

STATE OF SOUTH CAROLINA

COUNTY OF LANCASTER

New York Community Bank,

PLAINTIFF,

vs.

Scott L. Butler; Jacqueline Butler; Mortgage Electronic Registration Systems, Inc.; as nominee for Northstar Mortgage Group, LLC; and LVNV Funding, LLC,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2012-CP-29-0892

ORDER DENYING DEFENDANTS' MOTION TO VACATE JUDGMENT OF FORECLOSURE

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OFFICE OF CLERK  
OF COURT  
LANCASTER, SC  
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THIS MATTER came before the Court upon Motion for Relief from Judgment ("Motion") filed by Scott L. Butler and Jacqueline Butler ("Defendants"). A hearing on the Motion was held October 26, 2016, at which counsel for both parties were present. Based upon the survey dated August 3, 2016 and offered into evidence by Plaintiff, the parties are in agreement the property that is the subject of this action is located in both South Carolina and North Carolina. The parties further agree that this Court does not possess jurisdiction to order a judicial sale of that portion of the property located in North Carolina. The sole question before the Court, then, was whether the Order and Judgment of Foreclosure and Sale obtained by Plaintiff is void in its entirety because it orders the foreclosure of a mortgage covering property in both states. Based upon the arguments of counsel and parties' respective memoranda, the Defendants' Motion is denied. I therefore find and conclude as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Plaintiff commenced this foreclosure with the filing of its Lis Pendens, Summons, and Complaint on July 5, 2012 in the Court of Common Pleas for Lancaster County, South Carolina.
2. The subject mortgage is a purchase money mortgage and covers real property described as follows:

Being all of Lot 718 of Bridgehampton Subdivision, Phase 10, Map 3 as shown on plat recorded

in Map Book 2004, Page 336, Office of the Clerk of Court for Lancaster County.

3. The mortgage was filed on November 6, 2006, and is of record in the Office of the Register of Deeds for Lancaster County in Book 1608 at Page 265.

4. The property described by the mortgage is located in both Lancaster County, South Carolina and Mecklenberg County, North Carolina, as evidenced by the plat dated August 3, 2016 and offered as an exhibit herein.

5. Plaintiff was granted summary judgment on its cause of action for foreclosure of its mortgage, and a Judgment and Order of Foreclosure was entered on March 2, 2016.

6. Defendants filed a Motion for Relief from Judgment pursuant to Rule 60(b)(4), SCRPC on September 26, 2016. Defendants claim the entire judgment is void because it seeks to foreclose a mortgage describing property partially located in North Carolina. Defendants also contend that this Court lacks the authority to vacate only that portion of the judgment seeking to foreclose the mortgage as to the North Carolina portion.

7. A judgment of a court without subject matter jurisdiction is void and constitutes grounds for the court to vacate the judgment under Rule 60(b)(4). *Thomas & Howard Co., Inc. v. T.W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995); Rule 60(b)(4) (stating a court may relieve a party from a final judgment if the judgment is void). "A void judgment is one that, from its inception, is a complete nullity and is without legal effect and must be distinguished from one which is merely 'voidable.'" *Id.* 318 S.C. at 291, 457 S.E.2d at 343 (1995).

8. The definition of "void" under Rule 60, SCRPC only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction. *See McDaniel v. U.S. Fidelity and Guar. Co.*, 324 S.C. 639, 478 S.E.2d 868, 871 (Ct. App. 1996) (citing *Thomas*, 318 S.C. 286, 457 S.E.2d 340).

9. "A judgment is not rendered void by irregularities which do not involve jurisdiction."

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*Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (Ct. App. 2002). There is a wide difference between a want of jurisdiction in which case the court has no power to adjudicate *at all*, and a mistake in the exercise of undoubted jurisdiction in which case the action of the trial court is not void although it may be subject to direct attack on appeal. *Thomas*, 318 S.C. at 291, 457 S.E.2d at 343 (citing *Piana v. Piana*, 239 S.C. 367, 123 S.E.2d 297 (1961)) (emphasis added).

10. An order is “void” for purposes of Rule 60(b)(4) only if the court rendering the decision lacked personal or subject matter jurisdiction or acted in a manner inconsistent with due process of law. *See Eberhardt v. Integrated Design & Constr., Inc.*, 167 F.3d 861, 871 (4th Cir. 1999).

11. Courts narrowly construe the concept of a “void” order because it threatens the finality of judgments. *Wendt v. Leonard*, 431 F.3d 410, 413 (4th Cir. 2005). When deciding whether an order is “void” under Rule 60(b)(4) for lack of subject matter jurisdiction, courts must look for the “ ‘rare instance of a clear usurpation of power.’ ” *In re Bulldog Trucking, Inc.*, 147 F.3d 347, 352 (4th Cir. 1998) (quoting *Lubben v. Selective Serv. Sys. Local Bd. No. 27*, 453 F.2d 645, 649 (1st Cir.1972)); *see also Baumlín & Ernst, Ltd. v. Gemini, Ltd.*, 637 F.2d 238, 241–42 (4th Cir.1980) (citing *Lubben* and explaining that an “[e]rror ... does not make the judgment void” under Rule 60(b)(4)).

12. A court plainly usurps jurisdiction “only when there is a ‘total want of jurisdiction’ and no arguable basis on which it could have rested a finding that it had jurisdiction.” *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986) (quoting *Lubben*, 453 F.2d at 649); *see also In re G.A.D., Inc.*, 340 F.3d 331, 336 (6th Cir. 2003) (“Other circuits have determined ... that a Rule 60(b)(4) motion will succeed only if the lack of subject matter jurisdiction was so glaring as to constitute a total want of jurisdiction, or no arguable basis for jurisdiction existed.”) (citations and internal quotation marks omitted); *Gschwind v. Cessna Aircraft Co.*, 232 F.3d 1342, 1346 (10th Cir. 2000) (“There must be ‘no arguable basis on which [the court] could have rested a finding that it had jurisdiction.’ ” (quoting *Nemaizer*, 793 F.2d at 65)). “[A]n ‘error in interpreting a statutory grant of jurisdiction is not equivalent to acting with total want of

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jurisdiction.’ ” *Gschwind*, 232 F.3d at 1346–47 (quoting *Kansas City S. Ry. Co. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 825 (8th Cir. 1980)).

13. It is undisputed that part of the property is located in South Carolina and that the mortgage instrument is recorded in Lancaster County. The action was properly commenced in the Court of Common Pleas of Lancaster County, which unquestionably has the power to hear and determine foreclosure actions for real property in Lancaster County. *See State v. Campbell*, 376 S.C. 212, 656 S.E.2d 371 (2008); *Johnston v. S.C. Dep’t of Lab., Licensing, and Reg., S.C. Real Estate Appraisers Bd.*, 365 S.C. 293, 617 S.E.2d 363 (2005); *Fryer v. S.C.L. Enforcement Div.*, 369 S.C. 395, 631 S.E.2d 918 (2006).

14. Venue for the foreclosure of the South Carolina portion of the property is thus appropriate in the Court of Common Pleas of Lancaster County pursuant to S.C. Code § 15-7-10 (Supp. 2006), because that is where that property is located.

15. Further, action was appropriately referred and the Order of Reference conferred the Special Referee subject matter jurisdiction to hear the foreclosure in accordance with Rule 53, SCRCP. *See* Rule 53(b) (“An action for foreclosure may be referred to a master or special referee by order of a circuit judge or the clerk of court.”)

16. Therefore, Judgment is valid, effective, and entitles Plaintiff to a judicial sale of the South Carolina portion of the property.

17. The inclusion of the North Carolina portion of property’s description has no bearing on the subject matter jurisdiction of the Court to sell the South Carolina property, it cannot render the judgment void.

In *Universal Benefits, Inc. v. McKinney, infra*, the Court of Appeals concluded that an order dismissing a case with prejudice due to the Appellant’s failure to appear at a pretrial conference and roster meeting was not void under Rule 60(b)(4). *See McKinney*, 349 S.C. at 184, 561 S.E.2d at 662. The Court

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relied on the decision in *Thomas & Howard Co.*, for the proposition that “a judgment will not be vacated for a mere irregularity which does not affect the justice of the case, and of which the party could have availed himself, but did not do so until judgment was rendered against him.” *See Thomas*, 318 S.C. at 291, 457 S.E.2d at 343. The Court reached its decision by first establishing that the circuit court had subject matter and personal jurisdiction over the parties “without question”. *See McKinney*, 349 S.C. at 183, 561 S.E.2d at 661. The Court then concluded that the Appellant’s due process rights were not implicated because it had actual notice of the order dismissing the action; thus, Appellant was not denied the opportunity to move for reconsideration under Rule 59, which provided an avenue to appeal from the order. *McKinney*, 349 S.C. at 183, 561 S.E.2d at, 661.

Another instructive decision is *McDaniel v. US Fidelity and Guaranty Co.* *See* 324 S.C. 639, 478 S.E.2d 868 (Ct. App. 1996). There, the Court of Appeals affirmed the lower court’s denial of a motion made under Rule 60(b)(4) where the judgment in question was potentially violative of S.C. § Code 38-77-11(A), commonly known as South Carolina’s “mandate to write” insurance statute. *Id.* A settlement reached by the parties and incorporated into the judge’s trial order provided that, *inter alia*, the Plaintiff/Appellant was permitted to write new personal lines of insurance but prohibited from writing any “new commercial business.” *McDaniel*, 324 S.C. at 641, 561 S.E.2d at 869. Four years later, the Plaintiff/Appellant moved to set aside the judgment as void under Rule 60(b)(4), on the grounds that because the order prevented him from writing any “new commercial business,” it required him to avoid “small commercial [automobile] risks” in violation of S.C. § Code 38-77-11(A). *Id.* Plaintiff/Appellant argued that the settlement and resulting order were void and subject to attack at any time pursuant to Rule 60(b)(4). *Id.* The motion to vacate was denied by the lower court on the grounds that it was not made within a reasonable time. *Id.*

On appeal, the trial court’s decision that the motion was untimely was affirmed. More importantly, however, the Court of Appeals also found that because the lower court possessed personal

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and subject matter jurisdiction, the order did not fall within Rule 60(b)(4)'s definition of void. *McDaniel*, 324 S.C. at 644, 561 S.E.2d at 871. At best, the order was voidable because of its potential conflict with of S.C. § Code 38-77-11(A). *Id.* Accordingly, because the motion was untimely and the order itself was not rendered void despite any problems with its treatment of S.C. § Code 38-77-11(A), the decision was upheld.

Similarly, the order in this case cannot be rendered void by the inclusion of the description of the North Carolina portion of the property. The court indisputably possesses personal jurisdiction over the parties and subject matter jurisdiction to foreclose the mortgage encumbering the South Carolina portion of the property. Therefore, under the rationale of *Thomas & Howard Co.* and *McDaniel*, the order is arguably voidable, but certainly not void. The inclusion of the North Carolina property is precisely the type of "mere irregularity" contemplated by the foregoing decisions and applicable law, in that it does not implicate the court's clear jurisdiction over the parties and South Carolina property, and does not affect the justice of the case. The order falls within the category of matters in which there exists a mistake in the exercise of undoubted jurisdiction rather than a want of jurisdiction in which the court has no power to adjudicate at all. *See Thomas*, 318 S.C. at 291, 457 S.E.2d 343; *Piana*, 239 S.C. 367, 123 S.E.2d 297; *see also Petroleum Transportation Inc. v. SCPC*, 255 S.C. 419, 179 S.E.2d 326, 329 (1971).

Therefore, the Plaintiff is entitled to foreclose its mortgage lien against the South Carolina property.

Rule 1, SCRPC provides the Rules of Civil Procedure govern procedure in all South Carolina courts in all suits of a civil nature. Rule 1 further directs the Rules shall be construed to secure the just, speedy, and inexpensive determination of every action. Rule 61, SCRPC mandates: "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Rule 7(b), SCRPC provides an application to the court for an order shall be by written motion. Rule 8(f), SCRPC requires all pleadings to be so construed as to do substantial

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justice to all parties.

The foregoing analysis was adopted by the Court of Appeals in *Standard Fed. Sav. & Loan Assoc., v. Mungo*. See 306 S.C. 22, 410 S.E.2d 18 (1991). In *Mungo*, a mortgagee initially waived its right to seek a deficiency judgment in a foreclosure action against the mortgagor. *Id.* An order finding the mortgagor in default was entered, and after a hearing to determine the amount of the debt, a judgment of foreclosure and sale was entered. *Mungo*, 306 S.C. at 24, S.E.2d at 19. The judgment provided that the “undersigned master in equity will retain jurisdiction to do all necessary acts incident to this foreclosure,” and reflected the mortgagee’s deficiency waiver. *Mungo*, 306 S.C. at 24, S.E.2d at 20. Prior to sale, the mortgagor filed for Chapter 13 bankruptcy proceedings. *Mungo*, 306 S.C. at 25, S.E.2d at 20. The mortgagee subsequently filed a petition alleging that the bankruptcy had been dismissed, and sought a rule to show cause why the pending sale should not go forward. *Id.* The petition also sought to amend the order to seek a deficiency judgment, on the grounds that the mortgagor induced the deficiency waiver by intentionally misrepresenting to the mortgagee that the mortgaged premises included a house. *Id.* The master considered the petition under Rule 60(b). The mortgagor then moved to dismiss the petition, claiming the court lacked jurisdiction and that a rule to show cause was not the proper procedure by which to seek amendment of a judgment of foreclosure and sale. *Id.* The master denied the motions to dismiss and, over the objection of the mortgagor, amended the order to permit the mortgagee to seek a deficiency without taking evidence on the merits. *Id.*

The Court of Appeals reversed the granting of the petition in part, and remanded for an evidentiary hearing and determination of the mortgagee’s right to seek a deficiency judgment. However, the Court of Appeals affirmed the remainder of the decision and expressly rejected the mortgagor’s argument as “manifestly without merit” that the petition should not have been entertained because it was the wrong procedure to seek relief from the court. *Mungo*, 306 S.C. at 25, S.E.2d at 20. The Court explained that although the better practice under the Rules would have been to make a Rule 60(b) motion,

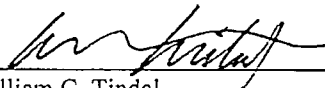
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the substance of the relief sought was the same, regardless of the form in which the request for relief was framed; thus, the master was correct to treat the petition as a Rule 60(b) motion. The Court also found that because the master “had the power, under Rule 60(b), to relieve [the mortgagee] *of that portion of the foreclosure order* barring the right to seek a deficiency judgment,” it need not decide whether the master could entertain a motion to amend under Rule 52, SCRPC. *Mungo*, 306 S.C. at 25, S.E.2d at 21 (emphasis added).

18. The Judgment is not void *in toto* for lack of subject matter jurisdiction and does not fall within the definition of “void” under Rule 60(b)(4), SCRPC.

19. The Court possesses the inherent authority to and does hereby vacate only that portion of the judgment affecting the real property located in North Carolina.

20. The Judgment and Order of Foreclosure entered on March 2, 2016 is affirmed in all other respects.

  
\_\_\_\_\_  
William C. Tindal  
Special Referee for Lancaster County

Lancaster, South Carolina

MARCH 6, 2017



STATE OF SOUTH CAROLINA  
COUNTY OF LANCASTER  
IN THE COURT OF COMMON PLEAS  
New York Community Bank,  
PLAINTIFF

FORM 4  
JUDGMENT IN A CIVIL CASE

C/A NO: 12-CP-29-0892

Scott L. Butler; Jacqueline Butler; Mortgage  
Electronic Registration Systems, Inc., as nominee for  
Northstar Mortgage Group, LLC; and LVNV  
Funding, LLC,

DEFENDANT(S)

Submitted by: FINKEL LAW FIRM LLC  
Magalie A. Creech (SC Bar 78855)

Attorney for: Plaintiff, Defendant,  
or Self-Represented Litigant

**DISPOSITION TYPE (CHECK ONE)**

**JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

**DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

**ACTION DISMISSED. (CHECK REASON)** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43 (k), SCRPC (Settled); Other \_\_\_\_\_

**ACTION STRICKEN. (CHECK REASON)** Rule 40(j), SCRPC; Bankruptcy; Binding Arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other \_\_\_\_\_

**DISPOSITION OF APPEAL TO THE CIRCUIT COURT (Check applicable box):**

Affirmed; Reversed; Remanded; Other \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:** See attached order (formal order to follow). Statement of Judgment by the Court: Defendant's Motion to Vacate Judgment is denied.

**ORDER INFORMATION**

This order ends does not end the case.

Additional Information for the Clerk: \_\_\_\_\_

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LANCASTER, SC  
Page 2





NOTICE OF SPECIAL REFEREE SALE  
CIVIL ACTION NO. 12-CP-29-0892

BY VIRTUE OF A DECREE of the Court of Common Pleas for Lancaster County, South Carolina, heretofore issued in the case of New York Community Bank, against Scott L. Butler; Jacqueline Butler; Mortgage Electronic Registration Systems, Inc., as nominee for Northstar Mortgage Group, LLC; and LVNV Funding, LLC, *et al.*, the Special Referee for Lancaster County, or his/her agent, will sell on May 1, 2017, at 11:00 AM, at Lancaster County Courthouse, 104 N. Main Street, Courtroom B, Lancaster, South Carolina, to the highest bidder:

That portion of Lot 718 of Bridgehampton Subdivision, Phase 10, Map 3, located in South Carolina only, as shown on the plat dated August 3, 2016 and to be recorded Office of the Register of Deeds for Lancaster County.

TMS Number: 0005A-0A-085.00  
PROPERTY ADDRESS: 30245 Camden Lane. Fort Mill, SC

This being a portion of the same property conveyed to Scott L. Butler and Jacqueline Butler by deed of John Wieland Homes and Neighborhoods of The Carolinas, Inc. fka John Wieland Homes and Neighborhoods of North Carolina, Inc., dated October 31, 2006, and recorded in the Office of the Register of Deeds for Lancaster County on November 6, 2006, in Deed Book 364 at Page 104.

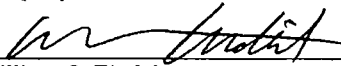
TERMS OF SALE: FOR CASH. The Special Referee will require a deposit of 5% of the bid amount in cash or certified funds, which is to be applied on the purchase price upon compliance with the bid. Interest on the balance of the bid at 4.5% shall be paid to the day of compliance. In case of noncompliance within 20 days, after the sale, the deposit of 5% is to be forfeited and applied to Plaintiff's judgment debt and the property re-advertised for sale upon the same terms at the risk of the former highest bidder. Purchaser to pay for deed recording fees and deed stamps.

Deficiency judgment not being demanded, the bidding will not remain open after the date of sale, but compliance with the bid may be made immediately.

Should Plaintiff, Plaintiff's attorney, or Plaintiff's agent fail to appear on the day of sale, the property shall not be sold, but shall be re-advertised and sold at some convenient sales day thereafter when Plaintiff, Plaintiff's attorney, or Plaintiff's agent, is present.

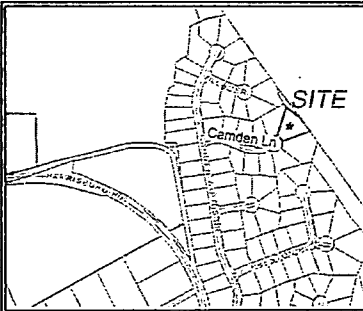
The sale shall be subject to taxes and assessments, existing easements and easements and restrictions of record.

Plaintiff does not warrant its title search to purchasers at foreclosure sale or other third parties, who should have their own title search performed on the subject property.

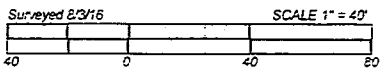
  
\_\_\_\_\_  
William C. Tindal  
Special Referee for Lancaster County

Lancaster, South Carolina  
MARCH 6, 2017  
FINKEL LAW FIRM LLC  
Post Office Box 71727  
North Charleston, South Carolina 29415  
(843) 577-5460  
Attorneys for Plaintiff

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CLERK OF COURT  
LANCASTER, SC



VICINITY MAP (NOT TO SCALE)



2017001889  
 PLAT LARGE  
 RECORDING FEES \$20.00  
 PREPARED & RECORDED:  
 02-09-2017 11:20 AM  
 JOHN LANE  
 REGISTER OF DEEDS  
 LANCASTER COUNTY, SC  
 BY: CANDICE PHILLIPS DEPUTY  
**BK: PLAT 2017**  
**PG: 83-83**

LANCASTER COUNTY RECORDING STAMP



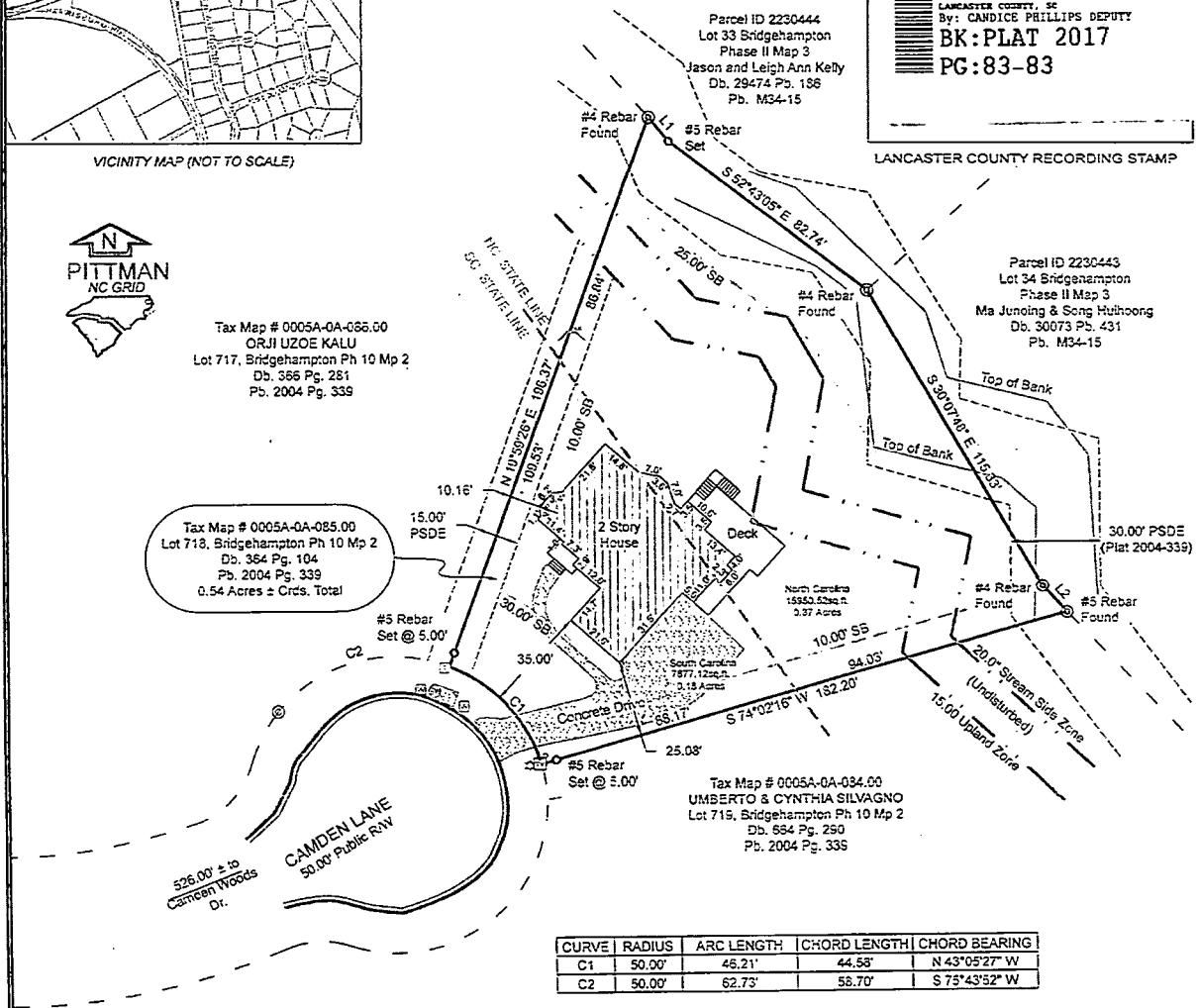
Tax Map # 0005A-0A-066.00  
 ORJI UZOE KALU  
 Lot 717, Bridgehampton Ph 10 Mp 2  
 Db. 366 Pg. 281  
 Pb. 2004 Pg. 339

Tax Map # 0005A-0A-085.00  
 Lot 718, Bridgehampton Ph 10 Mp 2  
 Db. 384 Pg. 104  
 Pb. 2004 Pg. 339  
 0.54 Acres ± Grds. Total

Parcel ID 2230444  
 Lot 33 Bridgehampton  
 Phase II Map 3  
 Jason and Leigh Ann Kelly  
 Db. 29474 Pb. 156  
 Pb. M34-15

Parcel ID 2230443  
 Lot 34 Bridgehampton  
 Phase II Map 3  
 Ma Junoing & Song Huthoong  
 Db. 30073 Pb. 431  
 Pb. M34-15

Tax Map # 0005A-0A-084.00  
 UMBERTO & CYNTHIA SILVAGNO  
 Lot 715, Bridgehampton Ph 10 Mp 2  
 Db. 534 Pg. 250  
 Pb. 2004 Pg. 335



CURVE	RADIUS	ARC LENGTH	CHORD LENGTH	CHORD BEARING
C1	50.00'	46.21'	44.58'	N 43°05'27" W
C2	50.00'	62.73'	58.70'	S 75°43'52" W

LINE	BEARING	DISTANCE
L1	S 39°38'16" E	10.45'
L2	S 41°48'53" E	12.13'

Flood Certification:  
 This Project DOES NOT lie within a F.E.M.A. Special flood hazard per Map # 45057C0040D dated June 16, 2011 and Map # 3710444500L dated February 19, 2014.



General Notes:  
 1. Measurements on this map are in feet and decimals thereof.  
 2. All set corners are #5 (5/8") Rebar unless otherwise noted.  
 3. This plat is subject to any Easements, Agreements, or Rights of Ways of Record prior to date of this plat, which was not visible at the time of our survey.

References:  
 1. As Shown.  
 No new lots or property lines established.

Certification:  
 I, hereby state to the best of my professional knowledge, information and belief, the survey shown herein was made in accordance with the requirements of the Standards Of Practice Manual for Land Surveying in South Carolina, and meets or exceeds the requirements for a class "A" survey as specified therein; also there are no visible encroachments, or projections other than shown.

Signed  
 James Jeter Pittman PLS#14815  
 jeter@pjsurvey.com

- LEGEND
- WATER METER
  - CABLE BOX
  - LIGHT POLE
  - TELEPHONE PEDESTAL
  - ⊙ STORM DRAIN MANHOLE
  - - - SETBACK LINE
  - FOUND PROPERTY CORNER
  - SET PROPERTY CORNER
  - ⊙ CALCULATED POINT

BOUNDARY AND PHYSICAL SURVEY FOR  
**NEW YORK COMMUNITY BANK**  
 LOCATED AT  
 30245 CAMDEN LANE  
 MECKLENSBURG COUNTY PROVIDENCE TWP NORTH CAROLINA  
 LANCASTER COUNTY INDIAN LAND TWP SOUTH CAROLINA

**PITTMAN**  
 professional land surveying



WWW.PPLLSURVEY.COM  
 P.O. BOX 1312, FORT MILL, SC 29716 (803) 547-7329