quoted Notice provisions by a NOTICE OF DEFAULT AND DEMAND, dated December 17, 2014 and mailed

to various addresses for the Appellants. [RECORD ON APPEAL, p.--.] As indicated, the Appellants raised the issue of the sufficiency of delivery of this Notice in their Answer [RECORD ON APPEAL, p.--.] and during the Hearing. [RECORD ON APPEAL, Transcript, p.--.] The objection by counsel of the Appellants on this point was overruled by the Trial Court. [RECORD ON APPEAL, p.--.]

The Appellants point out that the only addresses “shown near the beginning of th[e] Mortgage” (to cite the above-quoted language and requirement of that Mortgage) or, indeed, anywhere in the said Mortgage are a) the address of the Respondent’s Assignor, the original Bank, and “LOT 55 AND LOT 73, WALKERS RIDGE SUBDIVISION, ROCK HILL, SC 29732.” This Respondent did not address its Notice of Default and Demand to either such address. The Appellants note that the LOT address listed are, obviously, not mailing addresses.

The Respondent argues that there was no requirement to give the Appellants Notice under the terms of the Mortgage. [RECORD ON APPEAL, Transcript, p.--.] Appellants restate the relevant language of the Mortgage itself:

Any notice required to be given under this Mortgage, including without limitation any notice of default and any notice of sale shall be given in writing, . . .

[RECORD ON APPEAL, p.--; emphasis added.]

The only logical construction of the language above is that the notice of default under the Mortgage above is “required to be given” as the same is “includ[ed] without limitation” in that category.

The Appellants further note the Mortgage language which states that:

Any notice required to be given under this Mortgage . . . shall be effective when actually delivered, . . . directed to the addresses shown near the beginning of this Mortgage . . .

[RECORD ON APPEAL, p.--; emphasis added.]

This conclusion accords with the general precedents governing contract law. Thus, the commentators of AMERICAN JURISPRUDENCE 2D state:

A contract specifically requiring a notice calling for, or a demand for, performance cannot be enforced unless the notice or demand provided for has either been given or waived.

[17A AM.JUR.2D *Contracts* § 610 (2002); citations omitted.]

The same commentators state:

There can be no recovery on a contract specifically providing for notice or demand unless the notice or demand were given in accordance with the terms of the contract. Where parties enter into a contract by the terms of which one of them binds himself to perform at the option of the other upon being given demand or notice, the party having such option must exercise it in the manner provided by the contract.

[17A AM.JUR.2D *Contracts* § 612 (2002); citations omitted.]

The Respondent Bank has failed to give that Notice in the manner required by its own Mortgage documents, and has, therefore, failed to fulfill a precondition of an action asserting default on the Appellants' part.

This Court stated the basic rule of contract construction in *Gordon Farms, Inc. v. Carolina Cinema Corp.*, 294 S.C. 158, 363 S.E.2d 235 (Ct.App. 1987):

A contract is ambiguous only when it may fairly and reasonably be understood in more ways than one. *Farr v. Duke Power Co.*, 265 S.C. 356, 218 S.E.2d 431 (1975). Parties to a contract have a right to make their own contracts, and when the contracts they make are capable of clear interpretation, the court's province is confined to the enforcement of the contract as written; the court cannot exercise its discretion as to the contents of the contract or substitute its own construction for an agreement clearly entered into between the parties. *Bruce v. Blalock*, 241 S.C. 155, 127 S.E.2d 439 (1962). In ascertaining the intention of the parties, the court must first look to the language of the contract. *Blakeley v. Rabon*, 266 S.C. 68, 221 S.E.2d 767 (1976). And if the language of the contract is clear and capable of legal construction, the language alone determines the force and effect of the instrument. *Superior Automobile Insurance Co. v. Maners*, 261 S.C. 257, 199 S.E.2d 719 (1973). Moreover, the words used in the contract should be given their usual and ordinary meaning except where it appears that they were used in a different sense or have a technical meaning. *Blakeley v. Rabon, supra*.

[*Id.*, 294 S.C. at 160, 363 S.E.2d at \_\_\_\_.]

The Appellants argue that the cited language as to Notice of Default is not ambiguous. That language characterizes the Notice, and its method of delivery, as “required to be given”.

II. EVEN IF THE LANGUAGE OF THE MORTGAGE IS FOUND TO BE AMBIGUOUS, THE RULES OF CONSTRUCTION REQUIRE THAT A NOTICE OF DEFAULT AND DEMAND BE GIVEN AS A PRECONDITION TO FORECLOSURE.

The Appellants would further note that, if it is contended that the ‘said language is ambiguous, the same must be construed against the Respondent Bank as the drafter thereof. In *Southern Atlantic Financial Services, Inc. v. Middleton*, 349 S.C. 77, 562 S.E.2d 482 (Ct.App. 2002) *aff’d* 356 S.C. 444, 590 S.E.2d 27 (2003), this Court, in ruling on the requirement of default notice in a mortgage default, held:

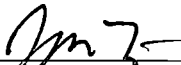
We rule that an ambiguity was created by Southern Atlantic regarding the meaning and operation of the "Notice of Default" provision. It is well settled that ambiguities arising within a contract must be construed against the drafter. This rule applies with particular force in cases involving a contract of adhesion. *Graham [v. Scissor-Tail, Inc.]*, [28 Cal.3d 807], 171 Cal.Rptr. 604, 623 P.2d at 172, n. 16 (citation omitted). Consequently, we find the master erred awarding judgment to South Atlantic following his conclusion the "Notice of Default" provision did not obligate Southern Atlantic to provide Middleton with notice before initiating its action.

[*Id.*, 349 S.C. at 84, 562 S.E.2d at 482.]

The Appellants argue that the appearance of the Mortgage documents are, in themselves, sufficient to establish that the same are standard commercial paper of the originating lender, and as such subject to this rule of interpretation if ambiguity is found to exist. If ambiguous, the same language must be construed to require a Notice of Default and Demand, and that the same be given in the prescribed manner as a precondition of foreclosure.

## CONCLUSION

The Notice of Default and Demand, specified to a particular but non-existent address, is required by the language of the Mortgage. That Notice, under the general tenets of contract law, is a precondition to the foreclosure action of the Respondent Bank. In the absence of that Notice, provided as required by the Mortgage, the Respondent's foreclosure cannot be upheld.

  
\_\_\_\_\_  
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Attorney for Appellants

January 23, 2017

Rock Hill, South Carolina

CERTIFICATE OF COUNSEL

The undersigned certifies that this final Brief of Appellants complies with Rule 211(b),  
S.C.A.C.R.

January 23, 2017

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Attorney for Appellants

THE STATE OF SOUTH CAROLINA  
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APPEAL FROM YORK COUNTY  
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S. Jackson Kimball, Master in Equity

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**SC Court of Appeals**

YADKIN BANK, ..... Respondent,

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THE WALKERS RIDGE HOMEOWNERS ASSOCIATION, INC.  
Of Whom  
J.W. NEAL CONSTRUCTION, LLC,  
JOSHUA WILFRED NEAL, are the ..... Appellants.

CERTIFICATE OF SERVICE

I certify that, on the date below, I have served the initial Brief and Designation of Matter to Be Included in the Record on Appeal, of Appellants, on the following counsel of record:

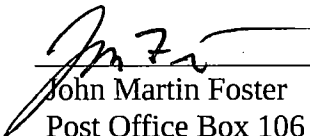
Elizabeth Wright  
310 N. Front Street, Suite 4-147  
Wilmington, NC 28401

by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below; or

by hand delivering copies of the same to the following persons, or by leaving the same at that person's office with that person's clerk or some other person in charge thereof, or by leaving it in a conspicuous place therein; or if the office was closed or the person to be served has no

office, by leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein. all pursuant to Rule 262, S.C.A.C.R.

January 23, 2017

  
\_\_\_\_\_  
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January 23, 2017

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, SC 29211

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**SC Court of Appeals**

Re: Yadkin Bank, Respondent  
v. J.W. Neal Construction, LLC, Joshua Wilfred Neal and The Walkers Ridge  
Homeowners Association, Inc.,  
of whom J.W. Neal Construction, LLC and Joshua Wilfred Neal  
are the Appellants  
Appellate Case No.: 2016-001344

Dear Ms. Kitchings:

In accordance with Rule 208, S.C.A.C.R., enclosed herewith please find the original and one (1) copy each of the Appellants' Initial Brief and Designation of Matter to Be Included in the Record on Appeal, together with the Certificate of Service for the same in the above referenced case.

By copy of this letter, I am serving the attorney for the Respondent with copies of the said Initial Brief and Designation of Matter, as evidenced by the Certificate of Service. Please return the extra conformed copy to my office in the enclosed self-addressed, stamped envelope. As always, thank you, and your staff, for your assistance in these matters.

I note the change in opposing counsel's address, as it was stated in her latest e-mails to me.

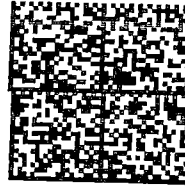
Sincerely,




John Martin Foster  
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Rock Hill, South Carolina 29731  
803 324-8100  
Attorney for Appellants

jmf/  
enclosures

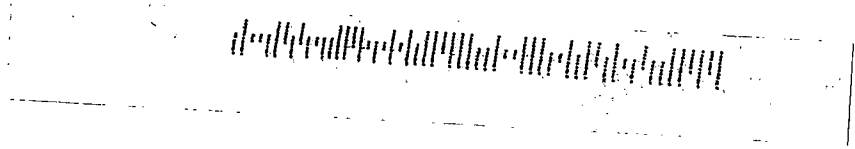
cc: Elizabeth Wright  
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**SC Court of Appeals**

**John Martin Foster Attorney**

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**TO:**

THE HONORABLE JENNY ABBOTT KITCHINGS  
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