

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No.: 2009-CP-26-5743

Hotel and Motel Holdings, LLC,

Respondent,

v.

BJC Enterprises, LLC, Wendy J. Bellamy,
Americana, Inc., a/k/a Americana Motel of
Myrtle Beach, Inc., Mozingo & Wallace
Architects, LLC, Kersi S. Shroff, and
Shroff Management, Inc.,

Defendants,

BJC Enterprises, LLC, Wendy J. Bellamy,
Americana, Inc., a/k/a Americana Motel of
Myrtle Beach, Inc.,

Appellants,

v.

First Palmetto Savings Bank, F.S.B.,
Jack Jones, Donald D. Godwin, and
Bhupendra Patel,

Respondents

PETITION FOR WRIT OF SUPERSEDEAS AND/OR
CLARIFICATION AS TO AUTOMATIC STAY IN
LOWER COURT DURING APPEAL

Appellants BJC Enterprises, LLC, Wendy J. Bellamy, and Americana, Inc.

(hereafter "Hotel Owners") seek an order granting supersedeas and/or clarifying and

confirming that trial of Respondent Hotel and Motel Holdings, LLC's (hereafter "H&M") complaint for claim and delivery and foreclosure of mortgages is automatically stayed pursuant to S.C. Code Ann. §18-9-220(1976) and Rule 205 and Rule 241(a), SCRCP. Appellant Hotel Owners have sought relief from the lower court by filing on January 3, 2012 a Motion to Stay Plaintiff's Foreclosure Claims and Case and/or to Reconsider the Court's Informal Decision to Proceed with Foreclosure Claims of Plaintiff H&M. See Exhibit A attached hereto and incorporated herein. This motion is still pending and it is hoped that the Circuit Court will hear Appellants' Motion to Stay prior to the trial that is scheduled to begin on Tuesday, May 29, 2012. If the trial judge agrees with Appellants and stays the trial, Appellant Hotel Owners will immediately notify the Court of Appeals and seek dismissal of this Petition. Out of an abundance of precaution, Appellant Hotel Owners are filing this Petition in the event the Circuit Court denies their motion prior to trial and seeks to move forward with the nonjury trial at that time. Due to these extraordinary circumstances, Appellant Hotel Owners bring this matter to the Court of Appeals for consideration prior to having a ruling by the trial court and will supplement this Petition with the lower court's certified Order if the Motion to Stay is denied or is not heard.

Appellant Hotel Owners have appealed two interlocutory orders: the order of the Circuit Court striking their demand for a jury trial on Respondent H&M's claim and delivery cause of action; and the lower court's granting of summary judgment to Respondent on Appellants' counterclaims. Hotel Owners brought affirmative defenses/counterclaims against Respondent H&M for breach of contract, breach of contract with fraud, fraud, civil conspiracy, conversion, tortious interference with the

lending contract, unfair trade practices, and outrage related to the note underlying Respondent's claim and delivery and foreclosure complaint, the transfer of that Note by First Palmetto to Plaintiff H&M, and the circumstances surrounding that transfer. The lower court's denial of Appellants' right to a jury trial on the claim and delivery action affects the mode of trial and is immediately appealable under S.C. Code Ann. §14-3-330(2) (1976). Likewise, the granting of summary judgment on Appellant Hotel Owners' counterclaims in effect determines those counterclaims and prevents a judgment for which an appeal might be taken under S.C. Code Ann. §14-3-330(2)(a) and strikes out an answer and pleading in the case pursuant to §14-3-330(2)(c) and is immediately appealable. Appellant Hotel Owners filed their Notices of Appeal, attached hereto as Exhibits B and C, and thus the trial of Respondent's claim and delivery and foreclosure claims were or should be stayed pursuant to S.C. Code Ann. §18-9-220, Rule 205 and Rule 241(a), SCACR. Plaintiff H&M is attempting to go forward with the trial of their case on May 29, 2012 on causes of action for foreclosure of three mortgages and one claim and delivery action.

The Circuit Court's trial of Respondent H&M's claims while this appeal is pending will affect matters that are the subject of the appeal and is thus stayed pursuant to Rule 205, and Rule 241(a), SCACR. The Appellant Hotel Owners' right to a jury trial on the claim and delivery cause of action affects the mode of trial and is essentially rendered moot if the Circuit Court goes forward with a bench trial. Rule 38(a), SCRCR; Bateman v. Rouse, 358 S.C. 667, 596 S.E.2d 386 (Ct. App. 2004); Lester v. Dawson, 327 S.C. 263, 491 S.E.2d 240 (1997). Also, and importantly, the factual and legal issues as to the enforceability of the debt which underlies the foreclosure and claim and delivery claims

are the same matters that are the subject of the appeal on Appellants' counterclaims. Thus, the matters which the lower court now seeks to try are affected by the appeal. The counterclaims on appeal affect the enforceability of the 2008 Note by H&M which is the underlying basis for Respondent's foreclosure and claim and delivery action. The debt for which the mortgages were given must first be established before any sale of foreclosed property will be valid to pass title. S.C. Code Ann. §29-3-630. There are common factual and legal issues in the Respondent's foreclosure and claim and delivery case and Appellant Hotel Owners' counterclaims on appeal including: determination of a debt owed, Respondent's right to collect under the Note, and calculation of amount owed. Until these factual and legal issues are determined which are all affected by Appellant Hotel Owners' counterclaims, it is impossible to determine if Respondent is entitled to foreclose. Gardner v. Travis, 316 S.C. 315, 450 S.E.2d 54 (Ct. App. 1994); Johnson v. SCN, 292 S.C. 51, 354 S.E.2d 895 (1987); Jones v. Barco, Inc., 250 S.C. 522, 159 S.E.2d 279 (1968).

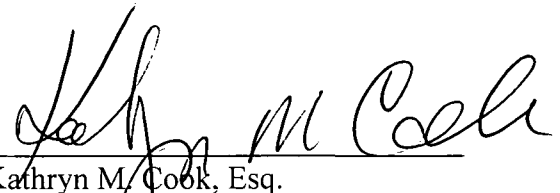
The Court of Appeals has exclusive jurisdiction of these matters pursuant to Rule 205, SCACR. An order of the Court of Appeals granting this Petition for Writ of Supersedeas is necessary to preserve jurisdiction of the appeal and prevent the issue of Appellants' right to a jury trial from becoming moot will be the case if a bench trial proceeds forward now on Respondents' claims.

CONCLUSION

Trial of Respondent H&M's claims for claim and delivery and foreclosure are stayed during Appellant Hotel Owners' appeal of their right to a jury trial on the claim and delivery cause of action and as to the striking of their counterclaims by summary

judgment pursuant to S.C. Code Ann. §14-3-330(2), §18-9-220, and Rules 205 and 241(a), SCACR. Appellants respectfully request that the Court of Appeals issue a writ of supersedeas staying the proceedings in the Circuit Court and/or clarifying that the trial of this case is stayed during the duration of this appeal.

May 24, 2012



Kathryn M. Cook, Esq.
SC Bar No. 1371
Cook & Roy LLC
Post Office Box 4086
N. Myrtle Beach, SC 29597
(843)663-1200
Fax: (843)663-0364
Email: kcook@cookandroy.com
Attorneys for Appellants BJC
Enterprises, LLC and Americana,
Inc.

Other Counsel of Record:

R. Wayne Byrd, Esq.
Audra M. Byrd, Esq.
Turner Padgett Graham & Laney, P.A.
PO Box 2116
Myrtle Beach, SC 29578
(843) 213-5500
Attorneys for the Respondents Hotel and Motel Holdings, LLC,
Donald Godwin, and Jack Jones

William W. DesChamps, Jr., Esq.
William W. "Trey" DesChamps, III, Esq.
DesChamps Law Firm
PO Box 2402
Myrtle Beach, SC 29578
(843) 448-2391
Attorney for Respondent Bhupendra Patel

William H. Short, Esq.
Haynsworth Sinkler Boyd, PA
PO Box 11889

Columbia, SC 29211
(803) 540-7823
Attorney for Respondent First Palmetto Savings Bank, FSB

Scott B. Umstead, Esquire
4226 Mayfair Street, Suite 100
Myrtle Beach, SC 29578
(843) 913-4610
Attorneys for Defendant Mozingo & Wallace
Architects, LLC

Susan P. MacDonald, Esquire
Nelson Mullins Riley & Scarborough, LLP
Post Office Box 3939
Myrtle Beach, SC 29578-3939
(843) 946-5654
Attorneys for Defendants Kersi S. Shroff and
Shroff Management, Inc.

EXHIBIT A

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2009-CP-26-5743

Hotel and Motel Holdings, LLC,)

Plaintiffs)

v.)

BJC Enterprises, LLC, Wendy J. Bellamy,)
Americana, Inc., a/k/a Americana Motel of)
Myrtle Beach, Inc., Mozingo & Wallace)
Architects, LLC, Kersi S. Shroff, and)
Shroff Management, Inc.,)

Defendants)

BJC Enterprises, LLC, Wendy J. Bellamy,)
and Americana, Inc. a/k/a Americana Motel)
of Myrtle Beach, Inc.,)

Third-Party Plaintiffs)

v.)

First Palmetto Savings Bank, F.S.B.,)
Jack Jones, Donald D. Godwin, and)
Bhupendra Patel,)

Third-Party Defendants)

Defendants/Third-Party Plaintiffs' Motion
to Stay Plaintiff's Foreclosure Claims and
Case and/or Reconsider the Court's
Informal Decision to Proceed with
Foreclosure Claims of Plaintiff H&M

HORRY COUNTY
12 JAN -3 PM 4:50
JELANE HUGHES-WARD
CLERK OF COURT

TO: PLAINTIFF HOTEL AND MOTEL HOLDINGS, LLC, THIRD-PARTY
DEFENDANTS JACK JONES, DONALD D. GODWIN, BHUPENDRA PATEL, AND
FIRST PALMETTO SAVINGS BANK, F.S.B. AND THEIR RESPECTIVE
ATTORNEYS, AUDRA M. BYRD, R. WAYNE BYRD, WILLIAM W. DESCHAMPS,
JR., WILLIAM W. DESCHAMPS, III, AND WILLIAM H. SHORT

YOU WILL PLEASE TAKE NOTICE that the undersigned will move before the
Honorable William H. Seals, Jr. within ten days hereafter or as soon as counsel may be heard for
an order to stay the trial of the foreclosure claims and the trial of the entire case due to

Defendants' pending appeal and/or reconsider the Court's informal email decision of December 22, 2011. Pursuant to Rules 205 and 241, SCACR and S.C. Code Ann. §18-9-220 and §14-3-330(2), the trial of Plaintiff's foreclosure claims are stayed and the Circuit Court is divested of jurisdiction in this case. For the Court's information, the four (4) orders appealed in this case were consolidated on appeal by the South Carolina Court of Appeals on December 22, 2011.

BJC Defendants/Third-Party Plaintiffs request that this motion be heard and a proper record be made of the same. The grounds of this motion are that Plaintiff's foreclosure claims and the remainder of the case are automatically stayed pursuant to S.C. Code Ann. §18-9-220 and §14-3-330(2) pursuant to the interlocutory appeal of Judge Seals' four orders set out in BJC Defendants' Memorandum Regarding Automatic Stay Pending Appeal, filed 12/28/11, which is incorporated herein by reference. Since the matters that must be decided in H&M's foreclosure claims are **affected** by the orders on appeal, pursuant to Rules 205 and 241(a), SCACR, the Circuit Court may not proceed with the trial of the foreclosure claims and does not have jurisdiction over the claims. Also, the issues in the foreclosure claims are affected by the mode of trial to which Defendants are entitled, which is the subject of an appealed order. The defenses and counterclaims that Defendants are entitled to have heard in the foreclosure claims are the subject of the other three appealed orders.

BJC Defendants request that the Court stay the foreclosure proceeding and refrain from trying Plaintiff's claims during the pendency of the appeal and/or reconsider its December 22, 2011 email decision. In as much as the Court's decision to go forward with the trial of this case was as a result of email correspondence, not a motion and proceeding in court from which a record was made, Defendants set forth below the email string so a proper record can be had in the Court's file.

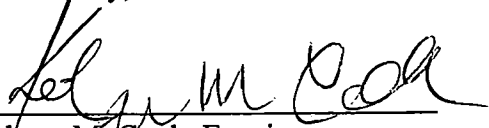
On December 14, 2011, Audra Byrd, counsel for Plaintiff Hotel and Motel Holdings, LLC (hereafter "H&M"), emailed Judge Seals and attached a letter requesting that the foreclosure claims be heard in this case during the Court's January 9, 201¹²~~1~~ term in Horry County. Judge Seals asked Attorney Byrd how long the case would take to try and she stated one hour and Judge Seals agreed to try the matter. See Exhibit A and B, attached hereto and incorporated herein. On December 15, 2011, Kathryn Cook, counsel for Defendants BJC Enterprises, LLC, Americana, Inc., and Wendy Bellamy (hereafter "BJC Defendants"), emailed Judge Seals to advise him that the case was stayed due to multiple appeals, including appeals from the Court's grant of summary judgment as to BJC Defendants' defenses and counterclaims and striking Defendants' jury trial demand. See Exhibit C, attached hereto and incorporated herein. Later on December 15, 2011, Attorney Byrd informed the Court that Plaintiff did not agree that the matter was stayed. At this point, Judge Seals informed the parties that he would get back to them shortly and advise on plans to proceed. See Exhibit D, attached hereto and incorporated herein. Around 4:00 P.M. on December 15, 2011, Judge Seals advised that per S.C. Code §18-9-170, the matter could go forward. See Exhibit E, attached hereto and incorporated herein. Attorney Cook advised the Court that §18-9-170 dealt with the stay of an actual "sale" of property if a foreclosure order had been rendered after a trial on the merits and directed the Court's attention to §18-9-220 as the proper statute governing this matter. See Exhibit F, attached hereto and incorporated herein. The Court then advised the parties that it would consider authority submitted and would decide the matter the following week. See Exhibit F. On December 21, 2011, Attorney Cook submitted the attached letter and a Memorandum Regarding Automatic Stay Pending Appeal. See Exhibit G, attached hereto and incorporated herein. On December 22, 2011, Attorney Byrd submitted the attached Memorandum of Law in Opposition

to Defendants' Request for Stay of Foreclosure Hearing. See Exhibit H, attached hereto and incorporated herein. Thereafter, on December 22, 2011, Judge Seals advised that upon a review of the briefs, the Court has jurisdiction to hear the foreclosure claims and set the same for January 9, 2012 at 10:00 A.M. See Exhibit I, attached hereto and incorporated herein.

This Motion will be supported by a Memorandum in Support, which will be filed prior to the motion hearing, and oral argument, which counsel request the Court allow so that a proper record can be made in this case. Because Plaintiff's foreclosure claims and claim and delivery action are affected by Defendants' appeal of orders striking their counterclaims, which constitute affirmative defenses, and for which Defendants seek set off as to Plaintiff's claims and effect the mode of trial to which Defendants are entitled, the circuit court no longer has jurisdiction in this case and the foreclosure claims cannot be tried.

Respectfully Submitted,

Cook & Roy, LLC


Kathryn M. Cook, Esquire
SC Bar No.: 1371
Post Office Box 4086
North Myrtle Beach, SC 29597
Phone: 843-663-1200
Fax: 843-663-0364
Email: kcook@cookandroy.com
Attorney for Defendants/Third-Party
Plaintiffs BJC Enterprises, LLC, Wendy J.
Bellamy, and Americana, Inc. a/k/a
American Motel of Myrtle Beach, Inc.

Date: January 3, 2012

North Myrtle Beach, SC

James Lewis

From: Seals, William [wsealsj@sccourts.org]
Sent: Thursday, December 15, 2011 9:26 AM
To: Byrd, Audra M.; Seals, William Law Clerk (Ryan Huntley)
Cc: Byrd, R. Wayne; Kif Cook; James Lewis; William H. Short Jr. Esquire (bshort@hsblawfirm.com); Susan MacDonald; Scott Umstead; Trey DesChamps; wwd@sc.rr.com
Subject: RE: Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC et al. - Civil Action Number: 2009-CP-26-05743
Attachments: image002.jpg; image003.jpg

Sure

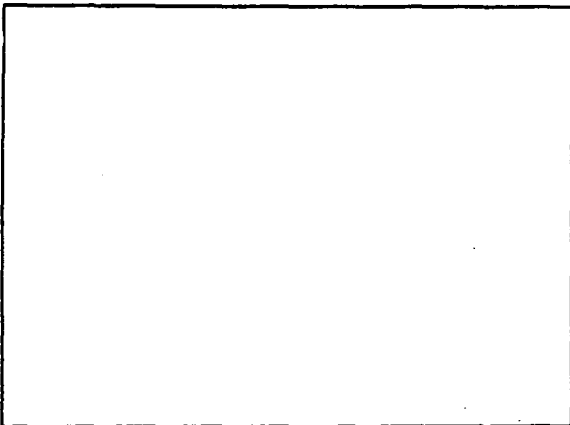
From: Byrd, Audra M. [mailto:AByrd@TurnerPadget.com]
Sent: Thursday, December 15, 2011 8:34 AM
To: Seals, William; Seals, William Law Clerk (Ryan Huntley)
Cc: Byrd, R. Wayne; Kathryn M. Cook Esquire (kcook@cookandroy.com); James Lewis; William H. Short Jr. Esquire (bshort@hsblawfirm.com); Susan MacDonald; Scott Umstead; Trey DesChamps; wwd@sc.rr.com
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Judge Seals,

We only anticipate one witness from the bank to establish the debt. Since it is a bench trial, our case could certainly be done in an hour.

Thank you again,

Audra



From: Seals, William [mailto:wsealsj@sccourts.org]
Sent: Thursday, December 15, 2011 7:49 AM
To: Byrd, Audra M.; Seals, William Law Clerk (Ryan Huntley)
Cc: Byrd, R. Wayne; Kathryn M. Cook Esquire (kcook@cookandroy.com); James Lewis; William H. Short Jr. Esquire (bshort@hsblawfirm.com); Susan MacDonald; Scott Umstead; Trey DesChamps; wwd@sc.rr.com
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How long will it take?

From: Byrd, Audra M. [<mailto:AByrd@TurnerPadget.com>]

Sent: Wednesday, December 14, 2011 12:33 PM

To: Seals, William Law Clerk (Ryan Huntley); Seals, William

Cc: Byrd, R. Wayne; Byrd, Audra M.; Kathryn M. Cook Esquire (kcook@cookandroy.com); James Lewis; William H. Short Jr. Esquire (bshort@hsblawfirm.com); Susan MacDonald; Scott Umstead; Trey DesChamps; wwd@sc.rr.com

Subject: Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC et al. - Civil Action Number: 2009-CP-26-05743

Importance: High

Dear Judge Seals and Mr. Huntley,

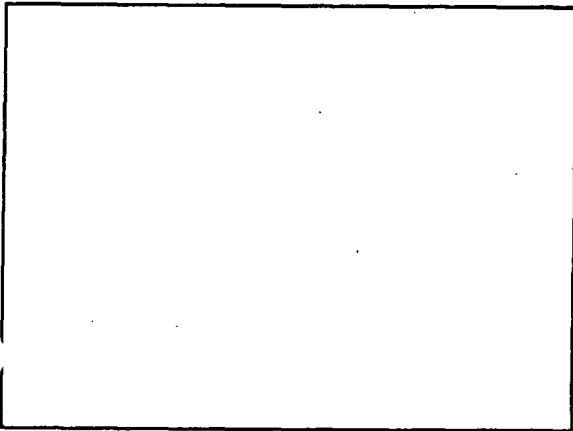
Please see the attached letter to you in the above matter.

If you have any problems opening the attachment, please let me know.

Thank you for your consideration.

With highest regards,

Audra Byrd



CIRCULAR 230 DISCLOSURE: To comply with Treasury Department regulations, we inform you that, unless otherwise expressly indicated, any tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties that may be imposed under the Internal Revenue Code or any other applicable tax law, or (ii) promoting, marketing or recommending to another party any transaction, arrangement, or other matter.

/..

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If you have received this communication in error or are not sure whether it is privileged, please immediately notify us by return e-mail and destroy any copies, electronic, paper or otherwise, which you may have of this communication.

TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

REPLY TO:

December 14, 2011

VIA E-MAIL TO ALL

The Honorable William H. Seals, Jr.
Circuit Court Judge, At-Large Seat 6
208 West Dozier Street
Marion, SC 29571

Re: **Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC et al.**
Civil Action Number: 2009-CP-26-05743
Our File Number: 10338.00101

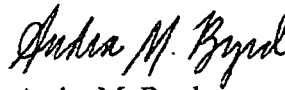
Dear Judge Seals and Mr. Huntley:

In reviewing the judicial assignments for the upcoming year, it appears that Your Honor has a term of Court in Horry County the week of January 9, 2012. On behalf of the plaintiff, Hotel & Motel Holdings, LLC, we would like to inquire as to whether Your Honor will be able to hold a bench trial of the above-referenced foreclosure action during that term of Court. We would greatly appreciate your time and consideration of this matter.

With highest professional regards, I am

Very truly yours,

TURNER, PADGET, GRAHAM & LANEY, P.A.


Audra M. Byrd

AMB:mmmb

TURNER PADGET

The Honorable William H. Seals, Jr.

December 14, 2011

Page 2

cc: Kathryn M. Cook, Esquire
William H. Short, Jr., Esquire
William DesChamps, Jr., Esquire
William W. DesChamps, III, Esquire
Susan P. MacDonald, Esquire
Scott B. Umstead, Esquire
R. Wayne Byrd, Esquire
Mr. Ryan Huntley

EXHIBIT B

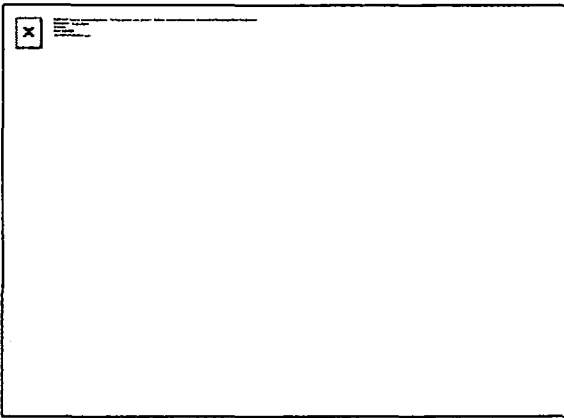
James Lewis

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Sent: Thursday, December 15, 2011 9:33 AM
To: Susan MacDonald; Byrd, R. Wayne; Kif Cook; Scott Umstead; William H. Short Jr. Esquire (bshort@hsblawfirm.com); Trey DesChamps; James Lewis
Subject: FW: Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC et al. - Civil Action Number: 2009-CP-26-05743
Attachments: image003.jpg

Judge Seals asked that I forward his response to everyone since he is having trouble with emails coming back to him as undeliverable.

Thanks,

Audra



From: Seals, William [mailto:wsealsj@sccourts.org]
Sent: Thursday, December 15, 2011 9:28 AM
To: Byrd, Audra M.
Subject: RE: Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC et al. - Civil Action Number: 2009-CP-26-05743

Sure. I tried to reply to all and something in the email kicks it back as undeliverable. Thus if you would pass this email on to all.

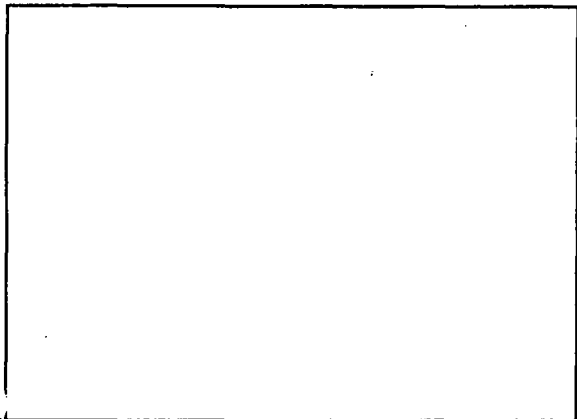
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Cc: Byrd, R. Wayne; Kathryn M. Cook Esquire (kcook@cookandroy.com); James Lewis; William H. Short Jr. Esquire (bshort@hsblawfirm.com); Susan MacDonald; Scott Umstead; Trey DesChamps; wwd@sc.rr.com

Subject: RE: Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC et al. - Civil Action Number: 2009-CP-26-05743

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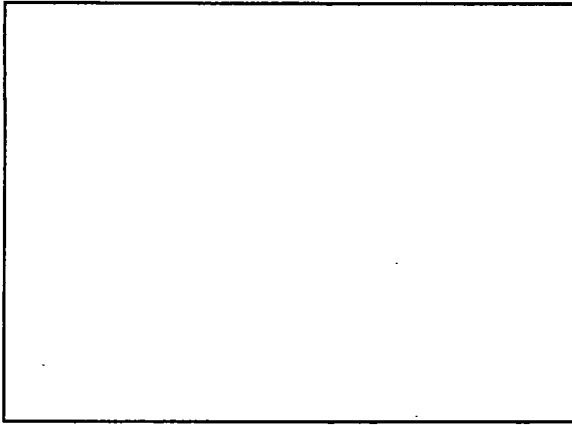
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James Lewis

From: Seals, William [wsealsj@sccourts.org]
Sent: Thursday, December 15, 2011 1:39 PM
To: Kif Cook; Byrd, Audra M.; Seals, William Law Clerk (Ryan Huntley)
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Subject: RE: Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC et al. - Civil Action Number: 2009-CP-26-05743
Attachments: image001.jpg; image002.jpg

Thanks for keeping me informed.

From: Kif Cook [mailto:Kif@cookandroy.com]
Sent: Thursday, December 15, 2011 1:18 PM
To: Byrd, Audra M.; Seals, William; Seals, William Law Clerk (Ryan Huntley)
Cc: Byrd, R. Wayne; James Lewis; bshort@hsblawfirm.com; Susan MacDonald; Scott Umstead; Trey DesChamps; wwd@sc.rr.com
Subject: RE: Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC et al. - Civil Action Number: 2009-CP-26-05743

Judge Seals, This case is stayed as a result of the multiple pending appeals which include the granting of several motions for summary judgment and the Court's striking of the jury trial. All of the matters are immediately appealable and stay the remainder of the case until the appeals are resolved.

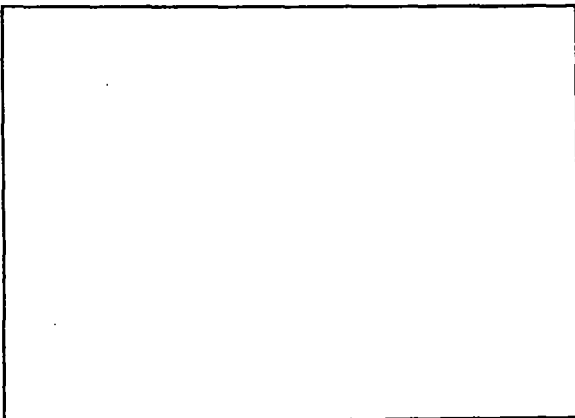
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Sent: Wednesday, December 14, 2011 12:33 PM

To: Seals, William Law Clerk (Ryan Huntley); Seals, William

Cc: Byrd, R. Wayne; Byrd, Audra M.; Kathryn M. Cook Esquire (kcook@cookandroy.com); James Lewis; William H. Short Jr. Esquire (bshort@hsblawfirm.com); Susan MacDonald; Scott Umstead; Trey DesChamps; wwd@sc.rr.com

Subject: Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC et al. - Civil Action Number: 2009-CP-26-05743

Importance: High

Dear Judge Seals and Mr. Huntley,

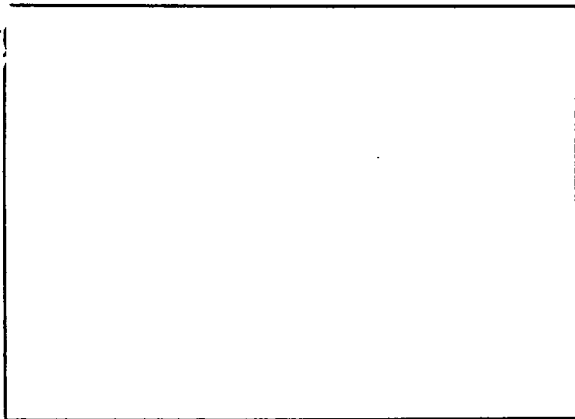
Please see the attached letter to you in the above matter.

If you have any problems opening the attachment, please let me know.

Thank you for your consideration.

With highest regards,

Audra Byrd



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1..

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James Lewis

From: Seals, William [wsealsj@sccourts.org]
Sent: Thursday, December 15, 2011 3:36 PM
To: Byrd, Audra M.; Kif Cook; Seals, William Law Clerk (Ryan Huntley)
Cc: Byrd, R. Wayne; James Lewis; bshort@hsblawfirm.com; Susan MacDonald; Scott Umstead; Trey DesChamps; wwd@sc.rr.com
Subject: RE: Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC et al. - Civil Action Number: 2009-CP-26-05743
Attachments: image001.jpg; image002.jpg

I will get back with you all shortly on how I plan to proceed.

From: Byrd, Audra M. [mailto:AByrd@TurnerPadget.com]
Sent: Thursday, December 15, 2011 2:24 PM
To: Seals, William; Kif Cook; Seals, William Law Clerk (Ryan Huntley)
Cc: Byrd, R. Wayne; James Lewis; bshort@hsblawfirm.com; Susan MacDonald; Scott Umstead; Trey DesChamps; wwd@sc.rr.com
Subject: RE: Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC et al. - Civil Action Number: 2009-CP-26-05743

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We do not agree that the foreclosure is stayed. The appeals currently pending do not affect the foreclosure claim and therefore, do not fall within the automatic stay provisions of the Appellate Court Rules. Instead, the appeals involve the counterclaims and third party claims. We only seek to go forward with the foreclosure hearing, and we believe the foreclosure matter can and should proceed.

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With highest regards,

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Thanks for keeping me informed.

From: Kif Cook [mailto:Kif@cookandroy.com]
Sent: Thursday, December 15, 2011 1:18 PM
To: Byrd, Audra M.; Seals, William; Seals, William Law Clerk (Ryan Huntley)
Cc: Byrd, R. Wayne; James Lewis; bshort@hsblawfirm.com; Susan MacDonald; Scott Umstead; Trey DesChamps; wwd@sc.rr.com
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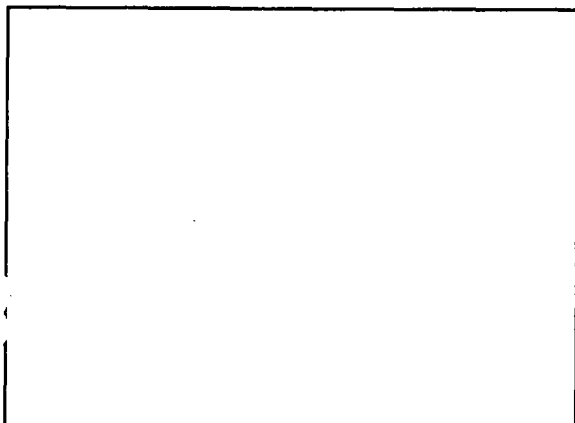
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Thank you again,

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Sent: Thursday, December 15, 2011 7:49 AM

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Cc: Byrd, R. Wayne; Kathryn M. Cook Esquire (kcook@cookandroy.com); James Lewis; William H. Short Jr. Esquire (bshort@hsblawfirm.com); Susan MacDonald; Scott Umstead; Trey DesChamps; wwd@sc.rr.com

Subject: RE: Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC et al. - Civil Action Number: 2009-CP-26-05743

How long will it take?

From: Byrd, Audra M. [mailto:AByrd@TurnerPadget.com]

Sent: Wednesday, December 14, 2011 12:33 PM

To: Seals, William Law Clerk (Ryan Huntley); Seals, William

Cc: Byrd, R. Wayne; Byrd, Audra M.; Kathryn M. Cook Esquire (kcook@cookandroy.com); James Lewis; William H. Short Jr. Esquire (bshort@hsblawfirm.com); Susan MacDonald; Scott Umstead; Trey DesChamps; wwd@sc.rr.com

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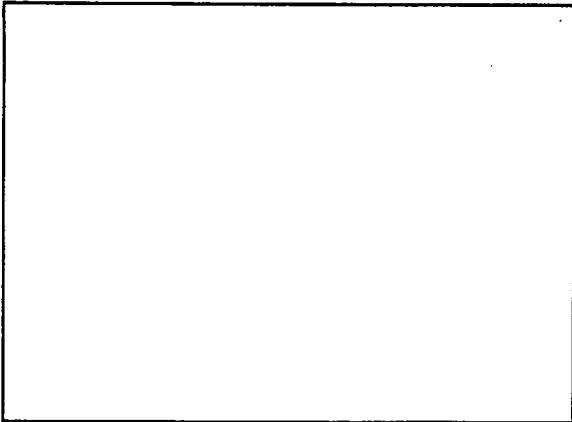
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To: Byrd, Audra M.; Kif Cook; Seals, William Law Clerk (Ryan Huntley)
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Subject: RE: Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC et al. - Civil Action Number: 2009-CP-26-05743
Attachments: image001.jpg; image002.jpg

Take a look at SC Code sec. 18-9-170. It appears we can go forward.

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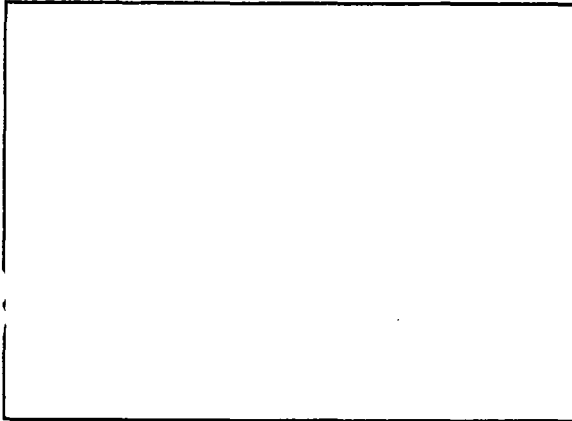
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Subject: RE: Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC et al. - Civil Action Number: 2009-CP-26-05743

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Subject: Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC et al. - Civil Action Number: 2009-CP-26-05743

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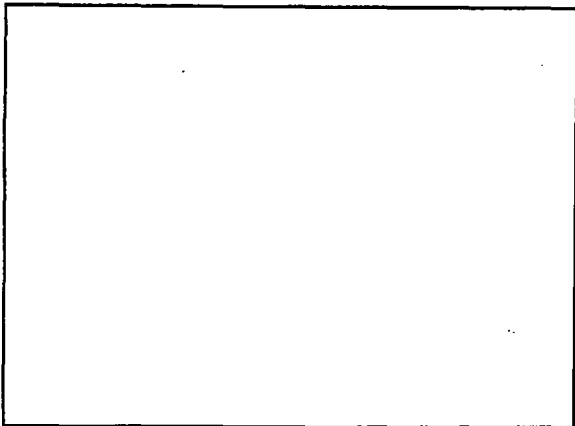
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EXHIBIT F

James Lewis

From: Byrd, Audra M. [AByrd@TurnerPadget.com]
Sent: Thursday, December 15, 2011 5:11 PM
To: Seals, William; Kif Cook; William Law Clerk
Cc: Byrd, R. Wayne; James Lewis; bshort@hsblawfirm.com; Susan MacDonald; Scott Umstead; Trey DesChamps; wwd@sc.rr.com
Subject: RE: Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC et al. - Civil Action Number: 2009-CP-26-05743
Attachments: image001.jpg; image002.jpg

Thank you Judge Seals. We agree with Your Honor and will submit a memorandum for your consideration.

Thank you,

Audra "Seals, William" wrote:

I am willing to consider any authority from the parties about going forward and will decide by the end of next week.

From: Kif Cook [mailto:Kif@cookandroy.com]
Sent: Thursday, December 15, 2011 4:30 PM
To: Seals, William; Byrd, Audra M.; Seals, William Law Clerk (Ryan Huntley)
Cc: Byrd, R. Wayne; James Lewis; bshort@hsblawfirm.com; Susan MacDonald; Scott Umstead; Trey DesChamps; wwd@sc.rr.com
Subject: RE: Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC et al. - Civil Action Number: 2009-CP-26-05743

With all due respect you Honor, that statute deals with a stay of the actual "sale" if the order of foreclosure had been rendered after a trial on the merits and the Defendant was appealing at that time. We are not at that point and the statute that governs this case at this point is 18-9-220. There is an abundance of case law on this point. I will be glad to send the cites on Monday if your clerk is unable to locate. I will be out of the office on Friday.

From: Seals, William [mailto:wsealsj@sccourts.org]
Sent: Thursday, December 15, 2011 4:05 PM
To: Byrd, Audra M.; Kif Cook; Seals, William Law Clerk (Ryan Huntley)
Cc: Byrd, R. Wayne; James Lewis; bshort@hsblawfirm.com; Susan MacDonald; Scott Umstead; Trey DesChamps; wwd@sc.rr.com
Subject: RE: Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC et al. - Civil Action Number: 2009-CP-26-05743

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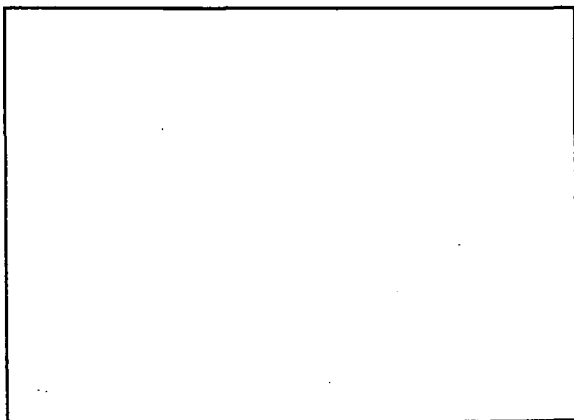
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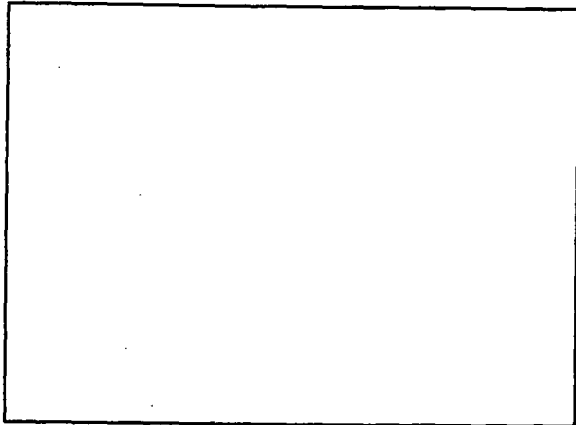
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EXHIBIT G

James Lewis

From: Tenna Turman
Sent: Wednesday, December 21, 2011 4:00 PM
To: Seals, William
Cc: wsealslc@sccourts.org; Byrd, Audra M.; wbyrd@turnerpadget.com; Short, Bill; 'William W. DesChamps, Jr.'; 'Trey DesChamps'; Susan MacDonald; Scott B. Umstead; Kif Cook; James Lewis
Subject: Hotel and Motel Holdings, LLC v. BJC Enterprises, LLC, Wendy J. Bellamy, Americana, Inc., et al
Attachments: 0149_001.pdf

Dear Judge Seals:

Attached please find Ms. Cook's letter of today's date along with a Memorandum Regarding Automatic Stay Pending Appeal relating to the above-referenced matter.

*Please note, our office will be CLOSED Friday, December 23rd (11:00 am) through January 2nd, 2011 for the Christmas/New Year holidays. We will return to work on Tuesday, January 3, 2011, at 8:00 a.m.**

We wish you a happy and safe holiday.

Tenna Turman, Legal Assistant
to Kathryn M. Cook, Esq.
Mailing Address:
Cook & Roy, LLC
PO Box 4086
North Myrtle Beach, SC 29597
Physical Location:
10409 North Kings Highway
Myrtle Beach, SC 29572
Contact Information:
Phone: 843-663-1200
Fax: 843-663-0364

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Any views expressed in this message are those of the individual sender and may not necessarily reflect the views of the company.

From: COOK&ROY [mailto:mgallagher@cookandroy.com]
Sent: Wednesday, December 21, 2011 3:34 PM
To: Tenna Turman
Subject: Attached Image

Kathryn M. Cook
Roger P. Roy, Jr.
James E. Lewis, Jr.

COOK & ROY, LLC
P.O. Box 4086
North Myrtle Beach, South Carolina 29597

Phone: (843) 663-1200
Fax: (843) 663-0364

December 21, 2011

VIA EMAIL ONLY

The Honorable William H. Seals, Jr.
Circuit Court Judge At-Large Seat 6
208 W. Dozier Street
Marion, SC 29571

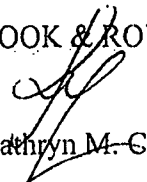
Re: Hotel and Motel Holdings, LLC v. BJC Enterprises, LLC, Wendy J. Bellamy,
Americana, Inc., et al v. First Palmetto Bank, Jack Jones, Donald Godwin, and
Bhupendra Patel et al
Civil Action Number: 2009-CP-26-5743
C&R File No.: 6847.09.0783

Dear Judge Seals:

I am submitting information for you to consider with regard to the stay of the above-captioned case pending the appeals in this matter. Pursuant to your email of last week, I submit the following Memorandum to aid Your Honor in your decision concerning the automatic stay of this action. If you need any further information from me, please do not hesitate to contact me. Our office will be closed from 11:00 a.m. on Friday, December 23, 2011, and will not re-open until Tuesday morning, January 3, 2012. I hope this letter and Memorandum find you and your clerk having a happy holiday season.

Sincerely,

COOK & ROY, LLC


Kathryn M. Cook, Esq.

Enclosure

Cc:(via email w/ enclosures): Ryan Huntley, Law Clerk of Honorable William H. Seals,
Audra Byrd, Esq. and Wayne Byrd, Esq.
Bill Short, Esq.
Bill DesChamps, Esq. and Trey DesChamps, Esq.
Susan MacDonald, Esq.
Scott Umstead, Esq.
James E. Lewis, Jr., Esq.

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Hotel and Motel Holdings, LLC,)

Plaintiffs)

v.)

BJC Enterprises, LLC, Wendy J. Bellamy,)
Americana, Inc., a/k/a Americana Motel of)
Myrtle Beach, Inc., Mozingo & Wallace)
Architects, LLC, Kersi S. Shroff, and)
Shroff Management, Inc.,)

Defendants)

BJC Enterprises, LLC, Wendy J. Bellamy,)
and Americana, Inc. a/k/a Americana Motel)
of Myrtle Beach, Inc.,)

Third-Party Plaintiffs)

v.)

First Palmetto Savings Bank, F.S.B.,)
Jack Jones, Donald D. Godwin, and)
Bhupendra Patel,)

Third-Party Defendants)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2009-CP-26-5743

MEMORANDUM REGARDING
AUTOMATIC STAY PENDING APPEAL

Currently, there are four orders that have been appealed by Defendants/Third-Party Plaintiffs(hereafter "Appellants") in this matter as follows:

1. 4/21/11 Order of Judge Seals granting Third-Party Defendants' Patel, Jones, and Godwin's Rule 12(b)(6) motions to dismiss the Third-Party Plaintiffs' claims based on civil conspiracy and related Order Denying Third-Party Plaintiffs' Motion to Reconsider said Order;

2. 6/6/11 Order of Judge Seals granting Plaintiff H&M summary judgment on Defendants' counterclaims based on breach of contract, fraud, breach of contract accompanied by fraud, civil conspiracy, conversion, violations of the South Carolina Unfair Trade Practices Act, tortuous interference with contract, and outrage and related Order denying Defendants' Motion to Reconsider said Order;
3. 6/6/11 Order of Judge Seals granting to Third-Party Defendant First Palmetto Savings Bank, FSB summary judgment and/or 12(b)(6) dismissal on Third-Party Plaintiffs' claims based on breach of contract, fraud, breach of contract accompanied by fraud, civil conspiracy, conversion, violations of the South Carolina Unfair Trade Practices Act, and outrage and related Order denying Third-Party Plaintiffs' Motion to Reconsider; and
4. 9/29/11 Order of Judge Seals granting Plaintiff H&M's motion to strike Defendants' jury trial demand.

Based on these rulings, what is left for trial is Plaintiff H&M's three foreclosure claims relating to three separate parcels of property and Plaintiff H&M's two causes of action against Defendants based on claim and delivery. Also left for trial are Third-Party Defendant Bhupendra Patel's claims against Defendants/Third-Party Plaintiffs for breach of contract, breach of contract accompanied by fraud, tortuous interference with contract, and violation of the South Carolina Frivolous Proceedings Act.

It is Appellants' position that pursuant to South Carolina Code, Annotated, Section 14-3-330(2) and Section 18-9-220, the appeals of the four above-captioned orders stay this case until a decision by the South Carolina Court of Appeals has been rendered. As set forth in Link v. School District of Pickens County, 302 S.C. 1, 393 S.E.2d 176 (1990), the Supreme Court has

held that an order granting summary judgment as well as an order dismissing claims under Rule 12(b)(6) may be appealable under Section 14-3-330(1) or as an order involving merit and striking pleadings under Section 14-3-330(2)(c). It is the appellant's choice whether to wait until final judgment in a case to appeal intermediate orders under Section 14-3-330(1) or to immediately appeal such interlocutory orders under Section 14-3-330(2). Here, Appellants have chosen to immediately appeal these four Orders, each of which affect the mode of trial and/or striking out Appellants' claims and pleadings pursuant to 14-3-330(2)(a) and (c). The Court must then look to South Carolina Code, Annotated, Section 18-9-220 to determine if the remaining portion of the case is stayed during the pendency of these appeals. Since the four orders appealed do not fit within any of the exceptions set forth in South Carolina Code, Annotated, Sections 18-9-130, 150, 160, 170, or 180, the Notice of Appeal of these interlocutory orders stays the proceedings before the trial court until a ruling by the appellate court.

Pursuant to Rules 72 and 73, SCRPC, South Carolina statutes, and case law, the four interlocutory orders are immediately appealable. The Orders appealed are all matters of law and thus, are governed by the jurisdictional statutes, S.C. Code § 18-9-10 and 14-3-330. Section 14-3-330(1) allows the aggrieved party to wait until the final judgment in a case is entered by the lower court to appeal interlocutory orders. Section 14-3-330(2) allows the aggrieved party to immediately appeal interlocutory orders if the orders affect a substantial right which (a) in effect determines the action or (c) strikes out any pleading in an action. See Link, id.; AJG Holdings, LLC, et al v. Dunn, 392 S.C. 160, 708 S.E.2d 218 (S.C. App., 2011).

It is the Appellant's choice to immediately appeal or wait until the conclusion of the entire case to appeal intermediate orders. In some instances, such as mode of trial (i.e. jury trial or non-jury trial), if the order is not immediately appealed, the right to appeal is waived. See

Bateman v. Rouse, 358 S.C. 667, 596 S.E.2d 386 (S.C. App., 2004); Mortgage Electronic Systems, Inc. v. Daniel White, et al, 384 S.C. 606, 682 S.E.2d 498 (S.C. App., 2009); Lester v. Dawson, 327 S.C. 263, 491 S.E.2d 240 (1977). In this case, Appellants must appeal Judge Seals' Order striking the Appellants' demand for a jury trial now or the same will be waived.

Additionally, Appellants have chosen under South Carolina Code, Section 14-3-330(2)(a) and (c) to immediately appeal the three orders granting summary judgment and dismissing their counterclaims and third-party claims based on breach of contract, fraud, breach of contract accompanied by fraud, conversion, civil conspiracy, violations of the South Carolina Unfair Trade Practices Act, and outrage brought against Plaintiff H&M and Third-Party Defendants First Palmetto, Patel, Godwin, and Jones, all of which have been struck from the pleadings. If an order removes a material issue from the case preventing the issue from being tried on the merits, such as a good cause of action, it is impossible for the aggrieved party to correct the error during or after trial because that evidence and issues cannot be presented to the judge or jury and on appeal after the trial, the appellate court would not have a record. Thus, the striking of counterclaims and third-party claims affect a substantial right making the ruling immediately appealable under Section 14-3-330(2)(c): Thornton v. SCE&G, 391 S.C. 297, 705 S.E.2d 475 (S.C. App., 2011); Bowden v. Powell, 194 S.C. 482, 10 S.E.2d 8 (1940); Harbert v. Atlanta & Charlotte Air Line Ry. Co., 74 S.C. 13, 53 S.E. 1001 (1906).

Next, to determine if these immediate appeals of the interlocutory orders stay further proceedings in the trial court below, one must look to South Carolina Code §18-9-220 which states the general rule that lower court proceedings are stayed unless the orders or judgments "appealed from" fit within one of five statutory exceptions (i.e. Section 18-9-130, Section 18-9-150 to 18-9-180) or the order directs the sale of perishable property. The three orders granting

summary judgment and 12(b)(6) dismissals and striking Appellants' demand for a jury trial did not direct the sale of perishable property nor do the Orders direct or come within any one of the five statutory exceptions as shown below. Thus, pursuant to Section 18-9-220, all lower court proceedings in this case are stayed until the Court of Appeals has ruled.

The five statutory exceptions to the automatic stay rule in Section 18-9-220, which are not applicable here, are as follows:

1. §18-9-130: The appealed order or judgment directs the payment of money;
2. §18-9-150: The appealed order or judgment directs the assignment or delivery of documents or personal property;
3. §18-9-160: The appealed order or judgment directs the execution of a deed or other instrument;
4. §18-9-170: The appealed order or judgment directs the sale or delivery of possession of real property; or
5. §18-9-180: The appellant posts a bond if required under §18-9-130, 150, or 170 or the appellant delivers the documents or personal property to the Court as required under §18-9-150 or 160.

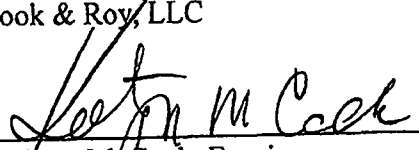
Here none of the five exceptions apply to the appealed orders and thus, nothing is required of Appellants to stay the proceedings below during these appeals, which is the general rule.

Appellants agree that if the case had proceeded to the point where a trial on the merits of the foreclosure claims had been held and the Court had issued a Judgment of Foreclosure and an Order of Sale prior to the interlocutory orders being appealed, Section 18-9-170 would apply and Appellants would have to post a bond to stay any further activity in the case during the appeal. However, Appellants have chosen to immediately appeal the interlocutory orders as allowed and

required under Section 14-3-330(2), which now stays all lower court actions until the appeals are concluded per Section 18-9-220.

Respectfully Submitted,

Cook & Roy, LLC


Kathryn M. Cook, Esquire
SC Bar No.: 1371
James E. Lewis, Jr., Esq.
SC Bar No.: 77698
Attorneys for Defendants BJC
Enterprises, LLC, Wendy J.
Bellamy, and Americana, Inc. a/k/a
American Motel of Myrtle Beach,
Inc.
Post Office Box 4086
North Myrtle Beach, SC 29597
Phone: 843-663-1200
Fax: 843-663-0364
Email: kcook@cookandroy.com
Email: james@cookandroy.com

North Myrtle Beach, South Carolina

Date: 12/21, 2011

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2009-CP-26-5743

Hotel and Motel Holdings, LLC,
Plaintiffs

v.

CERTIFICATE OF SERVICE

BJC Enterprises, LLC, Wendy J. Bellamy,
Americana, Inc., a/k/a Americana Motel of
Myrtle Beach, Inc., Mozingo & Wallace
Architects, LLC, Kersi S. Shroff, and
Shroff Management, Inc.,

Defendants

BJC Enterprises, LLC, Wendy J. Bellamy,
and Americana, Inc. a/k/a Americana Motel
of Myrtle Beach, Inc.,

Third-Party Plaintiffs

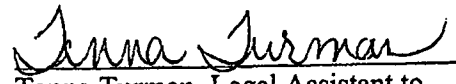
v.

First Palmetto Savings Bank, F.S.B.,
Jack Jones, Donald D. Godwin, and
Bhupendra Patel,

Third-Party Defendants
Defendants

As an employee with the law firm of COOK & ROY, LLC, counsel for
Defendants/Third-Party Plaintiffs BJC Enterprises, LLC, Wendy J. Bellamy, Americana, Inc.,
a/k/a Americana Motel of Myrtle Beach, Inc., I certify that I have served the Honorable William
H. Seals, Jr. and all counsel of record with a copy of the pleadings herein specified below, by
email to the following:

- Pleadings: 1. Memorandum Regarding Automatic Stay Pending Appeal
- Counsel Served:
1. The Honorable William H. Seals, Jr.
Circuit Court Judge At-Large Seat 6
208 W. Dozier Street
Marion, SC 29571
 2. R. Wayne Byrd, Esq.
Audra M. Byrd, Esq.
Turner Padgett Graham & Laney, P.A.
PO Box 2116
Myrtle Beach, SC 29578
Attorneys for the Plaintiff Hotel & Motel Holdings, LLC and
Third-Party Defendants Jack Jones and Donald Godwin
 3. William H. Short, Esq.
Haynsworth Sinkler Boyd, PA
PO Box 11889
Columbia, SC 29211
Attorney for Third-Party Defendant First Palmetto Savings Bank,
FSB
 4. William W. DesChamps, Jr., Esq.
William W. DesChamps, III, Esq.
DesChamps Law Firm
PO Box 2402
Myrtle Beach, SC 29578
Attorney for Third-Party Defendant Bhupendra Patel
 5. Scott B. Umstead, Esquire
4226 Mayfair Street, Suite 100
Myrtle Beach, SC 29578
Attorneys for Defendant Mozingo & Wallace Architects, LLC
 6. Susan P. MacDonald, Esquire
Nelson Mullins Riley & Scarborough, LLP
Post Office Box 3939
Myrtle Beach, SC 29578-3939
Attorneys for Defendants Kersi S. Shroff and Shroff Management,
Inc.


Tenna Turman, Legal Assistant to
Kathryn M. Cook, Esq.

North Myrtle Beach, South Carolina

Date: December 21, 2011

EXHIBIT H

James Lewis

From: Byrd, Audra M. [AByrd@TurnerPadget.com]
Sent: Thursday, December 22, 2011 11:42 AM
To: wsealslc@sccourts.org; wsealsj@sccourts.org
Cc: Kif Cook; Susan MacDonald; William H. Short Jr. Esquire (bshort@hsblawfirm.com); Trey DesChamps; wwd@deschampsllaw.com; Scott Umstead; Byrd, R. Wayne; Byrd, Audra M.; James Lewis
Subject: Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC et al. - Civil Action Number: 2009-CP-26-5743
Attachments: H&M v. BJC_Memo In Opp. to Request for Stay of Foreclosure Hearing.PDF

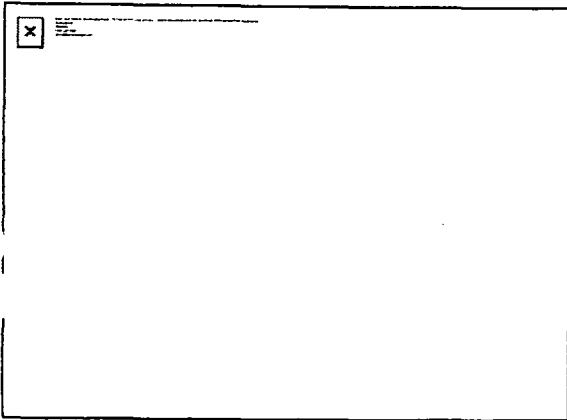
Dear Judge Seals and Mr. Huntley,

Attached please find a Memorandum of Law in Opposition to Defendants' Request for Stay of Foreclosure Hearing in the above matter.

Again, thank you for your consideration of this matter.

With highest regards,

Audra Byrd



CIRCULAR 230 DISCLOSURE: To comply with Treasury Department regulations, we inform you that, unless otherwise expressly indicated, any tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties that may be imposed under the Internal Revenue Code or any other applicable tax law, or (ii) promoting, marketing or recommending to another party any transaction, arrangement, or other matter.

CONFIDENTIAL & PRIVILEGED:

Unless otherwise indicated or obvious from the nature of the above communication, the information contained herein may be an attorney-client privileged and confidential information/work product. The communication is intended for the use of the individual or entity named above. If the reader of this transmission is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited.

If you have received this communication in error or are not sure whether it is privileged, please immediately notify us by return e-mail and destroy any copies, electronic, paper or otherwise, which you may have of this communication.

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

HOTEL & MOTEL HOLDINGS, LLC,)

Plaintiff,)

vs.)

BJC ENTERPRISES, LLC, ET AL.,)

Defendants.)

BJC ENTERPRISES, LLC, ET AL.,)

Third Party Plaintiffs,)

vs.)

FIRST PALMETTO SAVINGS BANK,)

F.S.B., JACK JONES, DONALD D.)

GODWIN, AND BHUPENDRA PATEL,)

Third Party Defendants.)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2009-CP-26-05743

**MEMORANDUM OF LAW IN
OPPOSITION TO REQUEST OF
DEFENDANTS FOR STAY OF
FORECLOSURE HEARING**

Plaintiff Hotel & Motel Holdings, LLC ("H & M"), by and through its undersigned counsel, hereby submits this memorandum of law in opposition to the request of Defendants for a stay of the foreclosure hearing pending their appeal of unrelated Orders.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

This commercial foreclosure action was originally brought by First Palmetto Savings Bank, FSB. The Summons and Complaint were filed with the Court on June 11, 2009. Subsequently, an Amended Summons and Complaint were filed with the Court wherein H & M was substituted as the plaintiff. In its Amended Complaint, H & M asserted three causes of action: (1) foreclosure of real property mortgage, (2) claim and delivery, and (3) appointment of a receiver.

Thereafter, Defendants answered the Amended Complaint and later filed an Amended Answer, Counterclaims and Third-Party Complaint. In the Amended Answer, Defendants asserted the following counterclaims against H & M: breach of contract, fraud, breach of contract accompanied by a fraudulent act, civil conspiracy, conversion, interference with contractual relationship, intentional infliction of emotional distress/outrage, and violation of the South Carolina Unfair Trade Practices Act.

In response to the counterclaims, H & M filed and served a Motion for Summary Judgment, and a hearing on the Motion was held before this Court on Thursday, May 12, 2011. By Order filed with the Horry County Clerk of Court on June 6, 2011, this Court granted the Motion for Summary Judgment as to Defendants' Counterclaims. Defendants have appealed the Orders relating to summary judgment as to their counterclaims. Similarly, the Court granted various dispositive motions filed by the third party defendants, and Defendants have appealed the Orders relating to dismissal of the third party claims. The final issue pending in the Court of Appeals relates to the right of Defendants to a trial by jury on the claim and delivery cause of action. Through its counsel, H & M requested a hearing on the foreclosure matter only. Defendants objected and alleged the foreclosure claims were automatically stayed by the appeals and could not proceed.

ARGUMENT

The South Carolina Appellate Court Rules provide that "service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment decree or decision." Rule 225, SCACR. Once a notice of appeal is filed and served, the appellate court assumes exclusive jurisdiction over the appeal and matters affected by the appeal. Rule 205,

SCACR. Significantly however, the circuit court is expressly permitted to proceed "with matters not affected by the appeal." Rule 205, SCACR; see also, Arnal v. Fraser, 371 S.C. 512, 641 S.E.2d 419 (2007) (enforcing provisions in final divorce decree that were not being challenged in the appeal); Andrick Develop. Corp. v. Maccaro, 280 S.C. 103, 311 S.E.2d 95 (Ct. App. 1984) (retaining jurisdiction to appoint receiver after appeal of an order for accounting). Therefore, this Court may exercise jurisdiction over any matters not affected by the appeal, including matters not decided in the Orders being appealed. South Carolina Nat'l Bank v Devine Blossom, 321 S.C. 110, 467 S.E.2d 767 (Ct. App.1996).

Here, the defendants have appealed Orders relating to their counterclaims, third party claims, and their purported right to a jury trial on the claim and delivery cause of action. None of these Orders affect the foreclosure causes of action. Likewise, none of the Orders being appealed address the foreclosure claims, and these are the only claims on which H & M has requested a hearing. As such, the automatic stay provisions of the Appellate Court Rules have no application, and the foreclosure matters are not stayed.

H & M does not assert that an exception to the automatic stay rule applies; rather, H & M contends that the automatic stay provision simply does not apply in these circumstances since the Orders being appealed do not affect the foreclosure causes of action. This contention is supported by South Carolina case law. See e.g., Devine Blossom, at 113, 467 S.E.2d at 769 (holding that the automatic stay rule did not apply in a foreclosure matter when the appeal involved issues of the debtor's statutory right to an appraisal); Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 215, 493 S.E.2d 826, 834 (1997) (finding no prejudice where the master in equity proceeded with foreclosure hearing while defendants appealed the dismissal of their legal counterclaims).

The only Order that addresses the foreclosure claims of H & M is the Court's Order denying H & M summary judgment on its claims and allowing Defendants an opportunity to be heard on their defenses. This Order has not been appealed. Therefore, the Court has jurisdiction to hear the foreclosure claims.

CONCLUSION

For the reasons set forth above, Plaintiff Hotel & Motel Holdings, LLC respectfully requests that this Court set the foreclosure matters for hearing during the term of Court beginning January 9, 2012.

Respectfully submitted,

TURNER PADGET GRAHAM & LANEY P.A.

By: Audra M. Byrd
R. Wayne Byrd (S.C. Bar # 1068)
WByrd@TurnerPadget.com
Audra M. Byrd (S.C. Bar # 76719)
AByrdd@TurnerPadget.com
Post Office Box 2116
Myrtle Beach, South Carolina 29578
Telephone: (843) 213-5500
Facsimile: (843) 213-5555
ATTORNEYS FOR PLAINTIFF HOTEL &
MOTEL HOLDINGS, LLC

December 22, 2011

EXHIBIT I

James Lewis

From: Seals, William Law Clerk (Ryan Huntley) [wsealslc@sccourts.org]
Sent: Thursday, December 22, 2011 1:29 PM
To: Kif Cook; Susan MacDonald; William H. Short Jr. Esquire (bshort@hsblawfirm.com); Trey DesChamps; wwd@deschampsllaw.com; Scott Umstead; Byrd, R. Wayne; Byrd, Audra M.; James Lewis; LillyRh@HorryCounty.org
Subject: Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC et al 2009-CP-26-5743

Counselors:

Upon review of the briefs submitted in the above captioned matter, Judge Seals concludes that this Court has jurisdiction to hear the foreclosure claims and will set same for hearing on January 9, 2012 at 10:00 a.m.

Best regards,

Ryan E. Huntley
Judicial Clerk to the Honorable William H. Seals, Jr.
Circuit Court Judge At-Large Seat 6
208 West Dozier Street
Marion, South Carolina 29571

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2009-CP-26-5743

Hotel and Motel Holdings, LLC,
Plaintiffs

v.

BJC Enterprises, LLC, Wendy J. Bellamy,
Americana, Inc., a/k/a Americana Motel of
Myrtle Beach, Inc., Mozingo & Wallace
Architects, LLC, Kersi S. Shroff, and
Shroff Management, Inc.,

Defendants

BJC Enterprises, LLC, Wendy J. Bellamy,
and Americana, Inc. a/k/a Americana Motel
of Myrtle Beach, Inc.,

Third-Party Plaintiffs

v.

First Palmetto Savings Bank, F.S.B.,
Jack Jones, Donald D. Godwin, and
Bhupendra Patel,

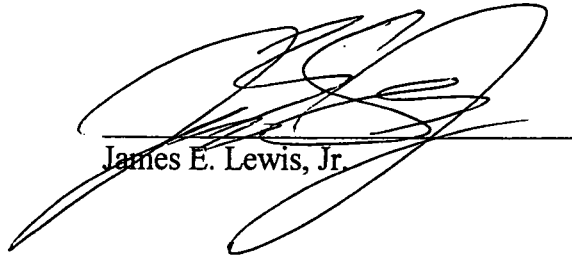
Third-Party Defendants
Defendants

CERTIFICATE OF SERVICE

HORRY COUNTY
12 JAN -3 PM 4:50
MELANIE HUGHES-WARD
CLERK OF COURT

As an attorney with the law firm of COOK & ROY, LLC, counsel for Defendants/Third-Party Plaintiffs BJC Enterprises, LLC, Wendy J. Bellamy, Americana, Inc., a/k/a Americana Motel of Myrtle Beach, Inc., I certify that I have emailed Honorable William H. Seals, Jr. and all counsel of record a copy of the pleadings herein specified below:

- Pleadings: 1. Defendants/Third-Party Plaintiffs' Motion to Stay Plaintiff's Foreclosure Action and/or Reconsider Informal Ruling to Proceed with Foreclosure
- Counsel Served: 1. The Honorable William H. Seals, Jr.
Circuit Court Judge At-Large Seat 6
208 W. Dozier Street
Marion, SC 29571
2. R. Wayne Byrd, Esq.
Audra M. Byrd, Esq.
Turner Padgett Graham & Laney, P.A.
PO Box 2116
Myrtle Beach, SC 29578
Attorneys for the Plaintiff Hotel & Motel Holdings, LLC and
Third-Party Defendants Jack Jones and Donald Godwin
3. William H. Short, Esq.
Haynsworth Sinkler Boyd, PA
PO Box 11889
Columbia, SC 29211
Attorney for Third-Party Defendant First Palmetto Savings Bank,
FSB
4. William W. DesChamps, Jr., Esq.
William W. DesChamps, III, Esq.
DesChamps Law Firm
PO Box 2402
Myrtle Beach, SC 29578
Attorney for Third-Party Defendant Bhupendra Patel
5. Scott B. Umstead, Esquire
4226 Mayfair Street, Suite 100
Myrtle Beach, SC 29578
Attorneys for Defendant Mazingo & Wallace Architects, LLC
6. Susan P. MacDonald, Esquire
Nelson Mullins Riley & Scarborough, LLP
Post Office Box 3939
Myrtle Beach, SC 29578-3939
Attorneys for Defendants Kersi S. Shroff and Shroff Management,
Inc.



James E. Lewis, Jr.

North Myrtle Beach, South Carolina

Date: January 3, 2012

EXHIBIT B

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No.: 2009-CP-26-5743

Hotel & Motel Holdings, LLC,

Respondent,

v.

BJC Enterprises, LLC, Wendy J. Bellamy,
Americana, Inc., a/k/a Americana Motel of
Myrtle Beach, Inc.,

Appellant,

Mozingo & Wallace Architects, LLC,
Kersi S. Shroff, and Shroff Management, Inc.

Defendants,

v.

First Palmetto Savings Bank, F.S.B.,
Jack Jones, Donald D. Godwin, and
Bhupendra Patel,

Third-Party Defendants

NOTICE OF APPEAL

BJC Enterprises, LLC, Wendy J. Bellamy, and Americana, Inc. a/k/a Americana Motel of Myrtle Beach, Inc. appeal the Order of the Honorable William H. Seals, Jr., signed September 26, 2011 and enrolled by the Horry County Clerk of Court on September 29, 2011. Appellants received written notice of the entered Order on October 17, 2011.

October 26, 2011


Kathryn M. Cook, Esq.
SC Bar No. 1371
James E. Lewis, Jr., Esq.
SC Bar No. 77698
Cook & Roy LLC
Post Office Box 4086
N. Myrtle Beach, SC 29597
(843)663-1200
Fax: (843)663-0364
Email: kcook@cookandroy.com
jlewis@cookandroy.com
Attorneys for Appellants

Other Counsel of Record:

R. Wayne Byrd, Esq.
Audra M. Byrd, Esq.
Turner Padgett Graham & Laney, P.A.
PO Box 2116
Myrtle Beach, SC 29578
(843) 213-5500
Attorneys for the Respondents Hotel and Motel Holdings, LLC,
Donald Godwin, and Jack Jones

Scott B. Umstead, Esquire
4226 Mayfair Street, Suite 100
Myrtle Beach, SC 29578
(843) 913-4610
Attorneys for Defendant Mazingo & Wallace
Architects, LLC

Susan P. MacDonald, Esquire
Nelson Mullins Riley & Scarborough, LLP
Post Office Box 3939
Myrtle Beach, SC 29578-3939
(843) 946-5654
Attorneys for Defendants Kersi S. Shroff and
Shroff Management, Inc.

William H. Short, Esq.
Haynsworth Sinkler Boyd, PA
PO Box 11889
Columbia, SC 29211
(803) 540-7823
Attorney for Respondent First Palmetto Savings Bank, FSB

William W. DesChamps, Jr., Esq.
William W. "Trey" DesChamps, III, Esq.
DesChamps Law Firm
PO Box 2402
Myrtle Beach, SC 29578
(843) 448-2391
Attorney for Respondent Bhupendra Patel

COPY

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY)

Civil Action No. 2009-CP-26-05743

HOTEL & MOTEL HOLDINGS, LLC,)

Plaintiff,)

vs.)

BJC ENTERPRISES, LLC, ET AL.,)

Defendants.)

**ORDER GRANTING MOTION TO STRIKE
REQUEST FOR JURY TRIAL**

BJC ENTERPRISES, LLC, ET AL.,)

Third Party Plaintiffs,)

vs.)

FIRST PALMETTO SAVINGS BANK,
F.S.B., JACK JONES, DONALD D.
GODWIN, AND BHUPENDRA PATEL,)

Third Party Defendants.)

RECEIVED

OCT 27 2011

SC Court of Appeals

FILED
CLERK OF COURT
MELANIE HUGGINS-MARCO
2011 SEP 29 PM 2:23
HORRY COUNTY

This matter comes before the Court upon the Motion of Plaintiff Hotel & Motel Holdings, LLC ("H & M") seeking an Order of this Court striking the request for jury trial made on behalf of Defendants BJC Enterprises, LLC ("BJC"), Wendy J. Bellamy, and Americana Motel, Inc. ("Americana"). A hearing on the Motion was held before this Court on August 24, 2011. Present at the hearing for H & M was Audra M. Byrd. Defendants BJC, Americana and Bellamy were represented at the hearing by Kathryn M. Cook. Tara E. Naful appeared on behalf of First Palmetto Savings Bank, F.S.B. ("First Palmetto"). After review of the Motion and memoranda submitted by the parties and hearing arguments of counsel, the Motion to Strike Request for Jury Trial is GRANTED.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

This commercial foreclosure action was originally brought by First Palmetto. The Summons and Complaint were filed with the Court on June 11, 2009. Subsequently, an Amended Summons and Complaint were filed with the Court wherein H & M was substituted as the plaintiff. In its Amended Complaint, H & M asserted three causes of action: (1) foreclosure of real property mortgage, (2) claim and delivery, and (3) appointment of a receiver.

Thereafter, Defendants answered the Amended Complaint and later filed an Amended Answer, Counterclaims and Third-Party Complaint. In the Amended Answer, Defendants asserted the following counterclaims against H & M: breach of contract, fraud, breach of contract accompanied by a fraudulent act, civil conspiracy, conversion, interference with contractual relationship, intentional infliction of emotional distress/outrage, and violation of the South Carolina Unfair Trade Practices Act.

In response to the counterclaims, H & M filed and served a Motion for Summary Judgment, and a hearing on the Motion was held before this Court on Thursday, May 12, 2011. By Order filed with the Horry County Clerk of Court on June 6, 2011, this Court granted the Motion for Summary Judgment as to Defendants' Counterclaims.

Similarly, the Court granted various dispositive motions filed by the third party defendants, and currently, the only affirmative claims that remain pending in this case are those asserted by H & M.¹ As a result, on June 6, 2011, H & M filed the present Motion to Strike Request for Jury Trial, alleging that the current action involves only the foreclosure of real

¹ Defendants have alleged numerous affirmative defenses, and those defenses are still at issue in this action. The Court makes no findings with regard to the merit or validity of those defenses in this Order.

property mortgages, and the other causes of action have been previously adjudicated by the Court.

LEGAL ANALYSIS AND CONCLUSIONS

I. THERE IS NO RIGHT TO A JURY TRIAL IN A FORECLOSURE ACTION.

It is axiomatic that foreclosures are equitable actions, and in equitable actions, there is no right to a jury trial. Gardner v. Travis, 316 S.C. 315, 450 S.E.2d 54 (Ct. App. 1994); Lester v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). There is no dispute between the parties on this point; during the hearing on this Motion, counsel for Defendants conceded that the claims for foreclosure of the real property mortgages at issue in this case do not require a trial by jury.

To the extent the defendants request a jury trial on the foreclosure claims, their request is stricken, and the matter of the foreclosure of the real property mortgages shall be heard by this Court, sitting without a jury.

II. THE CAUSES OF ACTION FOR APPOINTMENT OF RECEIVER AND CLAIM AND DELIVERY HAVE BEEN PREVIOUSLY ADJUDICATED BY THE COURT AND ARE THEREFORE, MOOT.

The causes of action for Claim and Delivery and Appointment of Receiver have been previously disposed of or rendered moot by Order of this Court dated April 20, 2010, and filed on the same date. In the April, 2010 Order, the Honorable Steven H. John appointed Kenan S. Walker of Waccamaw Land & Timber Management Co., LLC as Receiver and further ordered that Mr. Walker take immediate possession of the properties which are the subject of this action. Since his appointment, the Receiver has maintained possession and control of the properties, including the personal property which is the subject of the Claim and Delivery cause of action.

The defendants are no longer in possession of the personal property, and therefore, the Claim and Delivery cause of action is moot.

Based on the foregoing, the causes of action for Appointment of Receiver and Claim and Delivery have been rendered moot and do not require a trial by jury.

III. THE CLAIM LABELED AS A CAUSE OF ACTION FOR CLAIM AND DELIVERY SOUNDS IN EQUITY, AND DEFENDANTS ARE NOT ENTITLED TO A JURY TRIAL.

As set forth above, the Court finds the cause of action labeled as Claim and Delivery has been rendered moot by previous Order of this Court. However, Defendants argue to the contrary and demand a jury trial on this claim. To the extent the cause of action labeled as Claim and Delivery is not moot, for the reasons set forth below, this Court finds the cause of action sounds in equity, and the defendants are not entitled to a jury trial on this matter.

Pleading must be liberally construed in favor of the pleader, and the nature of the action is to be determined primarily by the allegations of the complaint. Barnwell Production Cred. Ass'n v. Hartzog, 231 S.C. 340, 347, 98 S.E.2d 835, 839 (1957). More significantly, the complaint must be considered as a whole, and "the theory most apparent and clearly outlined by such consideration will be adopted rather than another possible theory which may be, to some extent, indicated by a consideration of the formal parts or of detached parts and fragmentary statements." Id. (quoting 71 C. J. S. Pleading, § 92, p. 230 et seq.).

In the case of security interests secured by personal property, upon default, the secured party has multiple remedies available to him to realize his security, and a secured party is not limited to those remedies outlined in the Uniform Commercial Code adopted by this State. Nat'l

Bank of S.C. v. Daniels, 283 S.C. 438, 441, 322 S.E.2d 689, 691 (Ct. App. 1984). A secured party has three options to recover his security:

(1) He may peaceably take possession of the chattel, advertise and sell and apply the proceeds of sale to his secured debt, paying the surplus, if any, to the mortgagor; (2) if possession be refused, he may institute claim and delivery proceedings to get possession of the chattel for the purpose of sale as in the first instance; (3) he may institute a proceeding similar to the foreclosure of a mortgage of real estate.

Id. (quoting Stokes v. Liverpool & London & Globe Ins. Co., 130 S.C. 521, 531, 126 S.E. 649 (1925)).

Claim and delivery is a statutory remedy for the recovery of specific personal property wrongfully taken or withheld from its rightful owner, accompanied by the recovery of any damages resulting from the taking or possession of the property. See S.C. Code Ann. § 22-3-1310 et seq. In order to state a viable cause of action for claim and delivery, the plaintiff must submit an affidavit with his complaint establishing, among other things, that he owns the property or is entitled to immediate possession of it, that the property is being wrongfully withheld or detained, the cause of the wrongful detention or withholding, and the value of the property. S.C. Code Ann. § 22-3-1320. In this case, no such affidavit was submitted, and the Verified Amended Complaint lacks similar allegations.

Rather, in its Amended Complaint, H & M has merely requested the personal property be sold, along with the real properties, and the proceeds applied towards its secured debt. H & M has not demanded possession of the property or alleged that Defendants have refused to relinquish possession of the property. To the contrary, the pleadings and Orders of this Court indicate the personal property is currently in the possession of the Receiver. The record further indicates that Defendants consented to the appointment of a Receiver and peaceably gave up

possession of the personal property. Therefore, the cause of action labeled as Claim and Delivery can only be viewed as a claim for the foreclosure of a chattel mortgage. This conclusion is supported by the pleadings filed in this action and the prevailing case law. See Barnwell Production Cred. Ass'n v. Hartzog, 231 S.C. 340, 346-347, 98 S.E.2d 835, 838-839 (1957) (holding that although the complaint contained a cause of action titled as "claim and delivery," it lacked the requisite allegations, and the claim was in substance a claim for foreclosure of a chattel mortgage).

For the foregoing reasons, even if the cause of action titled as "Claim and Delivery" has not been rendered moot by prior Order of the Court, it sounds in equity. As such, there exists no right to a trial by jury on this matter.

CONCLUSION

After a careful review of the pleadings, the briefs of the parties and the relevant case law, and hearing arguments from counsel, this Court concludes it has properly considered the Motion to Strike Request for Jury Trial.

NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff's Motion to Strike Request for Jury Trial is hereby GRANTED;

IT IS FURTHER ORDERED ADJUDGED, AND DECREED that the Plaintiff's claims for foreclosure of real property mortgages shall be heard by this Court, sitting without jury.

AND IT IS SO ORDERED this 26 day of September, 2011.



THE HONORABLE WILLIAM H. SEALS, JR.
Presiding Circuit Court Judge for the
Fifteenth Judicial Circuit

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

HOTEL & MOTEL HOLDINGS, LLC,)

Plaintiff,)

vs.)

BJC ENTERPRISES, LLC, et al.,)

Defendants.)

BJC ENTERPRISES, LLC, et al,)

Third Party Plaintiffs,)

vs.)

FIRST PALMETTO SAVINGS BANK,
F.S.B., et al.,)

Third Party Defendants.)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2009-CP-26-05743

CERTIFICATE OF SERVICE

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Horry County
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MELANIE HUGGINS-WARD
CLERK OF COURT

I hereby certify that on this 28th day of September, 2011, the foregoing ORDER GRANTING MOTION TO STRIKE REQUEST FOR JURY TRIAL has been served upon counsel of record, by depositing a copy of it in the United States mail, postage prepaid and properly addressed as follows:

James Lewis, Esquire
Kathryn M. Cook, Esquire
10409 N. Kings Highway
Post Office Box 4086
North Myrtle Beach, SC 29597

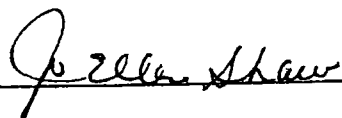
Susan P. MacDonald, Esquire
Nelson Mullins Riley & Scarborough, LLP
Post Office Box 3939
Myrtle Beach, SC 29578

William W. DesChamps, Jr., Esquire
DesChamps Law Firm
1551 21st Avenue North, Suite 14
Myrtle Beach, SC 29577

William H. Short, Jr., Esquire
Haynsworth Sinkler Boyd P.A.
Post Office Box 11889
Columbia, SC 29211

Scott B. Umstead, Esquire
Scott B. Umstead, PA
4226 Mayfair Street, Suite 100
Myrtle Beach, SC 29577

I further certify that copies of the foregoing documents were also emailed to counsel on the date shown above.

A handwritten signature in cursive script, reading "Jo Ellen Shaw", is written over a horizontal line.

Jo Ellen Shaw

COPY

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No.: 2009-CP-26-5743

Hotel & Motel Holdings, LLC,

Respondent,

v.

BJC Enterprises, LLC, Wendy J. Bellamy,
Americana, Inc., a/k/a Americana Motel of
Myrtle Beach, Inc.,

Appellants,

Mozingo & Wallace Architects, LLC,
Kersi S. Shroff, and Shroff Management, Inc.

Defendants, OCT 27 2011

v.

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SC Court of Appeals

First Palmetto Savings Bank, F.S.B.,
Jack Jones, Donald D. Godwin, and
Bhupendra Patel,

Third-Party Defendants

PROOF OF SERVICE

I certify that I have served the Notice of Appeal and Applicable Order on all parties by depositing a copy of the same in the United States Mail, postage prepaid, on October 26, 2011, addressed to their attorneys of record, to the following:

R. Wayne Byrd, Esq.
Audra M. Byrd, Esq.
Turner Padgett Graham & Laney, P.A.
PO Box 2116
Myrtle Beach, SC 29578

(843) 213-5500
Attorneys for the Respondents Hotel and Motel Holdings, LLC,
Donald Godwin, and Jack Jones

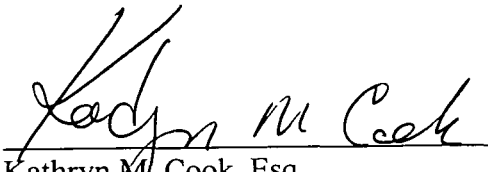
William W. DesChamps, Jr., Esq.
William W. "Trey" DesChamps, III, Esq.
DesChamps Law Firm
PO Box 2402
Myrtle Beach, SC 29578
(843) 448-2391
Attorney for Respondent Bhupendra Patel

William H. Short, Esq.
Haynsworth Sinkler Boyd, PA
PO Box 11889
Columbia, SC 29211
(803) 540-7823
Attorney for Respondent First Palmetto Savings Bank, FSB

Scott B. Umstead, Esquire
4226 Mayfair Street, Suite 100
Myrtle Beach, SC 29578
(843) 913-4610
Attorneys for Defendant Mozingo & Wallace
Architects, LLC

Susan P. MacDonald, Esquire
Nelson Mullins Riley & Scarborough, LLP
Post Office Box 3939
Myrtle Beach, SC 29578-3939
(843) 946-5654
Attorneys for Defendants Kersi S. Shroff and
Shroff Management, Inc.

October 26, 2011


Kathryn M. Cook, Esq.
SC Bar No. 1371
James E. Lewis, Jr., Esq.
SC Bar No. 77698
Cook & Roy LLC
Post Office Box 4086
N. Myrtle Beach, SC 29597

(843)663-1200

Fax: (843)663-0364

Email: kcook@cookandroy.com

jlewis@cookandroy.com

Attorneys for Appellants

EXHIBIT C
THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No.: 2009-CP-26-5743

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SC COURT OF APPEALS

Hotel & Motel Holdings, LLC,

Respondent,

v.

BJC Enterprises, LLC, Wendy J. Bellamy,
Americana, Inc., a/k/a Americana Motel of
Myrtle Beach, Inc.,

Appellant,

Mozingo & Wallace Architects, LLC,
Kersi S. Shroff, and Shroff Management, Inc.

Defendants,

v.

First Palmetto Savings Bank, F.S.B.,
Jack Jones, Donald D. Godwin, and
Bhupendra Patel,

Respondents

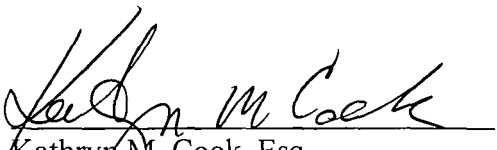
NOTICE OF APPEAL

BJC Enterprises, LLC, Wendy J. Bellamy, and Americana, Inc. a/k/a Americana Motel of Myrtle Beach, Inc. appeal the following Orders of the Honorable William H. Seals, Jr.:

1. Order Granting Motions To Dismiss Filed On Behalf Of Third-Party Defendants Bhupendra Patel, Jack Jones, And Donald Godwin, filed April 21, 2011 and received by Appellants on April 27, 2011, and Order Denying Defendants/Third-Party Plaintiffs' Motion for Reconsideration of Order, a signed and entered copy of which Appellants have not yet received;

2. Order Granting Motion for Summary Judgment on Counterclaims Asserted by Defendants Against Hotel & Motel Holdings, LLC filed June 6, 2011 and received by Appellants on July 6, 2011 and Order Denying Defendants' Motion For Reconsideration Of Order Granting Summary Judgment To Plaintiff On Defendants' Counterclaims signed July 25, 2011, but which entered Order Appellants have not yet received; and
3. Order Granting Motion for Summary Judgment on Claims Asserted by Third-Party Plaintiffs Against First Palmetto Savings Bank, F.S.B., entered June 6, 2011 and received by Appellants on June 10, 2011, and Order Denying Defendants/Third Party Plaintiffs' Motion For Reconsideration entered July 28, 2011 and received August 3, 2011.

August 24, 2011


Kathryn M. Cook, Esq.
SC Bar No. 1371
James E. Lewis, Jr., Esq.
SC Bar No. 77698
Cook & Roy LLC
Post Office Box 4086
N. Myrtle Beach, SC 29597
(843)663-1200
Fax: (843)663-0364
Email: kcook@cookandroy.com
jlewis@cookandroy.com
Attorneys for Appellants

Other Counsel of Record:

R. Wayne Byrd, Esq.
Audra M. Byrd, Esq.
Turner Padgett Graham & Laney, P.A.
PO Box 2116
Myrtle Beach, SC 29578
(843) 213-5500
Attorneys for the Respondents Hotel and Motel Holdings, LLC,
Donald Godwin, and Jack Jones

William W. DesChamps, Jr., Esq.
William W. "Trey" DesChamps, III, Esq.
DesChamps Law Firm
PO Box 2402
Myrtle Beach, SC 29578

(843) 448-2391
Attorney for Respondent Bhupendra Patel

William H. Short, Esq.
Haynsworth Sinkler Boyd, PA
PO Box 11889
Columbia, SC 29211
(803) 540-7823
Attorney for Respondent First Palmetto Savings Bank, FSB

Scott B. Umstead, Esquire
4226 Mayfair Street, Suite 100
Myrtle Beach, SC 29578
(843) 913-4610
Attorneys for Defendant Mozingo & Wallace
Architects, LLC

Susan P. MacDonald, Esquire
Nelson Mullins Riley & Scarborough, LLP
Post Office Box 3939
Myrtle Beach, SC 29578-3939
(843) 946-5654
Attorneys for Defendants Kersi S. Shroff and
Shroff Management, Inc.

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Hotel & Motel Holdings, LLC,

Plaintiff,

v.

BJC Enterprises, LLC, et al.,

Defendants.

BJC Enterprises, LLC, et al.,

Third Party Plaintiffs,

v.

First Palmetto Savings Bank, F.S.B., et al,

Third Party Defendants.

THE COURT OF COMMON PLEAS

Civil Action No.: 2009-CP-26-05743

**Order Granting Motion for Summary
Judgment on Counterclaims Asserted by
Defendants Against Hotel & Motel
Holdings, LLC.**

Hotel & Motel Holdings, LLC's Motion for Summary Judgment on Counterclaims of Defendants BJC Enterprises, LLC, Americana, Inc and Wendy Bellamy was heard by the Court on May 12, 2011. Appearing at the hearing were Audra Byrd, Esq. on behalf of Hotel & Motel Holdings, LLC. ("H&M") and Kathryn M. Cook, Esq. on behalf of BJC Enterprises, LLC (BJC), Wendy J. Bellamy, and Americana, Inc. a/k/a Americana Motel of Myrtle Beach, Inc. (collectively, "Third Party Plaintiffs"). Representatives for other parties in the lawsuit were also present.

Standard of Review

Summary judgment is proper when no issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any

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CLERK OF COURT

triable issue of fact exists, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006). "The non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Management Co., Inc.* 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Breach of Contract and Breach of Contract Accompanied by Fraudulent Act

To prove breach of contract, a party must establish there was a contract, the other party breached the contract, and the breach caused damages. "To maintain an action for breach of contract accompanied by a fraudulent act, a plaintiff must prove three elements: '(1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach.'" *RoTec Services, Inc. v. Encompass Services, Inc.*, 359 S.C. 467, 597 S.E.2d 881 (Ct. App., 2004).

In this case, Defendants' claim for breach of contract against H&M is based upon H&M standing in the shoes of First Palmetto Savings Bank, FSB ("Bank"). Defendant asserts H&M is not a holder in due course and is subject to claims that Defendants may have against Bank. In this Court's **Order Granting Motion for Summary Judgment on Claims Asserted by Third Party Plaintiffs Against First Palmetto Savings Bank, F.S.B.** filed on June 1, 2011, the Court granted summary judgment in favor of Bank, a third-party defendant, on these very same two claims brought by Defendants acting as third party plaintiffs. It is the law of the case that there is no factual evidence to support these claims against the bank. Consequently, as to these two claims, the Court need not reach the issue as to whether H&M is a holder in due course. Summary judgment should be granted as a matter of law based on the reasoning of this Court's

**Order Granting Motion for Summary Judgment on Claims Asserted by Third Party
Plaintiffs Against First Palmetto Savings Bank, F.S.B.**

Fraud

In order to recover in an action for fraud and deceit, based upon misrepresentation, the following elements must be shown by clear, cogent and convincing evidence: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; (9) the hearer's consequent and proximate injury. Failure to prove any one of the foregoing elements is fatal to recovery.

M. B. Kahn Const. Co., Inc. v. South Carolina Nat. Bank of Charleston, 275 S.C. 381, 271 S.E.2d 414 (1980). A "fraud claim requires proof by clear and convincing evidence; thus, more than a mere scintilla of evidence must be presented to withstand a motion for summary judgment." *Turner v. Milliman*, ---S.C.---, 2011 WL 1118833, 4 (2011). The only fraud claim that is asserted against H&M by Defendants is alleged to have occurred in January, 2008. H&M was incorporated in June, 2009. As is was not in existence at the time of the alleged fraud, H & M cannot be held liable as a matter of law.

Civil Conspiracy

In order to recover under a civil conspiracy claim, a party must prove (1) a combination of two or more person; (2) joining for the purpose of injuring the claimant; (3) which causes special damage to the plaintiff. *McMillan v. Oconee Memorial Hosp., Inc.* 367 S.C. 559, 626 S.E.2d 884 (2006). "When items of special damage are claimed, they shall be specifically stated." Rule

9(g), SCRCF. "Special damages must be properly pled, or the claim for civil conspiracy will be dismissed." *AJG Holdings LLC v. Dunn*, 708 S.E.2d 218 (Ct. App., 2011). In the case at bar, no special damages were pled in the Counterclaims. The only damages claimed are those relating to all the causes of action. Therefore the claim for civil conspiracy must be dismissed.

Conversion

Defendants allege H&M converted both real property and rental income from said property. Conversion is "defined as the unauthorized assumption in the exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner's rights." *SSI Medical Services, Inc. v. Cox*, 301 S.C. 493, 498, 392 S.E.2d 789, 792 (1990).

"There can be no conversion of money unless there is an obligation on the defendant to deliver a specific, identifiable fund to the plaintiff." *Mullis v. Trident Emergency Physicians*, 351 S.C. 503, 507, 570 S.E.2d 549, 551 (Ct. App. 2002) (internal citations omitted). A claim for conversion fails if the defendant is merely exercising a legal right over the property. *Castell v. Stephenson Finance Co.*, 244 S.C. 45 135 S.E.2d 311 (1964).

Defendants allege, in part, that H&M converted real property. "It is well settled that a conversion action does not lie when alleging the exercise of dominion or control over real property." *Hawkins v. City of Greenville*, 358 S.C. 280, 297, 594 S.E.2d 557, 566 (Ct.App., 2004). Therefore to the extent Defendants allege conversion of real property, this cause of action fails as a matter of law.

Defendants further allege that H&M converted rental income for the property. Money can only be the subject of a conversion action "if it is capable of being identified and there may be conversion of determinate sums even though the specific coins and bills are not identified." *Mullis*, 351 S.C. at 507, 570 S.E.2d at 551. Defendants' pleadings did not contain any specified

amount of money. A Court-appointed Receiver has been in place since April of 2010, and the receiver has made proper accountings to the Court. At the time of the Receiver's appointment, it appears all accounts and monies were given to the receiver. B. Patel Dep., Page 116, lines 1-12. No evidence has been presented that any money was taken by H&M or any money is held by H&M. At the hearing, Ms. Cook presented to the Court pictures allegedly showing members of H&M on the property and collecting rent. The Court carefully examined these photos. They did appear to show members of H&M on the property. However in no instance were any of the members shown taking or handling any money. Mere presence on the property is not probative of a conversion claim. Therefore summary judgment on the conversion claim is proper.

Violation of the South Carolina Unfair Trade Practices Act (UTPA)

To be actionable under UTPA, an unfair or deceptive trade practice or act must adversely affect the public interest. *Florence Paper Co. v. Orphan*, 298 S.C. 210, 379 S.E.2d 289 (1989) "[C]onduct which only affects the parties to the transaction provides no basis for a UPTA claim." *Jefferies v. Phillips*, 316 S.C. 523, 527-528, 451 S.E.2d 21, 23 (Ct. App. 1994). The case at bar concerns one transaction between two sophisticated parties. Since H&M's creation in June 2009, the only business it has ever conducted was the purchase of the note, loan, and other documents related to this case. It has never conducted any business with the general public. Defendants have failed to put forth any evidence that H&M has done any business with the public, or that it has harmed the public interest. Therefore the UTPA claim fails as a matter of law.

Tortious Interference With a Contract

To establish intentional interference with a contractual relationship the plaintiff must prove:

(1) a contract;

- (2) the wrongdoer's knowledge thereof;
- (3) his intentional procurement of its breach;
- (4) the absence of justification; and
- (5) the damage resulting therefrom.

Kinard v. Crosby, 315 S.C. 237, 240, 433 S.E.2d 835, 837 (1993). Defendants' allege H&M interfered with the following two categories of contracts: a lending contract between Bank and BJC Enterprises, LLC and contracts between BJC Enterprises, LLC and various renters of the properties.

As to the lending contract, as stated herein and in this Court's **Order Granting Motion for Summary Judgment on Claims Asserted by Third Party Plaintiffs Against First Palmetto Savings Bank, F.S.B.** filed on June 1, 2011, the Defendants presented no evidence Bank breached its contract with BJC Enterprises, LLC. In Defendants' memorandum in opposition to this Motion, Defendants' put forth a long list of alleges interferences carried out by Jack Jones and Bhupendra Patel. All of the alleged interferences occurred before the creation of H&M was created in June, 2009. Therefore, even if taken as true, H&M cannot be held liable as it did not exist.

Intentional Infliction of Emotional Distress/Outrage

To establish a claim for intentional infliction of emotional distress/outrage, the claimant must show the defendant:

- (1) "intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct";
- (2) that the conduct was so outrageous it exceeded "all possible bounds of decency" and so "atrocious" it was "utterly intolerable in a civilized

community”;

(3) such actions actually caused plaintiff's emotional distress; and

(4) the emotional distress was so severe “no reasonable man could be expected to endure it.”

AJG Holdings, LLC, 708 S.E.2d at 223 (quoting *Hansson v. Scalise Builders of S.C.*, 374 S.C. 353, 356, 650 S.E.2d 68, 70 (2007)). A claim for intentional infliction of emotional express/outrage carries a “heightened burden of proof, and there must be more than a scintilla of evidence in order to defeat a motion for summary judgment.” *Id.* at 224 (internal citations omitted).

After reviewing the evidence, the Court holds that there is no evidence to support a claim for intentional infliction of emotional distress/outrage. In Wendy Bellamy's deposition, Bellamy stated that her distress and suicide attempt was the result of her financial situation relating to Bank. W. Bellamy Dep., Page 60, lines 10-16; Page 63, lines 11-22. Her suicide attempt was a full two years before the creation of H&M. There is no evidence she had any significant distress caused by H&M after its creation in June 2009.

Conclusion

Based upon the reasons stated herein, Hotel & Motel Holdings, LLC's Motion for Summary Judgment on Counterclaims Asserted by Defendants is hereby **GRANTED**.
IT IS SO ORDERED.


William H. Seals, Jr., Judge
Twelfth Judicial Circuit

Horry County, South Carolina

June 1, 2011

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

HOTEL & MOTEL HOLDINGS, LLC,)

Plaintiff,)

vs.)

BJC ENTERPRISES, LLC, ET AL.,)

Defendants.)

BJC ENTERPRISES, LLC, ET AL.,)

Third Party Plaintiffs,)

vs.)

FIRST PALMETTO SAVINGS BANK,)
F.S.B., JACK JONES, DONALD D.)
GODWIN, AND BHUPENDRA PATEL,)

Third Party Defendants.)

IN THE COURT OF COMMON PLEAS #2

Civil Action No. 2009-CP-26-05743

**ORDER DENYING DEFENDANTS'
MOTION FOR RECONSIDERATION OF
ORDER GRANTING SUMMARY
JUDGMENT TO PLAINTIFF ON
DEFENDANTS' COUNTERCLAIMS**

HORRY COUNTY
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MELANIE WIGGINS-WARD
CLERK OF COURT

This matter comes before the Court upon the Motion of Defendants BJC Enterprises, LLC ("BJC"), Wendy J. Bellamy, and Americana, Inc. seeking an Order reconsidering the previous Order of this Court granting the Motion for Summary Judgment on Defendants' Counterclaims, which was filed by Hotel & Motel Holdings, LLC (hereinafter "H & M"). The parties have extensively briefed the issues presented in the Motion, and in accordance with Rule 59(f), SCRCP, the Court has made its determination on the briefs of the parties without oral argument. For the reasons set forth below, the Motion for Reconsideration of Order is DENIED.

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RELEVANT PROCEDURAL HISTORY

This commercial foreclosure action was originally brought by First Palmetto Savings Bank, F.S.B. ("First Palmetto"). The Summons and Complaint were filed with the Court on June 11, 2009. Subsequently, an Amended Summons and Complaint were filed with the Court wherein H & M was substituted as the plaintiff. According to the Amended Complaint, H & M purchased the mortgages which are the subject of this action, and assignments of the mortgages have been recorded with the Office of the Horry County Register of Deeds.

Thereafter, Defendants answered the Amended Complaint and later filed an Amended Answer, Counterclaims and Third-Party Complaint. In the Amended Answer, Defendants asserted the following counterclaims against H & M: breach of contract, fraud, breach of contract accompanied by a fraudulent act, civil conspiracy, conversion, interference with contractual relationship, intentional infliction of emotional distress/outrage, and violation of the South Carolina Unfair Trade Practices Act.

In response to the counterclaims, H & M filed and served a Motion for Summary Judgment, and a hearing on the Motion was held before this Court on Thursday, May 12, 2011. By Order filed with the Horry County Clerk of Court on June 6, 2011, this Court granted the Motion for Summary Judgment as to Defendants' Counterclaims. It is this Order that Defendants seek reconsideration of pursuant to Rules 52(b) and 59(e) of the South Carolina Rules of Civil Procedure. In their Motion for Reconsideration, filed on June 20, 2011, Defendants allege the Court erred in several ways, as addressed below. However, the Court finds that none of the issues raised by Defendants in their Motion provide a basis for reconsideration of the Court's Order, and thus, their Motion for Reconsideration is denied.

CONCLUSIONS OF LAW AND ANALYSIS

I. THE COURT DID NOT ERR IN CONCLUDING THAT THE STATUS OF H & M AS A HOLDER IN DUE COURSE DOES NOT AFFECT THE VIABILITY OF DEFENDANTS' COUNTERCLAIMS.

H & M concedes that it is not a holder in due course. The evidence in this case establishes that H & M purchased the loan documents of BJC after the present foreclosure action was filed. However, the status of H & M as a holder of due course only becomes an issue when the defendants establish the existence of a valid *defense*. More importantly, the fact that H & M is not a holder in due course has no bearing on whether Defendants may assert affirmative claims against H & M as an assignee of the loan documents.

Under South Carolina law, the rights of an assignee can be no greater than those of the assignor. Dixie Wood Preserving Co. v. Albert Gersten & Associates, 244 S.C. 57, 64-65, 135 S.E.2d 368, 371 (1964). "However, absent an agreement to the contrary, the common law assignee takes only the benefits, not the burdens of the assigned obligation." Rosemond v. Campbell, 288 S.C. 516, 523, 343 S.E.2d 641, 645 (1986). Therefore, "as against the assignee, the obligor *can only assert a claim defensively* when the assignee seeks to enforce the obligation; *he has no common law right to sue the assignee affirmatively* on a claim against the assignor arising from the underlying obligation." Id. (emphasis added); see also, 27 S.C. Jur. *Mortgages* § 172. The distinction between a defense and affirmative claim is critical in this case.

Many of the grounds set forth as reasons supporting the Court's reconsideration of its prior Order asserted by Defendants are based upon a mischaracterization of the protections afforded a holder in due course and the ramifications of not qualifying as such. "A person taking a negotiable instrument as a 'holder in due course' takes it free from all claims to it on the part of any person and free from all 'personal' defenses of any party to the instrument with whom the

holder has not dealt." Rosemond at 523, 343 S.E.2d at 645. There are numerous personal defenses including, among others, the following: failure of consideration, nonperformance of a condition precedent, nondelivery, theft of the instrument, payment or satisfaction to the holder would be inconsistent with the terms of a restrictive endorsement, and fraud in the inducement. 10 C.J.S. *Bills and Notes* § 204; see also, Park v. Funderburk, 87 S.C. 76, 68 S.E. 963 (1910) (noting that personal defenses include the defenses of fraud in the inducement and failure of consideration).

Critically, whether an assignee qualifies as a holder in due course affects only what *defenses* may be asserted against the assignee. The Order of this Court which Defendants seek reconsideration of deals with the affirmative *counterclaims* of Defendants, not their defenses. As such, the Court finds that whether H & M is a holder in due course has no bearing on the viability of these counterclaims, and H & M is not subject to affirmative claims based on the alleged conduct of First Palmetto. Rather, these claims must be asserted, if at all, against First Palmetto.

II. THE COURT DID NOT ERR IN FINDING THERE IS NO EVIDENCE THAT H & M BREACHED ITS IMPLIED OBLIGATIONS OF GOOD FAITH AND FAIR DEALING.

In their Motion for Reconsideration, Defendants make numerous unsupported, conclusory statements of fact which they allege constitute evidence of misconduct on the part of H & M, amounting to a breach of its obligations of good faith and fair dealing. Importantly, the allegations do not include a citation to the record or any evidence in this case. As a result, the Court finds that the arguments offered by Defendants are wholly insufficient to prove that H & M breached its implied obligations of good faith and fair dealing. The Court will address each alleged breach below.

A. Failure To Provide Notice.

Defendants allege that H & M breached its contractual obligation by failing to provide notice to Defendants. Notably, Defendants fail to specify the notice to which they were allegedly entitled. The terms of the loan documents do not require that notice be given. The notice provisions contained in the loan documents relate to acceleration of the debt. The evidence in this case clearly establishes that First Palmetto did not accelerate the debt; the loan matured. The Court finds that no provision of the loan documents requires First Palmetto to provide notice of default, much less maturity, to the defendants.

Even assuming notice was required, the Court finds ample evidence in this case which establishes that Defendants were provided written notice on at least two occasions. Moreover, the evidence establishes to the Court's satisfaction, that BJC received these notices. Additionally, when First Palmetto instituted a foreclosure action in February of 2009, it clearly outlined the defaults of BJC. Thus, the Court finds the defendants' contention that they were without notice of default without merit and unsupported by the evidence in this case.

Finally, even if BJC was entitled to notice and did not receive it, and therefore there was a breach of the loan agreement, the Court finds that BJC breached the contract first by failing to submit payment when due. As a matter of law, a party cannot take advantage of his own default in the performance of a contract, and where a contract is not performed, the party who is guilty of the first breach is the one upon whom rests all liability for the nonperformance. Willms Trucking Co. v. JW Constr. Co., 314 S.C. 170, 442 S.E.2d 197 (Ct. App. 1994); 17A Am. Jur. 2d *Contracts* § 621 (1991). Based on the foregoing, the Court did not err in finding H & M did not breach its implied obligations of good faith and fair dealing by allegedly failing to provide notice to BJC.

B. Conditional Approval Of Renewal Of Loan Letter.

In further support of their Motion for Reconsideration, Defendants allege that First Palmetto breached its implied obligation of good faith and fair dealing when it made an offer to renew the loan and sent it to an address where First Palmetto knew Bellamy, BJC and Americana would not receive it. As set forth above, the alleged acts of First Palmetto are not imputed to H & M simply by virtue of its status as an assignee of the loan documents. In any event, the Court finds there is no evidence to support this conclusory assertion of fact by Defendants. Indeed, the Court finds that the evidence in this case directly refutes the defendants' assertion.

Initially, the Court would note that there is no evidence to suggest that First Palmetto knew or should have known that Defendants would not receive their mail when it was sent to the address of record for BJC. To the contrary, the evidence reveals that BJC did receive the letter, and BJC's negotiations with First Palmetto continued after the letter was sent. The loan history report for the 2008 calendar year indicates that on November 26, 2008, a payment in the amount specified in the letter was made. Thus, the only reasonable inference is that BJC received the letter.

Based on the foregoing, the Court did not err in finding that First Palmetto and H & M did not breach their implied duties of good faith and fair dealing with regard to the November 24, 2008 letter of conditional approval.

C. Negotiations Regarding A Sale Of The Loan.

Next, Defendants contend that First Palmetto breached its implied obligation of good faith and fair dealing when it advised BJC and its members that the bank was negotiating a workout of the loan while simultaneously negotiating the sale of the loan. Presumably, Defendants find these actions mutually exclusive such that the sale of the loan could not

constitute a workout. Implicitly, Defendants are contending that the negotiations leading up to the sale of the BJC loan were done without the knowledge and acquiescence of the defendants. The Court finds that the evidence in this case does not support this assertion, and in fact, it is directly contradicted by the testimony of multiple witnesses.

In her deposition, Defendant Bellamy testified that she was present during discussions between First Palmetto and Jack Jones regarding the sale of the loan. In addition, Defendant Bellamy stated that she was present in several meetings with Jack Jones and others regarding the potential purchase of the loan documents. Similarly, Joyce Collins, a long-time friend of Defendant Bellamy, testified in her deposition that she discussed purchasing the loan from First Palmetto with Defendant Bellamy present. Moreover, Mrs. Collins testified that Defendant Bellamy was aware of the fact that she and Jack Jones were negotiating the purchase of the BJC loan. Bhupendra Patel testified similarly, corroborating the meetings where Defendant Bellamy was present and the knowledge of Defendant Bellamy regarding the loan sale negotiations.

The Court finds it significant that nothing within the loan documents prohibits First Palmetto from negotiating and consummating the sale of the BJC loan. This fact, coupled with the knowledge and apparent acquiescence of the defendants in the sale of the loan, compels a finding by the Court that First Palmetto has not breached its implied obligations of good faith and fair dealing by negotiating the sale of the loan documents.

Based on the above, the Court finds that BJC has presented no evidence to support its claims that First Palmetto (or H & M) breached the implied obligation of good faith and fair dealing by negotiating and completing the sale of BJC's loan.

D. Installation Of Patel As Manager And Diversion Of Funds.

Defendants also assert that First Palmetto assisted in the installation of Bhupendra Patel as manager of the properties, allowing Patel to divert rental funds which could have been used to make the May 31, 2009 payment to First Palmetto. Initially, the Court notes there is no evidence in the record to support Defendants' contention that Patel diverted any funds or failed to account for any funds; Defendant Bellamy admitted as much in her deposition.

Nonetheless, Defendants assert that the diversion of funds perpetrated by Patel is "evidenced, at a minimum, by substantial payments to Jack Jones and Wilbur Jones." The evidence establishes that Patel made these payments. However, the evidence also establishes that the payments were for loans made by Jack Jones and Wilbur Jones to Patel for the benefit of the defendants to allow Patel to open the motels in 2009. The loan agreements were memorialized in a notarized writing, executed by Defendant Bellamy and Henry C. Coan III, as well as two witnesses.

Based on the above, the Court finds that Defendants have presented no evidence to establish that First Palmetto assisted in the installation of Patel as a manager or of any diversion of funds by Patel. Therefore, the Court did not err in granting summary judgment to H & M on the counterclaims of Defendants.

III. THE COURT DID NOT ERR IN FINDING THAT H & M DID NOT EXIST PRIOR TO JUNE 2009, AND H & M IS NOT LIABLE FOR THE CONDUCT OF ANY PERSON OR ENTITY PRIOR TO THE DATE OF ITS INCORPORATION.

A. The De Facto Corporation Doctrine Does Not Apply In This Case.

"A de facto corporation is one so defectively created as not to be a de jure corporation, but nevertheless the result of a bona fide attempt to incorporate under existing statutory authority, coupled with the exercise of corporate powers, and recognized by the courts as such in

all proceedings except a direct attack by the state questioning its corporate existence.” Glaze v. Grooms, 324 S.C. 249, 256, 478 S.E.2d 841, 845 (1996). The evidence establishes that H & M was validly formed on June 15, 2009, when its Articles of Organization were filed with the Office of the South Carolina Secretary of State. H & M was not defectively created, and its corporate existence is not at issue in this case. Moreover, there is no evidence that there was an attempt to form H & M or an exercise of corporate powers prior to the date of H & M’s incorporation through the Secretary of State.

Based on the foregoing, H & M cannot be considered a de facto corporation, and the Court finds Defendants’ arguments in this regard are without support in fact or law.

B. The Alleged Acts Of Jack Jones Are Not Imputable To H & M.

Defendants further allege that Jack Jones was a promoter of H & M prior to its formation, and therefore, his acts are imputable to H & M. This argument fails as a matter of law. “Generally, a corporation is not liable for torts of its promoters prior to its creation unless it has rendered itself liable by its own act after acquiring corporate existence. A corporation is not liable for the fraud, negligence, or other torts of its promoters or corporators prior to its creation, unless it has in some way rendered itself liable by its own act after acquiring corporate existence.” 18 C.J.S. *Corporations* § 104 (2011). The Court finds there is no evidence, or allegation, that H & M ratified or otherwise rendered itself liable for the torts of Jack Jones.

C. H & M Is Not Estopped From Denying It Existed Prior To June 2009.

In their final effort to impute liability to H & M, Defendants assert that estoppel precludes H & M from denying it existed prior to its incorporation on June 15, 2009. For the reasons below, the Court finds this argument fails as a matter of law.

The South Carolina Court of Appeals has summarized the essential elements of estoppel, which are as follows:

- (1) conduct amounting to a false representation or concealment of material facts, or conduct calculated to convey the impression that the facts are otherwise than, and inconsistent with, the party's subsequent assertions;
- (2) intention or expectation that such conduct be acted upon by the other party; and
- (3) actual or constructive knowledge of the real facts.

As to the party claiming estoppel, the essential elements are:

- (1) lack of knowledge or the means of acquiring, with reasonable diligence, knowledge of the true facts;
- (2) reasonable reliance on the other party's conduct; and
- (3) a prejudicial change in position.

Provident Life and Acc. Ins. Co. v. Driver, 317 S.C. 471, 477, 451 S.E.2d 924, 928 (Ct. App. 1994).

Defendants allege that Jack Jones falsely represented to the members of BJC that a loan workout was being negotiated when no such workout was being negotiated. Further, Defendants assert that Jack Jones was working to "paper the deal to purchase the loan." Significantly, Defendants have presented the Court with no evidence in support of this proposition. To the contrary, the evidence before this Court establishes that Jack Jones was working to salvage the BJC loan and raise funds for BJC. As an example, Jack Jones and his brother lent \$70,000.00 to Patel for the benefit of BJC which enabled the motels to open for the 2009 season. Additionally, Jack Jones took Defendant Bellamy to numerous attorneys, resulting in several capital call letters to the members of BJC, but the members of BJC refused to contribute funds to pay the loan. Moreover, there is evidence establishing that Defendant Bellamy was aware that negotiations

were ongoing regarding the purchase of the loan. As a result, there is no false representation or concealment of material fact on the part of H & M.

In addition to their failure to present evidence of a false representation or concealment of material fact, the Court finds that Defendants have failed to present any evidence of their lack of knowledge, reasonable reliance or prejudicial change in position. Indeed, Defendants cannot make the required showing because, as Defendant Bellamy acknowledged in her deposition, regardless of who owned the loan, the obligation is owed. Neither H & M nor anybody else did anything to cause a prejudicial change in the defendants' positions. The defendants were (and are) in the same position after H & M purchased the loan as they were prior to its purchase of the loan. Thus, the Court finds that Defendants have failed as a matter of law to establish the requisite elements of estoppel, and the Court did not err in granting summary judgment to H & M as to Defendants' counterclaims.

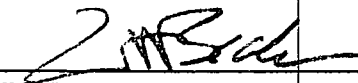
CONCLUSION

After a careful review of the pleadings, the briefs of the parties, and the relevant case law, this Court concludes it has properly considered the Motion for Reconsideration. Defendants have failed to state grounds sufficient to warrant reconsideration and have similarly failed to demonstrate any error of law in the Court's grant of summary judgment.

NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendants' Motion for Reconsideration of Order Granting Summary Judgment in favor of Plaintiff on the Counterclaims of Defendants is hereby denied.

AND IT IS SO ORDERED.


THE HONORABLE WILLIAM H. SEALS, JR.
Presiding Circuit Court Judge for the
Fifteenth Judicial Circuit

Dated this 25 day of July, 2011.
Maui, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

HOTEL & MOTEL HOLDINGS, LLC,)

Plaintiff,)

vs.)

BJC ENTERPRISES, LLC, et al.,)

Defendants.)

BJC ENTERPRISES, LLC, et al,)

Third Party Plaintiffs,)

vs.)

FIRST PALMETTO SAVINGS BANK,)
F.S.B., et al.,)

Third Party Defendants.)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2009-CP-26-05743

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of July, 2011, the following documents:

- ORDER DENYING DEFENDANTS/THIRD-PARTY PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; and
- ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION OF ORDER GRANTING SUMMARY JUDGMENT TO PLAINTIFF ON DEFENDANTS' COUNTERCLAIMS

have been served upon counsel of record, by depositing copies in the United States mail, postage prepaid and properly addressed as follows:

James Lewis, Esquire
Kathryn M. Cook, Esquire
10409 N. Kings Highway
Post Office Box 4086
North Myrtle Beach, SC 29597

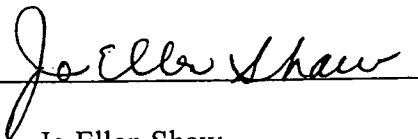
William H. Short, Jr., Esquire
Haynsworth Sinkler Boyd P.A.
Post Office Box 11889
Columbia, SC 29211

Susan P. MacDonald, Esquire
Nelson Mullins Riley & Scarborough, LLP
Post Office Box 3939
Myrtle Beach, SC 29578

Scott B. Umstead, Esquire
Scott B. Umstead, PA
4226 Mayfair Street, Suite 100
Myrtle Beach, SC 29577

William W. DesChamps, Jr., Esquire
William W. DesChamps, III, Esquire
DesChamps Law Firm
1551 21st Avenue North, Suite 14
Myrtle Beach, SC 29577

*I further certify that copies of the foregoing documents were also emailed to counsel on
the date shown above.*


Jo Ellen Shaw

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

COPY

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No.: 2009-CP-26-5743

Hotel & Motel Holdings, LLC,

Respondent,

v.

BJC Enterprises, LLC, Wendy J. Bellamy,
Americana, Inc., a/k/a Americana Motel of
Myrtle Beach, Inc.,

Appellants,

Mozingo & Wallace Architects, LLC,
Kersi S. Shroff, and Shroff Management, Inc.

Defendants,

v.

First Palmetto Savings Bank, F.S.B.,
Jack Jones, Donald D. Godwin, and
Bhupendra Patel,

Respondents

RECEIVED

AUG 29 2011

SC Court of Appeals

PROOF OF SERVICE

I certify that I have served the Notice of Appeal and Applicable Orders on all parties by depositing a copy of the same in the United States Mail, postage prepaid, on August 26, 2011, addressed to their attorneys of record, to the following:

R. Wayne Byrd, Esq.
Audra M. Byrd, Esq.
Turner Padgett Graham & Laney, P.A.
PO Box 2116
Myrtle Beach, SC 29578

(843) 213-5500
Attorneys for the Respondents Hotel and Motel Holdings, LLC,
Donald Godwin, and Jack Jones

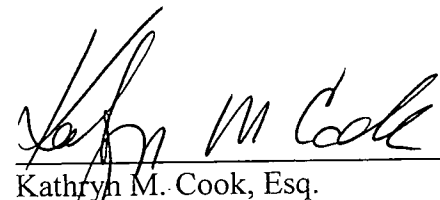
William W. DesChamps, Jr., Esq.
William W. "Trey" DesChamps, III, Esq.
DesChamps Law Firm
PO Box 2402
Myrtle Beach, SC 29578
(843) 448-2391
Attorney for Respondent Bhupendra Patel

William H. Short, Esq.
Haynsworth Sinkler Boyd, PA
PO Box 11889
Columbia, SC 29211
(803) 540-7823
Attorney for Respondent First Palmetto Savings Bank, FSB

Scott B. Umstead, Esquire
4226 Mayfair Street, Suite 100
Myrtle Beach, SC 29578
(843) 913-4610
Attorneys for Defendant Mazingo & Wallace
Architects, LLC

Susan P. MacDonald, Esquire
Nelson Mullins Riley & Scarborough, LLP
Post Office Box 3939
Myrtle Beach, SC 29578-3939
(843) 946-5654
Attorneys for Defendants Kersi S. Shroff and
Shroff Management, Inc.

August 26, 2011



Kathryn M. Cook, Esq.
SC Bar No. 1371
James E. Lewis, Jr., Esq.
SC Bar No. 77698
Cook & Roy LLC
Post Office Box 4086
N. Myrtle Beach, SC 29597

(843)663-1200

Fax: (843)663-0364

Email: kcook@cookandroy.com

jlewis@cookandroy.com

Attorneys for Appellants

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

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Architects, LLC, Kersi S. Shroff, and
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Defendants,

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Appellants,

v.

First Palmetto Savings Bank, F.S.B.,
Jack Jones, Donald D. Godwin, and
Bhupendra Patel,

Respondents

VERIFICATION OF APPELLANTS BJC ENTERPRISES, LLC,
WENDY J. BELLAMY, AND AMERICANA, INC. A/K/A
AMERICANA MOTEL OF MYRTLE BEACH, INC.

PERSONALLY appeared before me Appellants above-named in the foregoing action
who, being duly sworn say:

- (a) That these Deponents have read the allegations contained in the attached Petition.
- (b) That the attached Petition was prepared by Appellants' attorney at their request and with their knowledge and consent.
- (c) That the allegations contained in the attached Petition are true and correct to the best of Appellants' knowledge and belief and for proper purposes.
- (d) That these Appellants have authorized their attorney to file the attached Petition, to present the same to the Court, to secure any necessary Orders based thereon, and to secure service upon the adverse party of the attached Petition.

BJC ENTERPRISES, LLC

BY: Wendy Jones Bellamy
ITS: Managing Member

SWORN to before me this 24
Day of May, 2012.
John McCole
Notary Public for South Carolina
My Commission expires: 3/17/13.

AMERICANA, INC. A/K/A AMERICANA
MOTEL OF MYRTLE BEACH, INC.

BY: Wendy Jones Bellamy
ITS: Shareholder

SWORN to before me this 24
Day of May, 2012.
John McCole
Notary Public for South Carolina
My Commission expires: 3/17/13.

AMERICANA, INC. A/K/A AMERICANA
MOTEL OF MYRTLE BEACH, INC.

BY: Harvey Jones
ITS: Shareholder

SWORN to before me this 24
Day of may, 2012.
Kelvin M. Cook
Notary Public for South Carolina
My Commission expires: 3/17/13.

Wendy J. Bellamy
WENDY J. BELLAMY

SWORN to before me this 24
Day of may, 2012.
Kelvin M. Cook
Notary Public for South Carolina
My Commission expires: 3/17/13.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

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v.

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Bhupendra Patel,

Respondents

CERTIFICATE OF SERVICE

I certify that I have served the Petition for Writ of Supersedeas on all parties by depositing a copy of the same in the United States Mail, postage prepaid, on May 24, 2012, addressed to their attorneys of record, to the following:

R. Wayne Byrd, Esq.
Audra M. Byrd, Esq.
Turner Padget Graham & Laney, P.A.
PO Box 2116
Myrtle Beach, SC 29578
(843) 213-5500
Attorneys for the Respondents Hotel and Motel Holdings, LLC,
Donald Godwin, and Jack Jones

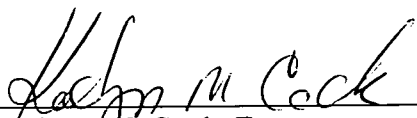
William W. DesChamps, Jr., Esq.
William W. "Trey" DesChamps, III, Esq.
DesChamps Law Firm
PO Box 2402
Myrtle Beach, SC 29578
(843) 448-2391
Attorney for Respondent Bhupendra Patel

William H. Short, Esq.
Haynsworth Sinkler Boyd, PA
PO Box 11889
Columbia, SC 29211
(803) 540-7823
Attorney for Respondent First Palmetto Savings Bank, FSB

Scott B. Umstead, Esquire
4226 Mayfair Street, Suite 100
Myrtle Beach, SC 29578
(843) 913-4610
Attorneys for Defendant Mozingo & Wallace
Architects, LLC

Susan P. MacDonald, Esquire
Nelson Mullins Riley & Scarborough, LLP
Post Office Box 3939
Myrtle Beach, SC 29578-3939
(843) 946-5654
Attorneys for Defendants Kersi S. Shroff and
Shroff Management, Inc.

May 24, 2012


Kathryn M. Cook, Esq.
SC Bar No. 1371

Cook & Roy LLC
Post Office Box 4086
N. Myrtle Beach, SC 29597
(843)663-1200
Fax: (843)663-0364
Email: kcook@cookandroy.com
Attorneys for Appellants