

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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**RECEIVED**

MAY 17 2017

APPEAL FROM YORK COUNTY  
Court of Common Pleas  
S. Jackson Kimball, Circuit Court Judge

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**SC Court of Appeals**

C.A. Nos: 2013-CP-46-00438; 2013-CP-46-00440  
Appellate Case No. 2016-001272

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Robert Clay Sparrow and Mickey Crowe ..... Respondents;

v.

Fort Mill Holdings, LLC, David Baucom and Maurer  
Holdings, LLC ..... Appellants.

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**AMICUS CURIAE BRIEF  
OF BRIAN MCCOY**

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## **STATEMENT OF ISSUES**

1. Whether the application of the North Carolina anti-deficiency statute in a South Carolina action violates South Carolina public policy?
2. Whether Appellants suffered substantial injustice or loss when the South Carolina circuit court judge ruled that the settlement agreement should be enforced?

## **STATEMENT OF THE CASE**

The amicus curiae, Brian McCoy, defers to the briefs of Appellants and Respondents for the statement of the case.

## INTRODUCTION

The amicus curiae, attorney Brian McCoy (“Amicus”), represented Appellants in the foreclosure cases below. Amicus takes no position on the outcome of the pending appeal, but believes that an important aspect of law in the case was not adequately addressed by the parties to the appeal due to the posture of the case. Specifically, whether the North Carolina anti-deficiency statute N.C. Gen. Stat. § 45-21.38 (the “Anti-Deficiency Statute”) would have any application in this case had it not settled. As set forth herein, Amicus contends that it would not apply, and this Court should consider that in deciding this appeal.

The underlying facts are that Appellants signed promissory notes<sup>1</sup> secured by mortgages on properties located in South Carolina. The promissory notes contain provisions stating that the notes are governed by the law of North Carolina. The mortgages contain no choice of law provision, and presumably it is undisputed that South Carolina law governs the mortgages because the property is located in South Carolina. See Leasing Enters., Inc. v. Livingston, 294 S.C. 204, 363 S.E.2d 410 (Ct. App. 1987) (finding the law of the situs would be applied in a case involving transfers or security interests in land).

Appellants argue the trial court erred in enforcing a settlement because they were unaware of a North Carolina statute that prohibits deficiency judgments in seller-financed purchase money transactions. (App. Br. 6-7). Appellants assert that, had they known of this North Carolina anti-deficiency statute, they would not have entered into the settlement agreement. (Id.). Appellants assert, “[t]his is not a situation in which the applicable law was uncertain or whether there were risks and benefits to be weighed in deciding whether to settle the case.” (App. Reply Br. 1). However, Appellants fail to address whether a South Carolina court will apply the North Carolina anti-deficiency statute when the property is located in South

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<sup>1</sup> The individual Appellant David Baucom signed as “guarantor.”

Carolina and governed by a mortgage recorded in South Carolina and controlled by South Carolina law. There is no South Carolina case law applying the North Carolina anti-deficiency statute under these circumstances. See, e.g., D.R. Allen & Son v. Harwal, Inc., 307 S.C. 315, 414 S.E.2d 805 (1992) (discussing the North Carolina anti-deficiency statute, but determining the case did not involve a deficiency judgment; thus, the North Carolina anti-deficiency statute was not implicated).

### LAW/ANALYSIS

#### **I. The North Carolina Anti-Deficiency Statute Does Not Apply Under the Facts of This Case.**

##### **A. South Carolina Will Not Enforce a Foreign Law That Violates Its Public Policy.**

South Carolina choice of law rules provide “contracts are to be governed as to their nature, validity, and interpretation by the law of the place where they are made, unless the contracting parties clearly appear to have had some other place in view.” Lister v. NationsBank of Delaware, N.A., 329 S.C. 133, 494 S.E.2d 449 (Ct. App. 1997). Contracting parties may indicate the applicable law in their agreement, and South Carolina courts will generally honor this choice of law. Nucor Corp. v. Bell, 482 F. Supp. 2d 714, 728 (D.S.C. 2007).

However, a choice of law provision in a contract will not be enforced if application of the foreign state law violates South Carolina public policy. Id.; Team IA, Inc. v. Lucas, 395 S.C. 237, 249, 717 S.E.2d 103, 109 (Ct. App. 2011); Standard Register Co. v. Kerrigan, 238 S.C. 54, 70-71, 119 S.E.2d 533, 541-42 (1961) (“The contract with which we are here concerned provides that it shall be construed according to the law of the State of Ohio, but if it is invalid under the law of the State where it is to be performed and contrary to our public policy, we will not enforce it.”). “[T]he fact that the law of two states may differ does not necessarily imply that the law of

one state violates the public policy of the other.” Nash v. Tindall Corp., 375 S.C. 36, 41, 650 S.E.2d 81, 84 (Ct. App. 2007). Instead, the foreign law must be “against good morals or natural justice” or “for some other such reason the enforcement of it would be prejudicial to the general interests of our own citizens.” Boone v. Boone, 345 S.C. 8, 13, 546 S.E.2d 191, 193 (2001); see also Rogers v. Lee, 414 S.C. 225, 777 S.E.2d 402 (Ct. App. 2015).

**B. Foreign Law Violates South Carolina Public Policy if It Is a Radical Departure from South Carolina Law.**

South Carolina courts refuse to apply the law of a foreign state when it is such a radical departure from our own state law. In Boone, the Supreme Court refused to apply the Georgia law of interspousal immunity from tort liability because South Carolina favored a public policy of providing married persons with the same legal rights and remedies as unmarried persons. Id. at 14, 546 S.E.2d at 194. Recently, the Court of Appeals refused to apply a choice of law provision in an employment contract that contained nondisclosure provisions because those provisions essentially operated as non-compete provisions with no reasonable time restrictions, in violation of South Carolina public policy favoring the right of a person to use his talents to earn a living. Fay v. Total Quality Logistics, LLC, Op. No. 5471 (S.C. Ct. App. filed March 1, 2017).

The federal court in South Carolina has also refused to apply the law of a foreign state where that law was a radical departure from the law of South Carolina. In Mizell v. Eli Lilly & Co., 526 F. Supp. 589 (D.S.C. 1981), the plaintiff argued California’s “market share” liability theory applied under South Carolina choice of law rules. Id. at 595. California courts recognized the market share liability theory, which allowed a plaintiff in a products liability case to shift the burden of proof for proximate causation to a defendant who did not necessarily manufacture the product at issue but was responsible for a market share of it. Id. The United

States District Court for South Carolina concluded the market share liability theory was a radical departure from South Carolina products liability law and violated the settled South Carolina rule that a plaintiff was required to prove his injury was caused by the tortious conduct of a particular defendant. Id.

**C. North Carolina's Public Policy Behind the Anti-Deficiency Statute Conflicts with South Carolina Public Policy.**

In seller-financed real estate transactions, North Carolina appears to have a strong public policy to protect buyers against deficiency judgments. See N.C. Gen. Stat. § 45-21.38. Applying the North Carolina anti-deficiency statute would violate South Carolina's public policy because the South Carolina deficiency judgment statute is unique and drastically contrasts with the North Carolina anti-deficiency statute. See Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Ret. Group, Inc., 302 S.C. 223, 394 S.E.2d 849 (Ct. App. 1990) (noting the uniqueness of the South Carolina deficiency judgment statute because other states statutes granted discretion to courts with entering a deficiency judgment).

North Carolina favors a strong public policy of protecting buyers in seller-financed transactions, whereas South Carolina's public policy protects sellers who are unable to secure the full debt obligation when a buyer defaults on a mortgage. See Perpetual Bldg. & Loan Ass'n of Anderson v. Braun, 270 S.C. 338, 341, 242 S.E.2d 407, 408 (1978) ("It is not implicit in the taking of a mortgage that the creditor is to look only to the property for satisfaction of the debt."). The North Carolina anti-deficiency statute is a radical departure from the well-settled rule in South Carolina that a mortgagee cannot receive full and equitable relief in a foreclosure action unless the court awards a deficiency judgment. See Bartles v. Livingston, 282 S.C. 448, 461, 319 S.E.2d 707, 715 (Ct. App. 1984) (noting there is no discretion in South Carolina to cut off the right to a deficiency judgment after the sale of property); Mizell, 526 F. Supp. at 595

(refusing to apply California law that was a radical departure from well-settled law in South Carolina); Boone, 345 S.C. at 13, 546 S.E.2d at 193 (same).<sup>2</sup>

Contrary to Appellants' arguments, it is not clear a South Carolina court would apply the choice of law provision within the promissory note to deny Respondents' right to a deficiency judgment. Deficiency judgments are an imposition of personal liability on a mortgagor for the unpaid balance of mortgage debt after the foreclosure of the property fails to yield the full amount of debt that is due. The North Carolina legislature abolished deficiency judgments in purchase money transactions where the foreclosure on the property yielded an insufficient amount to satisfy the indebtedness. N.C. Gen. Stat. § 45-21.38. In North Carolina, the holder of a purchase money mortgage is limited to the recovery of the property or the proceeds received from the sale of the property only. Id.; In re Rogers, 494 B.R. 664 (Bankr. E.D.N.C. 2013). Thus, North Carolina favors a public policy of protecting buyers in purchase money transaction from a seller foreclosing on the property and then seeking a deficiency judgment. See Rutherford Plantation, LLC v. Challenge Golf Group of Carolinas, LLC, 737 S.E.2d 409, 413 (N.C. 2013). As Appellants note in their briefs, the benefits of the anti-deficiency statute cannot

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<sup>2</sup> Other jurisdictions have similarly found a strong public policy interest in protecting their deficiency statutes. See, e.g., Verreaux v. D'Onofrio, 824 P.2d 1021 (Nev. 1992) ("Nevada has a strong interest in protecting the efficacy of the deficiency statute with respect to out of state owners of Nevada real property."); Key Bank v. Donnels, 787 P.2d 382 (Nev. 1990) (refusing to apply California's anti-deficiency statute that derogated from common law); California Fed. Sav. & Loan Ass'n v. Bell, 735 P.2d 499, 506 (Haw. Ct. App. 1987) (refusing to apply California's anti-deficiency statute because Hawaii had a strong interest in maintaining predictable results in disputes over transactions involving land in Hawaii and upholding its law relating to real estate transactions); see also 1 The Law of Debtors and Creditors § 8:20 Enforcement of the mortgage: default, receivership, and foreclosure ("Difficult conflict-of-law questions can arise concerning anti-deficiency judgment legislation.").

be waived because North Carolina favors such a broad public purpose of abolishing deficiency judgments. Chemical Bank v. Belk, 255 S.E.2d 421, 427 (N.C. Ct. App. 1979).

In contrast, South Carolina courts must award a deficiency judgment in a foreclosure action when the property fails to yield the full amount of the debt due. See American Gen. Fin. Servs., Inc. v. Brown, 376 S.C. 580, 583-84, 658 S.E.2d 99, 100-01 (2008); Perpetual Bldg. & Loan Ass'n of Anderson v. Braun, 270 S.C. at 343, 242 S.E.2d at 409; Bartles v. Livingston, 282 S.C. at 460, 319 S.E.2d at 714. The right to a deficiency judgment is provided by section 29-3-660 of the South Carolina Code, which states:

In actions to foreclose mortgages the court may adjudge and direct the payment by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage.

Pursuant to section 29-3-660, a South Carolina court has “inherent power” to issue a decree for a deficiency in a foreclosure action. Id. In a concurring opinion, Judge Cureton noted the South Carolina deficiency statute was unique because other state statutes, in that case Florida and Pennsylvania, gave their courts discretion in entering a deficiency judgment whereas South Carolina mortgagees were entitled to a deficiency judgment. Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Ret. Group, Inc., 302 S.C. at 232, 394 S.E.2d at 854 (Cureton, J., concurring).

A deficiency judgment in South Carolina is such an incident of foreclosure that a party may receive a deficiency judgment even if he does not plead specifically for a deficiency judgment. Braun, 270 S.C. at 341, 242 S.E.2d at 408. Unlike North Carolina, in South Carolina, “[i]t is not implicit in the taking of a mortgage that the creditor is to look only to the property for satisfaction of the debt.” Id. at 340, 242 S.E.2d at 408. The Supreme Court has characterized a deficiency judgment “as a sequel to foreclosure [that] is taken as a matter of

course” and “merely incidental to the relief sought [in] a foreclosure action.” Id. at 341, 242 S.E.2d at 408; see also Brown, 376 S.C. at 583, 658 S.E.2d at 100.

Traditionally, an action for foreclosure is based in equity and an action for a judgment is based in law; however, South Carolina courts have long since abandoned that strict distinction in foreclosure actions. Braun, 270 S.C. at 343, 242 S.E.2d at 409. An action for foreclosure in South Carolina is a proceeding *in personam* and *in rem*, which means a court can grant a deficiency judgment in a foreclosure suit to administer full equitable and legal relief to the mortgagee. See id. at 342, 242 S.E.2d at 409 (“This construction is consistent with the maxim that equity upon obtaining jurisdiction of an action will administer full equitable and legal relief.”); Carolina First Bank v. BADD, L.L.C., 414 S.C. 289, 778 S.E.2d 106 (2015) (providing a deficiency judgment is an intricate part of a foreclosure action in South Carolina). Thus, in South Carolina, the right to a deficiency judgment in a foreclosure proceeding is a significant right to ensure full payment of the buyer’s debt obligation when secured by property located in South Carolina. Braun, 270 S.C. at 340, 242 S.E.2d at 408.

**D. The North Carolina Anti-Deficiency Statute is Procedural and Cannot Apply in South Carolina.**

Even when the parties to a contract include a choice of law provision, South Carolina and a large majority of states will still apply the procedural law of the forum state. See In re Ashe, C/A No. 14-045241-HB, 2016 WL 1084282 (Bankr. D.S.C. 2016) (holding the procedural rules of the forum state, South Carolina, applied despite a choice of law provision in the parties’ contract providing it was governed by Utah law) (citing Georgia Bank & Trust Co. of Augusta v. Trener, C/A No. 3:08-2371-JFA, 2010 WL 3271732 at \*1 (D.S.C. Aug. 18, 2010) (applying South Carolina’s statute of limitations even though the contract provided that Georgia law applies); Skywaves I Corp. v. Branch Banking & Trust Co., C/A No. 2009-CP-10-7516 (S.C.

Cir. Feb. 9, 2015) (“Parties to a contract are free to include in their agreement a provision as to the applicable law; however, such an agreement would only be effective as to substantive issues, and would not be used by the forum as a reference point for determining, for instance, the applicable statute of limitations.”).<sup>3</sup> The North Carolina anti-deficiency statute has been held by the North Carolina Supreme Court to be procedural. Bullington v. Angel, 16 S.E.2d 411 (N.C. 1941). Similarly, the deficiency provisions of the South Carolina foreclosure laws are part and parcel of the procedural scheme. Thus, the promissory note may be governed by North Carolina law with respect to issues regarding validity of its formation and other substantive matters, but North Carolina’s procedural law will not apply in South Carolina. The reason that the forum state applies its procedural laws even if a choice of law provision selects a different state’s substantive law is sound and can be illustrated by the facts of this case. It would be inconceivable that the North Carolina procedures for a foreclosure could be imposed on a South Carolina court, such as the North Carolina non-judicial foreclosure process.

**II. Appellants Did Not Suffer Substantial Injustice when the Trial Court Enforced the Settlement Agreement Because the Terms Were Beneficial.**

Although Appellants contend that they would not have entered into the Mediation Settlement Agreement if they had known about the North Carolina anti-deficiency statute, the settlement agreement was beneficial. As with any litigation, Appellants faced risk, and the mediation was an opportunity to resolve the dispute to avoid these risks. In each of the underlying cases in this appeal, Appellants filed “Motion to Dismiss of Baucom, and Answer and Counterclaims of Defendants.” In the Motion and Answer, Appellants pled that they were not responsible for a deficiency based on various defenses and facts. (R. pp. 79-96). Thus, Appellants had pled (and could pursue at a hearing or trial) the very same relief they are now

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<sup>3</sup> The Ashe Court also noted that other states will not recognize a choice of law provision as being applicable to procedural matters unless the choice-of-law provision expressly provides that it is applicable to procedural matters.

advocating, i.e. no deficiency. Thus, Appellants were aware they could have proceeded to a hearing or trial and defended against a deficiency judgment. Appellants cannot justify rescinding the settlement agreement based on an opinion of law that was not firmly established when the parties entered into the agreement. See, e.g., Smothers v. U.S. Fid. & Guar. Co., 322 S.C. 207, 211, 470 S.E.2d 858, 860-61 (Ct. App. 1996) (refusing to rescind a release because the appellants relied on an opinion of a novel legal issue, which later proved to be incorrect).

In addition, the mediation and resulting settlement agreement were beneficial to Appellants, especially when considering a South Carolina court could have foreclosed the property and granted a deficiency judgment. The case was ready to proceed to foreclosure hearing. As with any litigation, Appellants faced risk, and the mediation was an opportunity to resolve the dispute to avoid these risks. Under the settlement agreement, Appellants had the opportunity to sell the property on the open market by listing it with a real estate professional and owe nothing to Respondents. (R. pp. 482-83). Through the settlement, Appellants could have profited from the sale of the property under the terms of the agreement if the sale price of the property on the open market was more than the contingent confession of judgment. (Id.).

Moreover, at the time of the mediation, there were past due property taxes and the properties were in danger of being sold at a tax sale. Such a result could cause a loss of the entire collateral, which would be devastating for both lenders and purchasers. The settlement required the lenders (Respondents) to pay the back taxes in the amount of \$70,595.46. After the settlement, this amount was paid by the lenders, which obviously was a tremendous benefit to Appellants. Accordingly, there are many reasons that the settlement agreement was beneficial to Appellants at the time it was entered.

**CONCLUSION**

For the reasons cited within this brief, this Court should find the North Carolina statute did not apply in this case. Accordingly, Appellants' argument that the settlement agreement violates applicable law and public policy fails.

The undersigned certifies that the enclosed Amicus Curiae Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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**AMICUS CURIAE BRIEF  
OF BRIAN McCOY**

May 17, 2017  
Columbia, South Carolina

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, Circuit Court Judge

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MAY 17 2017

**SC Court of Appeals**

C.A. Nos: 2013-CP-46-00438; 2013-CP-46-00440  
Appellate Case No. 2016-001272

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Robert Clay Sparrow and Mickey Crowe ..... Respondents,

v.

Fort Mill Holdings, LLC, David Baucom and Maurer  
Holdings, LLC ..... Appellants.

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**PROOF OF SERVICE**

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I hereby certify that I served the **Amicus Curiae Brief of Brian McCoy** upon all parties by placing a copy in the United States mail, postage prepaid, to the below listed parties on May 17, 2017, addressed to the following:

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FOR LEAVE TO FILE  
AMICUS CURIAE BRIEF**

Columbia, South Carolina  
May 17, 2017



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May 17, 2017

**VIA HAND DELIVERY**

The Honorable Jenny A. Kitchings  
South Carolina Court of Appeals  
1220 Senate Street  
Columbia, South Carolina 29201

RECEIVED

MAY 17 2017

SC Court of Appeals

**Re: *David Baucom, Fort Mill Holdings, LLC and Maurer Holdings, LLC adv. McCoy Law Firm and Brian McCoy, Esquire***  
***Claim No. 33799***  
***Appellate File No. 2016-001272***  
***C&L File No. 001326-00139***

Dear Ms. Kitchings:

Please find enclosed the original unbound Motion for Leave to File an Amicus Curiae Brief and original unbound Amicus Curiae Brief in connection with the above referenced matter. Also enclosed are seven (7) copies of the Motion, our firm's check in the amount of \$25.00, representing the motion filing fee and sixteen (16) bound copies of the Amicus Curia Brief. Please file the originals and return a clocked copy of each to our courier.

By copy of this correspondence and enclosure, we are serving counsel of record.

Respectfully,

A handwritten signature in black ink, appearing to read "Karen C. Ratigan". The signature is fluid and cursive.

Karen C. Ratigan

KCR/mmm

Enclosures

cc: Paul S. Landis, Esquire  
James M. Griffin, Esquire  
Margaret N. Fox, Esquire