

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Master in Equity Court

Charles B. Simmons Master in Equity Court Judge

Opinion No. 2012-UP-504 (S.C. Ct. App. filed Sep. 5, 2012)

The Palmetto Bank, Respondent,

v.

Walter T. Cardwell, Jr., Coach Hills Homeowner's Association, Inc., United
States of America, Defendants,
Of whom Walter T. Cardwell Jr., is the Petitioner.

PETITION FOR A WRIT OF CERTIORARI
APPENDIX

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S.C. Supreme Court

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RECORD ON APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Master in Equity Court

Charles B. Simmons Master in Equity Court Judge

Case No. 2010-CP-23-4560

Palmetto Bank,

Respondent,

v.

Dr. Walter T. Cardwell Jr.,

Appellant.

RECORD ON APPEAL

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Master Order and Judgement of Foreclosure Sale of April 6, 2011

FILED CLERK OF COURT
GREENVILLE CO. SC
PAUL B. WIGGINS
STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)
2011 APR - 8 A) C.A. NO. 2010-CP-23-4560
The Palmetto Bank,)
Plaintiff,)
-vs-)
Walter T. Cardwell, Jr.,)
Coach Hills Homeowner's Association, Inc.,)
United States of America,)
Defendants.)
Master's Order and Judgment of
Foreclosure and Sale
(Deficiency as to Defendant Walter T.
Cardwell, Jr.)
(Non-eligible under the Home Affordable
Modification Program)

PROCEDURAL HISTORY

This matter came before the undersigned as Master in Equity for Greenville County, South Carolina, for a hearing on March 30, 2011, attended by M. Kevin McCarrell and F. Marion Hughes of Smith Moore Leatherwood LLP, attorneys for Plaintiff; Robin Thomason and Josie Stewart, representatives of The Palmetto Bank; and Defendant Walter T. Cardwell, Jr. The matter was referred to me for the purposes of taking the testimony and issuing a final decree with any appeal therefrom to be directly to the South Carolina Court of Appeals. On or about March 25, 2011, Defendant Walter T. Cardwell, Jr. ("Cardwell") filed a Motion to Restore to Trial Roster seeking to obtain a jury trial of this case. Plaintiff filed an Objection to Defendant Cardwell's Motion to Restore to Trial Roster on or about March 28, 2011. Cardwell's Motion was addressed immediately before the foreclosure hearing.

AS TO THE MOTION TO RESTORE TO TRIAL ROSTER

Plaintiff's action for foreclosure is an equitable action, triable before this Court. The question raised by Cardwell's Motion is whether Cardwell's Answer and Counterclaim present

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legal issues that should be decided by a jury. Cardwell alleges that (a) he had an oral agreement with Plaintiff to allow him to bring his payments current over time (in essence, an agreement for Plaintiff to forbear in exercising its rights under the Note and Mortgage), and that (b) Plaintiff breached that agreement by reporting his account as delinquent to the credit bureaus and by instituting this foreclosure action. He further alleges that Plaintiff's actions caused him damages.

In C&S Real Estate Services, Inc. v. Messengale, 290 S.C. 299, 350 S.E.2d 191 (1986), the South Carolina Supreme Court summarized the proper analysis for determining the trial of issues raised by counterclaims in an equitable action and set out the procedure to be followed when issues are to be tried by a jury. That analysis is based on whether the counterclaims are determined to be permissive or compulsory. As to the counterclaims filed in this action, however, after careful consideration, I conclude that Cardwell would not be entitled to a jury trial on any of the issues he has raised, regardless of whether the counterclaims were determined to be permissive or compulsory.

A. Lack of Proximate Cause

In an action for breach of contract, "the burden [is] upon the [claimant] to prove the contract, its breach, and the damages caused by such breach. [citation omitted]. The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." Fuller v. Eastern Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (S.C.1962).

In the present case, Cardwell admits being delinquent in his payments (Cardwell Ans. ¶ 2). As a result, Plaintiff had the absolute right to report his account as delinquent. Any alleged agreement not to foreclose on the Mortgaged Property has no effect on whether the account was

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delinquent. Thus, even if Plaintiff's reporting Cardwell's account as delinquent to credit bureaus lead to the damages he is claiming, no cause of action can arise for such reporting. Therefore, any failure to honor the alleged agreement did not proximately cause the damages alleged by Cardwell, and Cardwell's claims fail as a matter of law.

B. Lack of Consideration

It is well-settled that "[t]he necessary elements of a contract are an offer, acceptance, and valuable consideration." Roberts v. Gaskins, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (S.C. Ct. App. 1997). Under South Carolina law, "[v]aluable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 206, 687 S.E.2d 714, 718 (S.C. Ct. App. 2009)(quoting Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998)).

Moreover, a promise to do something that a party is already legally bound to do is not sufficient consideration. Rabon v. State Finance Corporation, 203 S.C. 183, 26 S.E.2d 501 (1943). In Rabon, the maker of a promissory note sued the payor for breach of an alleged contract to extend the time for payment of the note. Id. at 183, 26 S.E.2d at 501. After the payor filed an assignment of wages to secure payment of the promissory note, the maker filed suit, alleging that, although he was delinquent on his payments, the payor had told him he could "catch up the two payments" at a later time. Id. at 183, 26 S.E.2d at 502. The court held that, because the maker was already legally obligated to pay the note, a promise to pay the debt owed was not sufficient consideration to form a new contract. Id.

In the present case, Cardwell requested that Plaintiff forbear from foreclosing on the Mortgage until Cardwell started receiving his social security payments. (Cardwell Ans. ¶ 3c: "I asked if it would be okay for me to resume payments after [my first social security] check arrived.") Under Rabon, Cardwell's promise to resume payments (that he was already legally obligated to pay) after he started receiving social security is not sufficient consideration to form a new contract. Therefore, the alleged agreement is unenforceable as a matter of law due to lack of consideration.

C. Statute of Frauds

South Carolina Code § 32-3-10 requires that certain agreements be in writing in order to be enforceable. The portion of this statute relevant to this case provides as follows:

No action shall be brought whereby

....
(4) To charge any person upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them . .

Unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

Id. Furthermore, it is well-settled that "a contract required to be in writing by the South Carolina Statute of Frauds cannot be orally modified." Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989)(citing Windham v. Honeycutt, 279 C.S. 109, 302 S.E.2d 856 (1983)).

A mortgage, being a contract concerning an interest in real estate, is subject to the Statute of Frauds. Therefore, any modification of a mortgage would further be subject to the Statute of Frauds.

Cardwell essentially alleges that he entered an *oral* agreement with Plaintiff to modify the

terms of the Mortgage so that Plaintiff would forbear from foreclosing on the Mortgage until Cardwell received his Social Security payments. (Cardwell ¶ 3c.) Even if these allegations are true, the oral forbearance agreement to modify the Mortgage is unenforceable under the Statute of Frauds. See e.g., Secrest v. Security National, 167 Ca. App. 4th 544 (Cal. Ct. App. 4th Dist. 2008)(following several courts that have explicitly held mortgage forbearance agreements must be in writing to be enforceable under the respective state's Statute of Frauds); As a result, Cardwell's counterclaims must fail as a matter of law.

For all of the above reasons, Defendant Cardwell's counterclaims would never be presented to a jury for determination because they involve matters of law to be decided by the Court. Therefore, Defendant Cardwell's Motion to Restore to Trial Roster is denied.

AS TO THE FORECLOSURE

Based on the testimony and exhibits presented at the hearing, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. I find that this action was duly and properly instituted by the filing of the Summons and Complaint on June 2, 2010, and the service of the Summons and Complaint upon each Defendant as shown by the proofs of service heretofore filed. I further find that an Amended Complaint was filed on July 6, 2010 and was served upon Defendants of record as set forth on the Certificate of Service filed herein.
2. I find that the Lis Pendens was duly and properly filed in the Office of the Clerk of Court of Greenville County on June 2, 2010.
3. I find that Defendant Coach Hills Homeowners' Association, Inc. is in default as

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shown by the affidavit filed herein. In addition, I find that Defendant the United States of America timely filed an Answer. I also find that Defendant Walter T. Cardwell, Jr. ("Cardwell") timely filed an Answer and Counterclaim.

4. I find that notice of the time and place of this hearing has been duly given to each Defendant.

5. I find that this action was instituted by Plaintiff for the purpose of foreclosing the Mortgage given to it by Defendant Cardwell.

6. I find that for value received, Defendant Cardwell made, executed and delivered to Plaintiff a Prime Access Interest Only Note dated on or about April 10, 2008, in the amount of \$104,000.00 (the "Note"), with interest thereon as set forth in the Note. Other terms and conditions are stated in the Note which is of record herein.

7. I find that in order to secure the payment of the Note described herein, Defendant Cardwell made, executed and delivered to Plaintiff a Mortgage, in writing, dated April 10, 2008, covering real property in Greenville County, South Carolina, which is the same as that described in the Complaint (the "Mortgaged Property"). The Mortgage was duly recorded on April 10, 2008 in the Register of Deeds Office for Greenville County in Book 4945 at Page 2282.

8. I find that Defendant Cardwell was the sole owner of the Mortgaged Property at the time the Mortgage was executed. Although in a deed dated July 8, 1997 and recorded in the Register of Deeds Office in Book 1702 at Page 992, Defendant Cardwell conveyed title to the Mortgaged Property to himself and Nancy Jean Cardwell with joint rights of survivorship, Nancy Jean Cardwell passed away on July 26, 2004, leaving Defendant Cardwell as the sole owner of the Mortgaged Property.

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9. I find that Defendant Cardwell failed to make the payments as called for under the Note, and, as a result, Plaintiff exercised its option to declare the entire unpaid balance due and payable and has placed the Note and Mortgage in the hands of an attorney for collection.

10. I find that the Note and Mortgage provide that in the event this matter is referred to an attorney for collection, the maker would pay all costs of collection including reasonable attorneys' fees. The sum of \$16,443.50 is a ^{1.5% per Note, p. 3 (PS)} reasonable fee to allow as attorneys' fees to Plaintiff's attorneys for the services performed and anticipated to be performed until final adjudication of the within action, under the terms of the Note and Mortgage. In making this award, I have considered that this action has been contested by Defendant Cardwell and that Plaintiff's attorneys have had to defend against counterclaims asserted by Defendant Cardwell. I have also considered the time, effort, difficulty and results obtained by Plaintiff's attorneys, as well as their professional standing and the usual fee awarded in Greenville County in similar matters. I find that the record and evidence fully substantiates such a fee, ^{and is allowed/required under the terms of the Note. (PS)} The services anticipated to be performed until final adjudication contemplate completion of this matter within a reasonable time and do not include exceptional circumstances delaying conclusion beyond the normal time.

11. I find that the amount due and owing on the Note, with interest at the rate provided in the Note, and all other costs and expenses of collection, including attorneys' fees, secured by the Note and Mortgage, is as follows:

Principal	\$104,466.90
Interest accrued as of 03/30/11	5,156.41
Cost of collection	530.00
Attorneys' fees	<u>16,443.50</u>
TOTAL	\$126,596.81

12. I find that subsequent to March 30, 2011, interest at the legal rate of 7.25% should

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be added to such judgment debt in order to comprise the amount of Plaintiff's debt secured by the Mortgage to the date to which such interest is computed.

13. I find that Plaintiff's Mortgage is a first lien on the Mortgaged Property.

14. Defendant United States of America is made a party to this action by reason of a tax lien filed against Defendant Cardwell recorded in the Register of Deeds Office for Greenville County on August 12, 1998. Defendant United States of America admitted in its Answer that said tax lien is no longer valid. I find that this tax lien should be cancelled of record as more than ten (10) years have passed since this lien was filed and a renewal Notice of Federal Tax Lien was not re-filed by October 21, 2006, the last day for re-filing according to the lien.

15. Defendant Coach Hills Homeowner's Association, Inc. is made a party to this action by reason of:

- a) a Notice of Lien in the amount of \$50.00, filed against Defendant Cardwell recorded in the Register of Deeds Office for Greenville County on November 5, 2008, in Mortgage Book 5008 at Page 1086; and
- b) a Notice of Lien in the amount of \$50.00, filed against Defendant Cardwell recorded in the Register of Deeds Office for Greenville County on October 27, 2009, in Mortgage Book 5060 at Page 1453.

I find that these liens are junior and subordinate to the lien of Plaintiff's Mortgage.

16. I find that Plaintiff is seeking foreclosure of the Mortgage and is also seeking a personal or deficiency judgment against Defendant Cardwell.

17. I find that the Note and Mortgage (a) are not owned or guaranteed by Federal National Mortgage Association ("Fannie Mae") or the Federal Home Loan Mortgage Corporation

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("Freddie Mac"), and (b) are not owned, guaranteed, or managed by a servicer who has signed an agreement to participate in the Home Affordable Modification Program ("HMP"). I find that this Note and Mortgage are not subject to modification under the HMP, and therefore are not subject to the administrative order issued by Chief Justice Jean Toal of the South Carolina Supreme Court on May 22, 2009, in matter identified as *RE: Mortgage Foreclosures and the Home Affordable Modification Program (HMP)*.

18. I also find that Plaintiff has complied with Justice Toal's Order by including the allegation in its duly signed Complaint that the Note and Mortgage are not subject to Justice Toal's Order.

CONCLUSIONS OF LAW

Based on the above Findings of Fact, IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff is granted judgment against Defendant Cardwell as to Defendant Cardwell's counterclaims for the reasons set forth above under the discussion of the Motion to Restore to Trial Roster.
2. There is due to Plaintiff on the obligation and Mortgage set forth in the Complaint the sum of \$126,596.81 representing the total debt due Plaintiff as set out in paragraph 11; supra, together with interest at the rate provided therein until the date of compliance with the sale.
3. The amount due in the preceding paragraph (see total debt as set forth in paragraph 11, supra), and later accrued interest and costs shall constitute the total judgment debt due Plaintiff and shall bear interest hereafter at the legal rate of 7.25% per annum (\$25.15 per day).
4. The Defendant liable for the aforesaid Mortgage debt shall, on or before the date of

sale of the Mortgaged Property hereinafter described, pay to Plaintiff, or to Plaintiff's attorney, the amount of Plaintiff's debt as aforesaid, together with the costs and disbursements of this action.

5. On default of payment at or before the sale of the property, the Mortgaged Property described in the Complaint as hereinafter set forth, shall be sold by me, as Master, at public auction, at the Greenville County Courthouse, in the City of Greenville, County and State aforesaid, on June 13, 2011, or on some convenient sales date hereafter (and should the regular day of judicial sales fall on a holiday, then and in such event, the sales date shall be on the Tuesday next succeeding such holiday) on the following terms, that is to say:

a) For cash -- I, as Master, shall require at the time of bid a deposit of five percent (5%) of the amount of the bid (in cash or equivalent), the same to be applied on the purchase price only upon compliance with the bid, but in case of noncompliance within twenty (20) days, the same is to be forfeited and applied to the costs and then to Plaintiff's debt.

b) The sale shall be subject to taxes, assessments, easements, and restrictions.

c) If find that the 120 day right of redemption pursuant to Section 2410(c), Title 28, United States Code, Defendant, United States of America does not apply because the tax lien should be cancelled of record.

d) Purchaser is to pay for deed stamps and the cost of recording the deed and for interest on the debt from March 30, 2011, through the date of compliance.

6. If Plaintiff is the successful bidder at the sale, for a sum not exceeding the amount of costs, disbursements, expenses and the indebtedness of Plaintiff in full, Plaintiff may pay to me, as Master, only the amount of the costs, disbursements, and expenses, crediting the balance of the bid on Plaintiff's indebtedness.

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7. Because a personal deficiency judgment has been sought, the sale will not be final as of the close of bidding on sales day but will remain open for 30 days for upset bids. Plaintiff reserves the right to waive its right to a deficiency, which deficiency waiver may be made in writing prior to the sale.

8. I, as Master, will, by advertisement according to law, give notice of the time and place of sale and the terms thereof and will execute to the purchaser, or purchasers, a deed to the Mortgaged Property sold. Plaintiff, or any other party to this action, may become a purchaser at such sale, and if, upon such sale being made, the purchaser or purchasers should fail to comply with the terms thereof within twenty (20) days after the date of sale, I, as Master, shall readvertise the Mortgaged Property for sale on the next or some other subsequent sales date, at the risk of the former highest bidder, and the Mortgaged Property shall be sold from time to time thereafter until compliance shall be secured.

9. I, as Master, shall apply the proceeds of the sale as follows: first, to the payment of the amount of the costs and expenses of this action; next to the payment to Plaintiff or to Plaintiff's attorney of the amount of Plaintiff's debt and interest, or so much thereof as the purchase money will pay on the same.

10. Any surplus will be held pending the further order of this Court.

11. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event the successful bidder is other than Defendant Cardwell in possession herein, the Sheriff of Greenville County is ordered and directed to eject and remove from the premises the occupants of the property sold, together with all personal property located thereon, and to put the successful bidder or its assigns in full, quiet and peaceful possession of the premises without delay and to keep the

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successful bidder or its assigns in such peaceful possession.

12. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each Defendant named herein and all persons whomsoever claiming under Defendants, be forever barred and foreclosed of all right, title and interest and equity of redemption in the same mortgaged premises so sold, or any part thereof.

13. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to S.C. Code § 30-9-31, the deed of conveyance pursuant to this sale shall be indexed in the grantor index by the Register of Deeds Office in the name of the owners of record of the subject property immediately prior to the execution of the deed, as well as in the name of the Master in Equity as grantor.

14. This Court will retain jurisdiction to do all necessary acts incident to this foreclosure; including, but not limited to, the issuance of a writ of assistance in disposing of any surplus funds pursuant to Rule 71(c), SCRPC.

15. The following is a description of the premises ordered to be sold:

All that certain piece, parcel or lot of land situate, lying and being in the State of South Carolina, County of Greenville, being known and designated as Lot Number One Hundred One (101) of a subdivision known as Coach Hills, according to a plat thereof prepared by Piedmont Engineers, Architects and Planners, dated September 26, 1974, and recorded in the RMC Office for Greenville County, South Carolina, in Plat Book 4-X at page 86 and re-filed in Plat Book 4-X at Page 94, reference is hereby made to said plat for a complete metes and bounds, courses and distances description thereof.

TMS.# 0540.01-01-180.00

16. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if the Plaintiff or the Plaintiff's representative does not appear at the scheduled sale of the above-described property, then the sale of the property will be null, void and of no force and effect. In such event, the sale will

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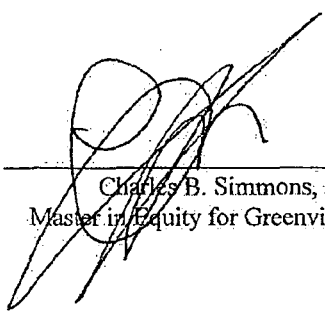


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be rescheduled for the next available sales day.

AND IT IS SO ORDERED.

Dated: April 6, 2011



Charles B. Simmons, Jr.
Master in Equity for Greenville County

A Certified Copy
of the
Order of Court C.D. & U.S.
Greenville County, SC
Dated 4/8/11

13.

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Compulsory Order of Reference

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. NO. 2010-CP-23-4560
	)	
The Palmetto Bank,	)	
	)	
Plaintiff,	)	COMPULSORY ORDER OF
	)	REFERENCE
-vs-	)	
	)	
Walter T. Cardwell, Jr.,	)	
Coach Hills Homeowner's Association, Inc.,	)	
United States of America,	)	
	)	
Defendants.	)	

This matter comes before the Court on Plaintiff's Motion for a Compulsory Order of Reference referring this action to The Honorable Charles B. Simmons, Jr. as Master in Equity for Greenville County, with authority to enter final judgment.

This action is a foreclosure action by Plaintiff. Defendant Walter T. Cardwell, Jr. ("Cardwell") filed an Answer and Counterclaim on July 1, 2010. Plaintiff filed a Reply to Answer and Counterclaim on August 2, 2010.

The Answer is a general denial of the allegations and the Counterclaim alleges breach of an alleged oral agreement between the parties not to foreclose on the property. Plaintiff's reply denies an oral agreement, and alleges several defenses to the alleged breach of oral agreement.

Because the Complaint is for the foreclosure of real estate, the action is equitable in nature, and Plaintiff is entitled to an Order of Reference. Rule 71(a) SCRCP ("Actions to foreclose liens or obtain partition of real property *shall* be tried by the court, and shall ordinarily be referred to a master pursuant to Rule 53")(emphasis added); Collier v. Green, 244 S.C. 367, 137 S.E.2d 277 (S.C. 1964)("This being an action in equity, the parties were not entitled to a trial by jury as a matter of right").

The assertion of a Counterclaim and demand for jury trial by Cardwell does not have any affect on Plaintiff's right to have the foreclosure action heard by the Court. Id. (citing multiple authorities); Byrn v. Walker, 275 S.C. 83, 85, 267 S.E.2d 601, 602 (S.C. 1980) ("The plaintiff's (respondent's) action was brought to foreclose a real estate mortgage, which is in equity, with legal actions interposed defensively by way of counterclaim and cross-complaint. Under Collier . . . the action is to be tried as an equitable action, since the defenses and counterclaims affect the validity of the lien and the amount due, and arise out of the transaction in which the mortgage was created."); Redwood Food v. Baker, 269 S.C. 528, 238 S.E.2d 214 (S.C. 1977) (affirming denial of jury trial demand in foreclosure action); Aiken Mortg. Co. v. Jones, 197 S.C. 245, 15 S.E.2d 119, 121 (S.C. 1941) ("The great weight of authority is to the effect that the interposition by the defendant in an equitable action, of a counterclaim of a legal nature, gives him no right to a jury trial, either of the case generally or of the issue raised by the counterclaim.") (citing 89 A.E.R. 1391); Livingston Holding Co. v. Avinger, 183 S.C. 1, 189 S.E. 806 (S.C. 1937); Judson Mills v. Norris, 164 S.E. 919, 919 (S.C. 1932) ("Where in actions of foreclosure, the defendant sets up a defense and/or a counterclaim affecting the consideration, and arising out of the transaction in which the mortgage or lien was created, the authorities hold that the issues thus raised are equitable and are to be tried by the court upon its equity side."); Tollner v. American Pub. Co., 125 S.C. 317, 317, 118 S.E. 619, 620 (S.C. 1923) ("The case was clearly one in equity, and the facts as to the title to personal property could be determined by the court without a trial by jury"); Mobley Co. v. McLucas, 99 S.C. 99, 82 S.E. 986 (S.C. 1914); McLaurin v. Hodges, 43 S.C. 187, 20 S.E. 991 (S.C. 1895).

Consequently Plaintiff is entitled to an Order of Reference pursuant to Rule 53(b) of the South Carolina Rules of Civil Procedure which provides that, upon application of any party or upon its own motion, the clerk of court or the judge may direct a reference of all or any of the

issues of law or fact. See Re: Orders of Reference in Foreclosure Cases, 2010-07-15-01, July 15, 2010, S.C. Supreme Court Order, (directing the Clerk of Court to sign Orders of Reference). Therefore, it is appropriate that an Order of Reference be issued in this action for the foreclosure of real property.

THEREFORE, IT IS ORDERED that the issues raised in the foreclosure action in the Complaint are referred to The Honorable Charles B. Simmons, Jr. as Master in Equity for Greenville County, to direct entry of final judgment in this action under Rule 53(b) SCRPC. Any appeal from the final judgment entered by the Master in Equity shall be directly to the South Carolina Court of Appeals.

AND IT IS SO ORDERED.

Paul B. Wilkerson

Clerk of Court for Greenville County

February 9, 2011

Copy mailed to
Attorney <u>McCarrell</u>
on <u>2</u> / <u>9</u> / <u>2011</u>

Complaint

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
The Palmetto Bank,)
Plaintiff,)
-vs-)
Walter T. Cardwell, Jr.,)
Coach Hills Homeowner's Association, Inc.,)
United States of America,)
Defendants.)

IN THE COURT OF COMMON PLEAS
2010 JUN -2 PM 1:34
C.A. NO. _____
FILED: CLERK OF COURT
GREENVILLE CO. S.C. 2010-CP-23-4560
JUL 1 2010

COMPLAINT
(Non-Jury – Foreclosure)

Plaintiff, complaining of Defendants, would respectfully show unto the Court:

1. Plaintiff is a state banking institution organized and existing under the laws of the State of South Carolina. Defendant Walter T. Cardwell, Jr. ("Cardwell") is a citizen and resident of the County of Greenville, State of South Carolina. Defendant Coach Hills Homeowner's Association, Inc. is a non-profit corporation organized and existing under the laws of the State of South Carolina, and doing business in the County of Greenville, State of South Carolina. Defendant United States of America is authorized to tax in every state and has offices and agents in the County of Greenville, State of South. The real estate hereinafter described is located in the County of Greenville, State of South Carolina.

2. On or about April 10, 2008, Cardwell, executed and delivered his Prime Access Interest Only Note to Plaintiff in writing, and thereby, for value received, promised to pay to Plaintiff, or order, the sum of \$104,000.00 (the "Note"), to be repaid according to the terms of the Note. A copy of the Note is attached hereto and incorporated herein by reference as Exhibit A.

3. Among other things, the Note provided that in the event the Note was referred to an attorney for collection, the maker thereof agreed to pay all costs of collection, including reasonable attorneys' fees.

4. In order to secure the payment of the Note, Cardwell executed and delivered to Plaintiff a Mortgage of Real Estate (the "Mortgage") dated April 10, 2008, and thereby conveyed by way of deed the following described property (the "Mortgaged Property"):

All that certain piece, parcel or lot of land situate, lying and being in the State of South Carolina, County of Greenville, being known and designated as Lot Number One Hundred One (101) of a subdivision known as Coach Hills, according to a plat thereof prepared by Piedmont Engineers, Architects and Planners, dated September 26, 1974, and recorded in the RMC Office for Greenville County, South Carolina, in Plat Book 4-X at page 86 and re-filed in Plat Book 4-X at Page 94, reference is hereby made to said plat for a complete metes and bounds, courses and distances description thereof.

TMS # 0540.01-01-180.00

The Mortgage was duly recorded in the Register of Deeds Office for Greenville County on April 22, 2008, in Mortgage Book 4945 at Page 2282. The Mortgage is a first mortgage on the Mortgaged Property and is not subject to the provisions of the South Carolina Consumer Protection Act.

5. Prior to the execution of the Mortgage, on or about September 15, 1980, Jack D. Dixon and Brenda J. Dixon conveyed the Mortgaged Property to Walter T. Cardwell, Jr., by deed recorded in the Register of Deeds Office for Greenville County on September 16, 1980, in Deed Book 1133 at page 558.

6. Subsequently by deed dated July 8, 1997, and recorded July 16, 1997 in the Register of Deeds Office for Greenville County in Deed Book 1702, Page 992, Walter T. Cardwell, Jr. conveyed the Mortgaged Property to Walter T. Cardwell, Jr., and Nancy Cardwell, as joint tenants with rights of survivorship.

Mortgaged Property and is not subject to the provisions of the South Carolina Consumer Protection Act.

8. The Note and Mortgage (a) are not owned or guaranteed by Federal National Mortgage Association ("Fannie Mae") or the Federal Home Loan Mortgage Corporation ("Freddie Mac"), and (b) are not owned, guaranteed, or managed by a servicer who has signed an agreement to participate in the Home Affordable Modification Program ("HMP"). The Note and Mortgage are not subject to modification under the HMP, and therefore are not subject to the administrative order issued by Chief Justice Jean Toal of the South Carolina Supreme Court on May 22, 2009, in matter identified as *RE: Mortgage Foreclosures and the Home Affordable Modification Program (HMP)*.

9. Defendant Cardwell is in default on the Note because of his failure to satisfy the terms of the Note. As of May 28, 2010, there was an outstanding balance due on the Note of \$106,123.67, with interest accruing thereon at the daily rate of \$9.25.

10. As a result of the default of Defendant Cardwell, Plaintiff is informed and believes that it is entitled to have its Mortgage foreclosed, the equity of redemption barred, and the Mortgaged Property sold at public sale with the proceeds therefrom to be applied first to the costs of this action, including a reasonable attorney's fee to Plaintiff's attorney, and then to Plaintiff's debt.

11. Defendant United States of America is made a party to this action by reason of a tax lien filed against Defendant Cardwell recorded in the Register of Deeds Office for Greenville County on August 12, 1998, and that Defendant United States of America has a 120-day right of Redemption. Plaintiff is informed and believes that this tax lien should be cancelled of record as more than ten (10) years have passed since this lien was filed and a renewal Notice of Federal Tax Lien was not re-filed by October 21, 2006, the last day for re-filing according to the lien.

12. Defendant Coach Hills Homeowner's Association, Inc. is made a party to this action by reason of:

- a) a Notice of Lien in the amount of \$50.00, filed against Defendant Cardwell recorded in the Register of Deeds Office for Greenville County on November 5, 2008, in Mortgage Book 5008 at Page 1086; and
- b) a Notice of Lien in the amount of \$50.00, filed against Defendant Cardwell recorded in the Register of Deeds Office for Greenville County on October 27, 2009, in Mortgage Book 5060 at Page 1453.

Plaintiff is informed and believes that these liens are junior and subordinate to the lien of Plaintiff's Mortgage.

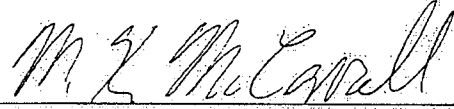
13. In the event that the proceeds of sale are insufficient to satisfy the indebtedness owed to Plaintiff, Plaintiff requests that it be granted a deficiency judgment against Defendant Cardwell.

WHEREFORE, Plaintiff respectfully prays judgment as follows:

- a) Plaintiff's Mortgage be declared a first lien on the Mortgaged Property;
- b) Plaintiff's Mortgage be foreclosed, subject to the 120-day right of redemption of the United States of America, the equity of redemption of Defendants and any person claiming by or through Defendants be forever barred and the Mortgaged Property be sold at public sale, with the proceeds therefrom to be applied first to the costs of this action, including reasonable attorneys' fees to Plaintiff's attorney, and then to Plaintiff's debt;
- c) For a personal judgment against Cardwell in the event a deficiency remains after the sale of the Mortgaged Property;

Mortgage Foreclosures and the Home Affordable Modification Program (HMP); and

e) For such other and further relief as to the Court may seem just and proper.



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ATTORNEYS FOR PLAINTIFF

Dated: June 1, 2010

Answer

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)
The Palmetto Bank,)
Plaintiff,)
-vs-) ANSWER
Walter T. Cardwell, Jr.)
Coach Hills Homeowner's Association)
United States of America,)
Defendants.)

Defendant, Walter T. Cardwell, in answer to the above complaint wish to make known to the court the following facts.

1. I, Defendant Walter T. Cardwell, Jr, am a resident of Greenville County.
2. As stated by the Plaintiff, I did secure a home equity line of credit of \$104,000 on or about April 10, 2008 from the Palmetto Bank through their Woodruff road branch manager, Josie Stewart.
3. Defendant while agreeing to pay "all cost of collection, including reasonable attorney's fees" denies that Defendant owes Plaintiff any collection costs because their referral to any collection entity was improper based on a verbal agreement made with Plaintiff's representative, Ms. Stewart.
 - a) At the time of the agreement with Ms. Stewart, I was working with an individual in Massachusetts developing a new transportation system. He was at the time funding this endeavor from his architectural practice and through private fund-raising. While most of my \$150,000 salary was deferred to keep expenses low, he did provide whatever income was necessary to pay outstanding bills.
 - b) When funding dried up due to the economic down turn I informed Ms. Stewart that I would be late on the mortgage payment but that I would be eligible for social security the following month and as soon as I received the first check I would resume payments and would gradually get caught up. She had no problem with this arrangement.
 - c) I applied for social security at the earliest opportunity and was informed that I would

receive my first check on February 22, 2010. I immediately informed Ms. Stewart that the check would arrive on February 22, and I asked if it would be okay for me to resume payments after the check arrived. She made a call to some department within the bank who at first asked if I could make a payment before the date and when I said it would be a problem Ms. Stewart received authorization for the payment to be made on the 22nd and she said she noted it in my account. I informed her that the check would arrive in the mail on the 22nd and that I would have to deposit it on the 23rd and that I would be in on the 24th after it cleared to resume making payments. She smiled and typed something on her computer which I assumed was her recording that I would be in on the 24th and the meeting was over..

- d) I did receive the social security check on the 22nd, I deposited it on the 23rd and I was in Ms. Stewart's office to make the payment as I said on the 24th at which time she informed me that they had already foreclosed on the house. I asked her how it could be stopped and she said only by paying the entire past due amount plus legal fees. When I objected to this renegeing on our agreement she told me to contact either "Carter" or "Robyn" and gave me their number. Unlike all of our earlier meetings when Ms. Stewart was warm and friendly, during this meeting she would not look me in the eye and refused to discuss with me the reason for renegeing on our agreement.
- e) After leaving Ms. Stewart's office and returning home I immediately called the number she gave me. I asked for a Mr. Carter which seemed to confuse the person who answered the phone but when I mentioned that Ms. Stewart asked me to call about the foreclosure the person said they knew about it and reiterated that to stop the foreclosure I would have to pay the entire back amount owed plus legal fees. When I explained about the agreement I had with Ms. Stewart he kept insisting that I make this payment. I asked him if his bank did not honor oral commitments made by their branch managers and he said they did but it was not until I said that if they did not honor their commitment that we would let a jury decide the issue, that he then said he would have to look into the matter and would call me early the next week.
- f) He did not call. Approximately two weeks later a person who identified himself as Derrick from that office called on another matter. I asked about the status of the investigation and he said he knew nothing about it but would look into the matter and have the person dealing with the foreclosure call me back the next day. They again did not call.
- g) After several more weeks of no response from them I became very suspicious of their actions and sent them a letter so that a written record would exist of our communications. I stopped by the local bank branch to obtain the address where I could contact them. Ms. Stewart was not in the office but another bank representative did look up the address. He informed me that there was no Mr. Carter at the office and that the person there was actually named Carter Ballentine which explained the initial confusion when I first called.

- h) I did send a certified letter to Mr. Ballentine a copy of which is attached mentioning that I still had not heard from them about the foreclosure and mentioned that their actions caused American Express to cancel my credit card even though it was current with no outstanding balance and that I had been an American Express card holder for over forty years. I also stated in that letter that all further communication should be in writing so that there will be a written record of our communication. Again, I still did not hear anything from anyone at the bank until I was served this summons.
- i) I mentioned that I was engaged in research in a new transportation system. Ms. Stewart was aware of this research and the importance that I attached to this endeavor. I also stated to her that we were working on a prototype model that should be completed in one or two months and that once this prototype was completed that fund raising then would not be a problem.
- j) By their actions in reneging on our agreement and the cancellation of the American Express Card all work on the prototype ceased as we now had to devote all of our efforts in fund-raising and me seeking employment elsewhere.
- k) This new transportation technology if successful will have a tremendous positive impact on the economy of South Carolina if Defendant remains here in South Carolina and will have a tremendous negative impact on the State's economy if Defendant is forced to leave the state should the Plaintiff prevail in this action.

4. The information about the property supplied by the Plaintiff was obtained by Plaintiff in negotiating the loan and is believed to be correct but as it was supplied by Plaintiff, Defendant takes no responsibility for its accuracy.

5. Again this information was supplied by Plaintiff and again is believed to be correct but Defendant takes no responsibility for its accuracy.

6. Again this information was supplied by Plaintiff and again is believed to be correct but Defendant takes no responsibility for its accuracy.

7. There is no numbered paragraph 7 but it appears that a fragment of the intended subject begins on the next sequentially numbered page. Because the supplied information is so incomplete that it makes its intended meaning unknown, it cannot be answered.

8. Plaintiff states the Note and Mortgage are not subject to the administrative order issued by Chief Justice Jean Toal of the South Carolina Supreme Court on May 22, 2009, in a matter identified as RE: Mortgage Foreclosures and the Home Affordable Modification Program (HMP) but provides no supporting documents. Defendant challenges this statement until Plaintiff can provide documentary proof of their assertion.

9. Defendant denies that he is in default on the note because of a verbal agreement made with Plaintiff's representative Ms. Josie Stewart modifying the repayment terms of the note which Plaintiff reneged on.

10. Plaintiff, by not honoring the agreement made with their duly authorized agent Ms. Stewart has engaged in fraud and deceptive practices and is therefore not entitled to have its mortgage foreclosed.

11. Defendant Walter T. Cardwell, Jr. agrees with the Plaintiff that the tax lien filed by Defendant United States of America has lapsed and was not renewed by the time the loan was renewed.

12. Defendant Walter T. Cardwell, Jr. denies that the two liens filed by Defendant Coach Hills Homeowner's Association represent valid claims of money owed to the Association. The Association claims that dues are owed to it based on new covenants which they claimed passed prior to filing the liens. Defendant Cardwell states that he believes that the passage of these covenants did not meet the requirements set forth in the original covenants for their modification and that they are currently being challenged by an unrelated legal action. Since payments could be made from the proceeds of the sale of the mortgaged property to the Coach Hills Homeowner's Association should the Plaintiff prevail, if Defendant Coach Hills Homeowner's Association does not withdraw the liens then this matter must also be adjudicated during these proceedings.

13. Defendant Walter T. Cardwell, Jr. denies that the Plaintiff is entitled to a deficiency judgement due to their improper action in renegeing on their agreement made by their agent Ms. Stewart

WHEREFORE, Due to the misbehavior of the Plaintiff in renegeing on our agreement whether by mistake or by design and the irrevocable damage caused by Plaintiff's actions the Defendant respectfully prays judgement as follows,

- a) That foreclosure be denied.
- b) That the personal judgement sought against Defendant by the Plaintiff also be denied.
- c) That any other and further relief sought by the Plaintiff be denied.
- d) That no additional interest be allowed on any late payments that may occur due to withholding of payments until this matter is adjudicated.
- e) That in the interest of justice that all late payments including those not made during this litigation period which are being withheld to cover the cost of this litigation not be considered late and that the account be considered current upon receipt by the Plaintiff of the first payment after all litigation is concluded.

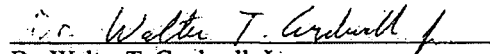
f) That compensatory damages be awarded to the Defendant against the Plaintiff equal to \$30,000 to cover direct damages done to Defendant by Plaintiff plus \$25,000 per month starting on March 1st 2010 and running until payment of the damages is received by the Defendant from the Plaintiff. This amount represents the combined monthly salary of the Defendant and his partner both of whom have now been forced into fund-raising rather than completing work on our proof of concept model.

g) That should it turn out that the Plaintiff took this action not due to a mistake but deliberately for some other reason constituting fraud on their part, that punitive damages also be awarded.

h) While the Alternate Dispute Resolution (ADR) form included with the CIVIL ACTION COVER SHEET excludes foreclosures from the ADR requirement, due to the misbehavior of the Plaintiff, we move that either ADR be required or that the Chief Judge for Administrative Purposes order that this case be referred to mediation.

FINALLY, I DO RESPECTFULLY DEMAND MY RIGHT TO A TRIAL BY JURY IN THIS ACTION WHICH AS SHOWN BY THE LOAN AGREEMENT SUPPLIED BY THE BANK WAS NOT WAIVED.

Dated June 30, 2010


Dr. Walter T. Cardwell, Jr.
15 Dawnwood Drive,
Greenville, S. C. 29615

Plaintiff's Reply to Defendant Walter T. Cardwell, Jr.'s Counterclaim

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. NO. 2010-CP-23-4560
	)	
The Palmetto Bank,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	PLAINTIFF'S REPLY TO DEFENDANT
	)	WALTER T. CARDWELL, JR.'S
Walter T. Cardwell, Jr.,	)	COUNTERCLAIM
Coach Hills Homeowner's Association, Inc.,	)	
United States of America,	)	
	)	
Defendants.	)	

Although not labeling his allegations as a Counterclaim, Defendant Walter T. Cardwell, Jr. ("Cardwell") appears to assert a counterclaim against Plaintiff. Therefore, Plaintiff, replying to the Counterclaim of Cardwell, respectfully alleges that:

FOR A FIRST REPLY

1. The allegations of the Complaint are reiterated and confirmed as if herein incorporated.
2. Each and every allegation of the Answer and Counterclaim not specifically admitted herein is denied.

FOR A SECOND REPLY AS TO DEFENDANTS' COUNTERCLAIM

3. The allegations of the preceding defense are incorporated herein by reference.
4. The allegations of paragraphs 1 and 2 comprising Defendant's Answer do not require a response from Plaintiff. To the extent a response is required, those allegations are denied to the extent they contradict or dispute the allegations of the Complaint.
5. The allegations of paragraph 3 are denied to the extent of any alleged verbal agreement with Plaintiff or its representatives.

-
- a. Plaintiff lacks sufficient information or knowledge to form a belief as to the allegations of paragraph 3(a), and therefore denies the same and demands proof thereof.
- b. With respect to the allegations of paragraph 3(b), Plaintiff admits that Josie Stewart ("Stewart"), a representative of Plaintiff, and Cardwell had conversations regarding Cardwell's default on the Note and Mortgage. Plaintiff further admits that Cardwell promised a payment in January which Cardwell failed to make. Plaintiff denies the remaining allegations of paragraph 3(b).
- c. With respect to the allegations of paragraph 3(c), Plaintiff admits that Stewart and Cardwell had conversations regarding Cardwell's default on the Note and Mortgage. Plaintiff denies the remaining allegations, and specifically denies that Stewart agreed to forego collection attempts until February 24, 2010.
- d. With respect to the allegations of paragraph 3(d), Plaintiff admits that Stewart and Cardwell had a conversation regarding Cardwell's default on the Note and Mortgage on or around February 24, 2010. Plaintiff denies the remaining allegations, and specifically denies the allegations to the extent that Cardwell alleges that he deposited any check in his Palmetto Bank checking account on or around February 23, 2010.
- e. With respect to the allegations of paragraph 3(e), Plaintiff admits that Carter Ballentine and Robin Thomason, both employees of Plaintiff, spoke with Cardwell. Plaintiff denies the remaining allegations of paragraph 3(e), and specifically denies that any oral agreement or commitment was reached between Plaintiff and Cardwell.

- f. With respect to the allegations of paragraph 3(f), Plaintiff admits that Cardwell spoke with Derriek Brunson ("Brunson"), another representative of Plaintiff on March 9, 2010. The remaining allegations of paragraph 3(f) are denied.
- g. Plaintiff admits that Carter Ballentine is a former employee of Plaintiff. Plaintiff lacks sufficient information or knowledge to form a belief as to the allegations of paragraph 3(g), and therefore denies the same and demands proof thereof.
- h. Plaintiff lacks sufficient information or knowledge to form a belief as to the allegations of paragraph 3(h), and therefore denies the same and demands proof thereof.
- i. With respect to the allegations of paragraph 3(i), Plaintiff admits that Cardwell informed Stewart that he was allegedly working on a research project. The remaining allegations of paragraph 3(i) are denied.
- j. Plaintiff denies the allegations of paragraph 3(j).
- k. Plaintiff denies the allegations of paragraph 3(k).

6. The allegations of paragraphs 4 through 11 comprising Defendant's Answer do not require a response from Plaintiff. To the extent a response is required, those allegations are denied to the extent they contradict or dispute the allegations of the Complaint. Plaintiff specifically denies any allegations that Plaintiff (and specifically Plaintiff's representative Stewart) and Cardwell had any verbal agreement.

7. Plaintiff lacks sufficient information or knowledge to form a belief as to the factual allegations of paragraph 12. Plaintiff further denies that any unrelated legal action with respect to Cardwell's Homeowner's Association dues need be adjudicated or consolidated with the instant action.

8. The allegations of paragraph 13 comprising Defendant's Answer do not require a response from Plaintiff. To the extent a response is required, those allegations are denied to the extent they contradict or dispute the allegations of the Complaint

FOR A THIRD REPLY
(SCRCP 12(b)(6))

9. The allegations contained in the preceding Paragraphs are incorporated by reference as if fully set forth herein.

10. Cardwell fails to state a claim upon which relief can be granted upon his Counterclaim pursuant to S.C. Rule of Civil Procedure 12(b)(6).

FOR A FOURTH REPLY
(Material Breach of Contract)

11. The allegations contained in the preceding Paragraphs are incorporated by reference as if fully set forth herein.

12. Cardwell should be denied relief in his Counterclaim based on Cardwell's material breach of contract entitling the holder of the documents to accelerate the balance due on the promissory note.

FOR A FIFTH REPLY
(Lack of Consideration)

13. The allegations contained in the preceding Paragraphs are incorporated by reference as if fully set forth herein.

14. Cardwell alleges an oral agreement by Plaintiff to forbear from foreclosing on the Mortgage. However, Cardwell fails to allege any consideration given in exchange for the alleged forbearance agreement by Plaintiff.

FOR A SIXTH REPLY
(Statute of Frauds - S.C. Code § 37-10-107)

15. The allegations contained in the preceding Paragraphs are incorporated by reference as if fully set forth herein.

16. Cardwell alleges an oral agreement by Plaintiff to forbear from foreclosing on the Mortgage. However, S.C. Code § 37-10-107 requires such agreements to be in writing in order to be enforceable.

FOR A SEVENTH REPLY
(Statute of Frauds - S.C. Code § 32-3-10)

17. The allegations contained in the preceding Paragraphs are incorporated by reference as if fully set forth herein.

18. Cardwell alleges an oral agreement by Plaintiff to forbear from foreclosing on the Mortgage. However, S.C. Code § 32-3-10 requires such agreements to be in writing in order to be enforceable.

WHEREFORE, having replied to the Answer and Counterclaim of Cardwell, Plaintiff respectfully prays that the Answer and Counterclaim be dismissed with prejudice, that Plaintiff be granted the relief sought in the Complaint, and that Plaintiff be granted such other and further relief as the Court may deem just and proper.

[SIGNATURE PAGE TO FOLLOW]



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ATTORNEYS FOR PLAINTIFF

Dated: July 29, 2010

Motion for Compulsory Order of Reference

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. NO. 2010-CP-23-4560
	)	
The Palmetto Bank,	)	
	)	
Plaintiff,	)	MOTION FOR
	)	COMPULSORY ORDER OF
-vs-	)	REFERENCE
	)	
Walter T. Cardwell, Jr.,	)	
Coach Hills Homeowner's Association, Inc.,	)	
United States of America,	)	
	)	
Defendants,	)	

TO ALL DEFENDANTS:

PLEASE TAKE NOTICE that Plaintiff, by and through its undersigned attorneys, hereby moves for an Order referring this foreclosure action to The Honorable Charles B. Simmons, Jr. as Master in Equity for Greenville County, to make findings of fact, conclusions of law and to issue a final decree with any appeal being directly to the South Carolina Court of Appeals.

This action is a foreclosure action by Plaintiff. Defendant Walter T. Cardwell, Jr. ("Cardwell") filed an Answer and Counterclaim on July 1, 2010. Plaintiff filed a Reply to Answer and Counterclaim on August 2, 2010.

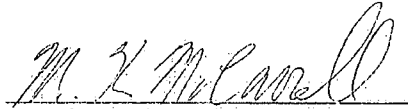
The Answer is a general denial of the allegations and the Counterclaim alleges breach of an alleged oral agreement between the parties not to foreclose on the property. Plaintiff's Reply denies any oral agreement, and alleges several defenses to the alleged breach of oral agreement.

Because the Complaint is for the foreclosure of real estate, the action is equitable in nature, and Plaintiff is entitled to an Order of Reference. Rule 71(a) SCRPC ("Actions to foreclose liens or obtain partition of real property *shall* be tried by the court, and shall ordinarily be referred to a master pursuant to Rule 53")(emphasis added); Collier v. Green, 244 S.C. 367, 137 S.E.2d 277

(S.C. 1964)(“This being an action in equity, the parties were not entitled to a trial by jury as a matter of right”).

The assertion of a Counterclaim and demand for jury trial by Cardwell does not have any affect on Plaintiff's right to have the foreclosure action heard by the Court. Id. (citing multiple authorities); Byrn v. Walker, 275 S.C. 83, 85, 267 S.E.2d 601, 602 (S.C. 1980)(“The plaintiff's (respondent's) action was brought to foreclose a real estate mortgage, which is in equity, with legal actions interposed defensively by way of counterclaim and cross-complaint. Under *Collier* . . . the action is to be tried as an equitable action, since the defenses and counterclaims affect the validity of the lien and the amount due, and arise out of the transaction in which the mortgage was created.”); Redwood Food v. Baker, 269 S.C. 528, 238 S.E.2d 214 (S.C. 1977)(affirming denial of jury trial demand in foreclosure action); Aiken Mortg. Co. v. Jones, 197 S.C. 245, 15 S.E.2d 119, 121 (S.C. 1941)(““The great weight of authority is to the effect that the interposition by the defendant in an equitable action, of a counterclaim of a legal nature, gives him no right to a jury trial, either of the case generally or of the issue raised by the counterclaim.”)(citing 89 A.L.R. 1391); Livingston Holding Co. v. Avinger, 183 S.C. 1, 189 S.E. 806 (S.C. 1937); Judson Mills v. Norris, 164 S.E. 919, 919 (S.C. 1932)(“Where in actions of foreclosure, the defendant sets up a defense and/or a counterclaim affecting the consideration, and arising out of the transaction in which the mortgage or lien was created, the authorities hold that the issues thus raised are equitable and are to be tried by the court upon its equity side.”); Tollner v. American Pub. Co., 125 S.C. 317, 317, 118 S.E. 619, 620 (S.C. 1923)(“ The case was clearly one in equity, and the facts as to the title to personal property could be determined by the court without a trial by jury”); Mobley Co. v. McLucas, 99 S.C. 99, 82 S.E. 986 (S.C. 1914); McLaurin v. Hodges, 43 S.C. 187, 20 S.E. 991 (S.C. 1895).

Consequently Plaintiff is entitled to an Order of Reference. This Motion is made pursuant to Rule 53(b) of the South Carolina Rules of Civil Procedure which provides that, upon application of any party or upon its own motion, the clerk of court or the judge may direct a reference of all or any of the issues of law or fact. See Re: Orders of Reference in Foreclosure Cases, 2010-07-15-01, July 15, 2010, S.C. Supreme Court Order, attached hereto as Exhibit A (directing the Clerk of Court to sign Orders of Reference). Therefore, it is appropriate that an Order of Reference be issued in this action for the foreclosure of real property.



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ATTORNEYS FOR PLAINTIFF

February 7, 2011

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2010-07-15-01

The Supreme Court of South Carolina

RE: Orders of Reference in Foreclosure Cases

ORDER

I FIND THAT Rule 53(b), SCRCP allows a Circuit Court Judge and/or the Clerk of Court to sign an Order of Reference in foreclosure actions, default cases, or an action where the parties consent. In most instances, it will promote judicial efficiency for the Clerk of Court in each county to sign Orders of Reference referring these matters to either the Master-in-Equity or a Special Referee in their county. Now, therefore,

Pursuant to the provisions of S.C. Const. Art. V § 4,

IT IS ORDERED that the Clerks of Court sign Orders of Reference pursuant to Rule 53(b), SCRCP in foreclosure actions, default cases, or an action where the parties consent. Circuit Judges shall also continue to sign Orders of Reference.

This Order is effective immediately.

s/Jean Hoefer Toal
Jean Hoefer Toal
Chief Justice

Columbia, South Carolina
July 15, 2010

Defendant's Motion to Restore to Trial Roster

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE)

C.A. NO. 2010-CP-23-4560

The Palmetto Bank,)

Plaintiff,)

-vs-)

**DEFENDANT'S
MOTION TO RESTORE
TO TRIAL ROSTER**

Walter T. Cardwell, Jr.)
Coach Hills Homeowner's Association)
United States of America,)

Defendants.)

ENTERED COMPUTER

2011 MAR 28 P 12:33

TO ALL DEFENDANTS:

PLEASE TAKE NOTICE that defendant hereby moves for an order returning this case to the trial roster.

1) In the Plaintiff's Motion for a Compulsory Order of Reference the Plaintiff states that the Plaintiff's action is a Foreclosure action on the Defendant, Walter T. Cardwell, Jr., that the Defendant filed an Answer and Counterclaim, and that the Plaintiff filed a Reply to the Answer and Counterclaim. The Defendant does not dispute these statements.

2) The Plaintiff then goes on to characterize Defendant's Answer as a general denial of allegations and a Counterclaim based on an alleged breach of an alleged oral agreement which the Plaintiff's Reply denies. This statement Defendant takes issue with. The Defendant's Answer was not a general denial of Plaintiff's allegations but was instead an allegation of wrongdoing by the Plaintiff preventing the Defendant from making payments as promised in the alleged oral agreement and the Counterclaim is based on the damage caused by the Plaintiff's wrongdoing. The Plaintiff denies in their Reply that this oral agreement existed.

cc: to Monitor

Plaintiff then cites rules from the SCRPC and case law that Plaintiff claims denies the Defendant of the right to a trial by jury.

3) The Plaintiff first cites Rule 71(a) of the SCRPC which states("Actions to foreclose liens or obtain partition of real property shall be tried by the court, and shall ordinarily be referred to a master pursuant to Rule 53.") Plaintiff then cites Collier v. Green, 244 S. C. 367, 137 S. E.2d 277 (S.C. 1964) which Plaintiff quotes as ("This being an action in equity, the parties were not entitled to a trial by jury as a matter of right.") The Plaintiff goes on to state that, "The assertion of a Counterclaim and demand for jury trial by Cardwell does not have any affect on Plaintiff's right to have the foreclosure action heard by the court.

4) The Plaintiff then cites Byrn v. Walker, 275 S. C. 83, 85, 267 S.E.2d 601, 602 (S.C. 1980). ("The plaintiff's (respondent's) action was brought to foreclose a real estate mortgage, which is in equity, with legal actions interposed defensively by way of counterclaim and cross-complaint. Under Collier... the action is to be tried as an equitable action, since the defenses and counterclaims affect the validity of the lien and the amount due, and arise out of the transaction in which the mortgage was created..) In the present action, the defenses and counterclaims in no way affect the validity of the lien nor the amount due and certainly don't arise out of the transaction in which the mortgage was created.

5) In the next citation, Redwood Food v. Baker, 269 S.C. 528, 238 S.E.2d 214 (S.C. 1977) (affirming denial of jury trial demand in foreclosure action). Unfortunately, Defendant having to handle this matter Pro Se and having only limited access to case law on the internet, the Plaintiff's short description and general nature of the details of the case are insufficient for the Defendant to comment on the citation. As in the Byrn v. Walker citation above, there are many reasons for denial of a jury trial that are not applicable to the current action.

6) In the citation of Aiken Mortg. Co. v. Jones, 197 S.C. 245 15 S.E..2d 119, 121 (S.C. 1941)("The great weight of authority is to the effect that the interposition by the defendant in an

equitable action, of a counterclaim of a legal nature, gives him no right to a jury trial, either of the case generally or of the issue raised by the counterclaim.”)(citing 89 A.L.R. 1391); Livingston Holding Co. v. Avinger, 183 S. C. 1, 189 S.E. 806 (S.C. 1937); Judson Mills v. Norris, 164 S.E. 919, 919’ (S.C. 1932)(“Where in actions of foreclosure, the defendant sets up a defense and/or a counterclaim affecting the consideration, and arising out of the transaction in which the mortgage or lien was created, the authorities hold that the issues thus raised are equitable and are to be tried by the court upon its equity side.”) This citation again refers to a defense and counterclaim “affecting the consideration, and arising out of the transaction in which the mortgage or lien was created” which also does not address the issue in the current action as the action does not arise out of the transaction in which the mortgage was created and does not “affect the consideration”.

7) In the citation Tollner v. American Pub. Co., 125 S.C. 317, 317, 118 S.E. 619, 620 (S.C. 1923)(“The case was clearly one in equity, and the facts as to the title to personal property could be determined by the court without a trial by jury.”) In the present action, Defendant’s allegation of wrong doing on the part of the Plaintiff which the Plaintiff denies does not challenge either the validity nor the amount due and therefore the defendants counter claim is not an equitable action. In addition, because the Defendant’s defense and Counterclaim is not one in equity and the true facts in the case are in dispute and cannot be determined without a trial, makes the issues raised by the Defendant triable of right by a jury.

8) Finally, the Plaintiff cites two other cases, Mobley Co. v. McLucas, 99 S.C. 99, 82 S.E. 986 (S.C. 1914) and McLaurin v. Hodges, 43 S.C. 187, 20 S.E 991 (S.C. 1895). In Mobley Co v. McLucas my reference simply cites a large number of cases not available to me however it does cite McLaurin v. Hodges which I do have access to. In McLaurin v. Hodges the appeals court “held, that in this ruling there was error, as the defence and counterclaim affected directly the amount due on the mortgage, and was not a defence separable from plaintiff’s equitable cause of action. All of the issues were, therefore, triable under the rules of the Court of Equity.” Again in these cases the defense and counterclaim seem to directly affect, the amount due on the mortgage. The Defense and Counterclaim in the current action does not.

9) Rule 38(b) states ("Any party may request a jury pursuant to Rule 38 on any or all issues triable of right by a jury and, upon the filing of a jury demand, the matter *shall* (emphasis added) be returned to the circuit court."). Clearly, if there are any issues triable of right by a jury then the matter must be returned to the circuit court for trial by jury if so requested by either party.

10) Rule 38(b) states ("Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.") This notice was given in Defendant's Answer to Plaintiff.

11) The issue here now is whether in the Defense or Counterclaim there is *any* (emphasis added) issue triable of right by a jury. The Defendant claims Plaintiff did engage in wrongdoing preventing the Defendant from fulfilling his obligation under a verbal agreement and in doing so did do great damage to the Defendant. Whether this action was due to negligence or fraud is immaterial as the action cannot be undone and the Defendant's only remedy is to seek money damages as was done in the Counterclaim. That Defendant seeks only money rule 38(a) states ("The right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate. Issues of fact in an action for the *recovery of money only* (emphasis added) or of specific real or personal property *must* (emphasis added) be tried by a jury, unless a jury trial be waived. Not only was a jury trial not waived, it was specifically requested.

12) From the above consideration it would appear that there are issues both in equity and in law. In Variations In Law Among the Jurisdictions "Right to Jury Trial On Equitable Claims" by Fred A. Simpson with regard to South Carolina he states, ("The Supreme Court of South Carolina prescribes a specific analysis to determine how to try legal and equitable issues in complaints and counterclaims: (1) If both the complaint and counterclaim are in equity, the entire matter is tried by the court; (2) If both are at law, the issues are triable by jury; (3) If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to jury trial; (4) If the complaint

is equitable and the counterclaim legal and compulsory, the plaintiff or the defendant each has rights to jury trial on the counterclaim by these procedures: (a) The trial judge may order separate trials of the legal and equitable claims, or may order the claims tried in a single proceeding; (b) If separate trials are ordered, the judge must determine the sequence of issues to be tried. If there are common issues, absent the "most imperative circumstances" (Beacon Theatres v. Westover, 359 U.S. 500 (1959)) the "at law" claims are tried first. If there are no common factual issues, the trial judge has discretion as to which claim is tried first; (c) If claims are tried in a single proceeding, the jury tries common factual issues first and the court determines equitable issues but is bound by jury findings on the common issues.")

13) In the present action, the complaint is equitable and the counterclaim is legal and compulsory. There are common factual issues, did the bank through their wrongdoing prevent me from fulfilling my obligation to them (equity) and did this wrongdoing result in damages to the defendant (legal). Rules 53(b) and 38(a) require a trial by jury of the legal issues first if either party so requests it. Since Defendant did request in writing in Defendant's answer a jury trial the case *must* be returned to the civil court for a jury trial. Consequently Defendant is entitled to a trial by jury of the issues at law first pursuant to Rules 53(b), 38(a), and 38(b) of the South Carolina Rules of Civil procedure which provide that:

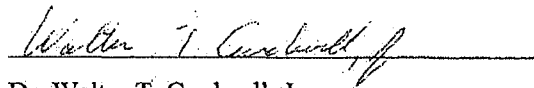
53(b) References. In an action where the parties consent, in a default case, or an action for foreclosure, some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit judge or the clerk of court. In all other actions, the circuit court may, upon application of any party or upon its own motion, direct a reference of some or all of the causes of action in a case. *Any party may request a jury pursuant to Rule 38 on any or all issues triable of right by a jury and, upon the filing of a jury demand, the matter shall be returned to the circuit court.* (emphasis added) A case shall not be referred to a master or special referee for the purpose of making a report to the circuit court. The clerk shall promptly provide the master or special referee with a copy of the order of reference.

38(a) Right Preserved. The right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate. *Issues of fact in an action for the recovery of money only or of specific real or personal property must be tried by a jury, unless a jury trial be waived* (emphasis added). A jury trial has not been waived.

38(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party. The right to a jury trial was demanded in the Defendant's answer.

Therefore, it is appropriate that the case be returned to the Civil Court for a jury trial on the issues of fact and law.

Dated March 24, 2011


Dr. Walter T. Cardwell, Jr.
15 Dawnwood Drive,
Greenville, S. C. 29615

Objection to Defendant's Motion to Restore to Trial Roster

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. NO. 2010-CP-23-4560
	)	
The Palmetto Bank,	)	
	)	
Plaintiff,	)	OBJECTION TO DEFENDANT'S
	)	MOTION TO RESTORE TO TRIAL
-vs-	)	ROSTER
	)	
Walter T. Cardwell, Jr.,	)	
Coach Hills Homeowner's Association, Inc.,	)	
United States of America,	)	
	)	
Defendants:	)	

Plaintiff/Counter-defendant, The Palmetto Bank ("Plaintiff"), files this objection to the Motion to Restore to Trial Roster of Defendant/Counter-claimant Walter T. Cardwell, Jr. ("Cardwell").

INTRODUCTION

Plaintiff filed this foreclosure action on certain real property (the "Mortgaged Property") secured by a Mortgage (the "Mortgage") because of the payment default by Defendant/Counter-claimant Walter T. Cardwell, Jr. ("Cardwell"). Cardwell filed an Answer and Counterclaim alleging that he had entered into an oral forbearance agreement with Plaintiff, whereby Plaintiff agreed not to foreclose on the Mortgaged Property, but rather, agreed that Cardwell could gradually catch up on his mortgage payments once Cardwell began receiving his social security payments (the "Alleged Agreement"). Cardwell raises the Alleged Agreement both as a defense to the foreclosure action, and as a claim for damages allegedly resulting from Plaintiff's reporting of his account to consumer credit bureaus.

While Plaintiff did initially attempt to work with Cardwell before his account became ninety (90) days delinquent and, therefore, subject to non-accrual status as required by the FDIC,

Plaintiff denies that it agreed to the terms alleged by Cardwell. More importantly, even if Cardwell's factual allegations are assumed to be true, such allegations fail to establish a legal defense or a legal counter-claim. Because Cardwell does not have a valid counterclaim, he does not have a right to a jury trial. Even if Cardwell's allegations were sufficient to allege a counterclaim, such a counterclaim would be permissive, rather than compulsory, and he would not be entitled to a jury trial.

PERTINENT FACTS ALLEGED

On or about April 10, 2008, Cardwell, executed and delivered his Prime Access Interest Only Note to Plaintiff in writing, and thereby, for value received, promised to pay to Plaintiff, or order, the sum of \$104,000.00 (the "Note"), to be repaid according to the terms of the Note (Amended Compl. ¶ 2; Cardwell Ans. ¶ 2.) In order to secure the payment of the Note, Cardwell executed and delivered to Plaintiff a Mortgage of Real Estate (the "Mortgage" or collectively with the Note, the "Mortgage Loan") dated April 10, 2008, thereby granting a lien on certain real property as more fully described therein (the "Mortgaged Property"). (Amended Compl. ¶ 4; Cardwell Ans. ¶ 4.) At one time, Cardwell and Nancy Cardwell held the fee simple title with joint rights of survivorship. However, because Nancy Cardwell became deceased prior to the execution of the Mortgage, Cardwell became the sole fee simple owner of the Mortgaged Property subject to Plaintiff's lien. (Amended Compl. ¶¶ 6 & 7.) Cardwell is in default on the Note and Mortgage for failure to make payments when due. (Amended Compl. ¶ 9.) Specifically, Cardwell has failed to make any payments since October 19, 2009.

Cardwell admits failing to make the payments when due on the Mortgage Loan (Cardwell Ans. ¶ 3b.) However, Cardwell claims that, in or around January 2010, he reached an oral agreement with a representative of Plaintiff. Essentially, he claims that Plaintiff agreed to

forbear from foreclosing on the Mortgage until Cardwell began receiving Social Security payments, at which point he would gradually catch up the delinquent payments. (Cardwell Ans. ¶ 3c.) According to Cardwell, he attempted to make one monthly payment on or about February 24, 2010 when he began receiving his Social Security funds, but Plaintiff refused his payment, requiring payment of all past due amounts before reinstating his delinquent account. (Cardwell Ans. ¶¶ 3d & 3e.) Cardwell alleges that, as a result of Plaintiff's reporting his account as delinquent, his American Express credit card was cancelled. (Cardwell Ans. ¶ 3h.) Cardwell further alleges that, due to the cancellation of his American Express credit card, his research on a "new transportation system" has been delayed, causing economic damages to him personally. (Cardwell Ans. ¶ 3j.)

LAW

I. CARDWELL IS NOT ENTITLED TO A JURY TRIAL ON HIS COUNTERCLAIMS

For the reasons stated below in this section, Cardwell's counterclaims would never be presented to a jury for determination. Cardwell's counterclaims against Plaintiff must fail as a matter of law for at least three reasons: (i) the Alleged Agreement lacks any proximate cause to Cardwell's alleged damages from Plaintiff's reporting Cardwell's delinquency to the credit reporting companies; (ii) the Alleged Agreement is unenforceable for lack of consideration; (iii) the Alleged Agreement is unenforceable under the Statute of Frauds.

A. Lack of Proximate Cause

In an action for breach of contract, "the burden [is] upon the [claimant] to prove the contract, its breach, and the damages caused by such breach. [citation omitted]. The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural

consequence and a proximate result of such breach.” Fuller v. Eastern Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (S.C.1962).

Cardwell cannot prove that any alleged breach of the Alleged Agreement resulted in the alleged damages. Cardwell admits being delinquent in his payments (Cardwell Ans. ¶ 2). Plaintiff has the absolute right to report any account that is delinquent. Any alleged agreement not to foreclose on the Mortgaged Property has no effect on whether the account was delinquent. Therefore, even if we were to assume that Plaintiff’s reporting Cardwell’s account as delinquent to credit bureaus lead to the cancellation of his American Express, there was nothing improper with Plaintiff so reporting his account. Because Plaintiff’s reporting the account as delinquent was not improper, no cause of action can arise for such reporting. Therefore, any failure to honor the Alleged Agreement did not proximately cause the damages alleged by Cardwell, and Cardwell’s claims fail as a matter of law.

B. Lack of Consideration

It is well-settled that “[t]he necessary elements of a contract are an offer, acceptance, and valuable consideration.” Roberts v. Gaskins, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (S.C. Ct. App. 1997). Under South Carolina law, “[v]aluable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 206, 687 S.E.2d 714, 718 (S.C. Ct. App. 2009)(quoting Prestwick Golf Club, Inc. v. Prestwick Ltd. P’ship, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998)).

Moreover, a promise to do something that a party is already legally bound to do is not sufficient consideration. Rabon v. State Finance Corporation, 203 S.C. 183, 26 S.E.2d 501

(1943). In Rabon, the maker of a promissory note sued the payor for breach of an alleged contract to extend the time for payment of the note. Id. at 183, 26 S.E.2d at 501. After the payor filed an assignment of wages to secure payment of the promissory note, the maker filed suit, alleging that, although he was delinquent on his payments, the payor had told him he could "catch up the two payments" at a later time. Id. at 183, 26 S.E.2d at 502. The court held that, because the maker was already legally obligated to pay the note, a promise to pay the debt owed was not sufficient consideration to form a new contract. Id.

The Alleged Agreement contains no hint of consideration given by Cardwell. Rather, Cardwell merely requested that Plaintiff forbear from foreclosing on the Mortgage until Cardwell's financial situation brightened. (Cardwell Ans. ¶ 3c: "I asked if it would be okay for me to resume payments after [my first social security] check arrived.") Under Rabon, Cardwell's promise to "catch up" the missed payments, which he was already legally obligated to pay, is not sufficient consideration to form a new contract. Therefore, the Alleged Agreement is unenforceable due to lack of consideration.

C. Statute of Frauds

South Carolina law has long required that certain agreements be in writing in order to be enforceable, and has explicitly set forth those types of agreement by statute. S.C. Code § 32-3-10. Specifically, South Carolina law provides as follows:

No action shall be brought whereby

(4) To charge any person upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them . .

Unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

Id. Furthermore, it is well-settled that "a contract required to be in writing by the South Carolina Statute of Frauds cannot be orally modified." Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989)(citing Windham v. Honeycutt, 279 C.S. 109, 302 S.E.2d 856 (1983)).

It is axiomatic that a mortgage is a contract concerning an interest in real estate which is subject to the Statute of Frauds. Therefore, any modification of a mortgage would further be subject to the Statute of Frauds.

Cardwell alleges that he entered an *oral* agreement with Plaintiff to modify the terms of the Mortgage so that Plaintiff would forbear from foreclosing on the Mortgage until Cardwell received his social security payments. (Cardwell ¶ 3c.) Even if the alleged facts are true, the oral forbearance agreement to modify the Mortgage is unenforceable under the Statute of Frauds. See e.g., Secrest v. Security National, 167 Cal. App. 4th 544 (Cal. Ct. App. 4th Dist. 2008)(following several courts that have explicitly held mortgage forbearance agreements must be in writing to be enforceable under the respective state's Statute of Frauds).

II. EVEN IF CARDWELL'S COUNTERCLAIMS COULD SURVIVE DISMISSAL AS A MATTER OF LAW, THOSE COUNTERCLAIMS WOULD BE PERMISSIVE, AND THEREFORE CARDWELL WOULD NOT BE ENTITLED TO A JURY TRIAL.

Cardwell cites a treatise which properly outlines the analysis for determining whether a defendant is entitled to a jury trial on a counterclaim in a foreclosure action as set forth in C&S Real Estate Services, Inc. v. Messengale, 290 S.C. 299, 350 S.E.2d 191 (1986). Because Plaintiff's claims for foreclosure and reformation are equitable and Cardwell's claims for breach of contract are legal, the question becomes whether Cardwell's counterclaims are compulsory or permissive: if compulsory, then Cardwell would be entitled to assert his right to a jury trial; if permissive, then Cardwell would be deemed to have waived his right to a jury trial. Id. at 301, 350 S.E.2d at 192.

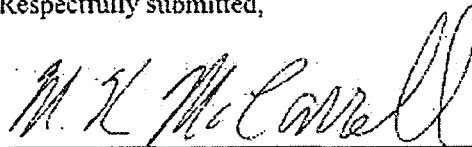
Rule 13(a) states that a counterclaim is compulsory "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Otherwise, a counterclaim is permissive.

Cardwell's counterclaims do not arise out of the Note and Mortgage which are the subject of the foreclosure action, but rather they arise out of Plaintiff's reporting of Cardwell's account to the credit bureaus. Therefore, Cardwell's counterclaims are permissive, and therefore, Cardwell has waived his right to a jury trial.

CONCLUSION

For the reasons stated above, Cardwell's Motion to Restore to Trial Roster should be denied, and the foreclosure hearing should proceed.

Respectfully submitted,



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ATTORNEYS FOR PLAINTIFF

Dated: March 28, 2011.

Defendant's Motion Requesting a New Trial

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. NO. <u>2010-CP-23-4560</u>
	)	
The Palmetto Bank,	)	
	)	
Plaintiff,	)	
	)	DEFENDANT'S MOTION
	)	REQUESTING A NEW TRIAL
-vs-	)	
	)	
Walter T. Cardwell, Jr.	)	
Coach Hills Homeowner's Association	)	
United States of America,	)	
	)	
Defendants.	)	
	}	

The Defendant Walter T. Cardwell, Jr. Files this motion requesting a new trial based on the following issues of fact and law not properly addressed due to what Defendant considers to be unfair procedures in the original trial and to facts obtained during the original trial.

ISSUES OF FACT

1) Defendant did secure the loan in question from the Palmetto Bank and was behind in payments to the bank. Defendant informed the loan officer, Ms. Josie Stewart, that Defendant was soon eligible for Social Security and kept her informed after Defendant, applied for Social Security, was accepted by them, and when he would receive the first check.

At trial, Defendant testified that on many occasions he would meet with Ms. Stewart in her office when Defendant had a problem and Ms. Stewart would usually call someone and get an approval and then Defendant testified that Ms. Stewart would enter the information into Defendants account information in the banks computer system. Ms. Stewart denied ever entering anything into defendant's record and in fact stated that she could not enter anything into any account from her computer. Defendant now believes that this is the case. Defendant now believes that it was not Ms. Stewart entering the data but the person she called and that Ms. Stewart, when she then typed something in her computer, was merely accessing Defendant's account to confirm that the information was entered by the person she called.

2) Mr. Tomison, a bank representative and Ms. Stewart testified that Defendant promised to

make a payment on January 5, 2010. Defendant stated that to the best of his recollection he never promised to make a payment on January 5th. On further reflection Defendant does now remember telling Ms. Stewart that the Social Security Administration had notified Defendant in December that he was eligible. Ms. Stewart then asked when he could make a payment and Defendant said he did not know when the check would arrive. Ms Stewart then pressed for a date and said can you make a payment in January. Defendant now believes that he told Ms. Stewart that his partner was continuing to try and raise money for the transportation project they were working on and that any money raised would be used to make a payment but if no money was raised that the bank would have to wait until the first Social Security check arrived. Defendant now believes that Ms. Stewart said something to the effect that she was putting me down for a payment in January. It was understood that this was conditional on funds arriving. Ms. Stewart it seems had that statement entered as a promise to pay on January 5th which it never was. That is also why when Defendant received a call while he was out of town, where the caller stated that the Defendant had promised to make a payment on January 5th, that Defendant told the caller that there was some mixup that he would clear up with Ms. Stewart when he returned.

3) At the start of the trial, Plaintiff's attorney submitted many document to the court as evidence and gave Defendant copies of each. Included in these documents were copies of the original loan agreement, an account summary and a document titled Debtors Comments which Defendant had never seen before. Again with no time to study any of the documents, Judge Simmons then began the trial by having the Plaintiff immediately call their first witness. Now, after the trial, having time to study the Plaintiff's documents carefully, there is information contained it the documents that support Defendant's version of the dispute.

Defendant swore under oath that there was a verbal agreement between Plaintiff and Defendant where Defendant would begin making payments after Defendant's Social Security Check had been deposited and cleared. Defendant stated that he told Ms. Stewart that he would receive his check on the 22nd of February, would deposit it on the 23rd and be in on the 24th to begin making payments again. Ms. Stewart then made a call and asked if it was ok for Defendant to begin making payments on the 22nd of February. While Ms. Stewart was on the phone, Defendant corrected Ms. Stewart saying he would make the payment on the 24th. She did not correct the date while on the phone. She said that she received an ok from whomever she was talking to and then as she had done many times in the past typed something on her computer and stated that she had me down for payment on February 22nd. Once again Defendant corrected Ms. Stewart and repeated that he would get the check on the 22nd, deposit it on the 23rd and be in on the 24th to make the payment.

Ms. Stewart swore under oath that no such verbal agreement took place and testified only that Defendant made some vague promise to pay sometime in February.

The testimony of the Defendant and Ms. Stewart are mutually contradictory and so both cannot be the truth. Since each stated categorically that the verbal agreement did or did not exist, either the Defendant or Ms. Stewart lied under oath and thus committed perjury. The issue now is can it be proven which one lied.

One of the documents supplied by Plaintiff at trial was titled "Debtor Comments" and appears to be comments made by the bank about the "Debtor" and not comments made by the "Debtor". Because this document was supplied by Plaintiff and was not verified by Defendant there is no guarantee that it is either complete or undoctored; however, in this document there are two entries, one dated 01/15/2010 stating "SPOKE WITH LO AND SHE SAID HE IS SUPPOSED TO GET A SSCHECK STARTING IN FEBRUARY AND WILL MAKE A PAYMENT. I AM SENDING A DEMAND LETTER GOOD THROUGH 01/29/2010. CCB <BY RMT0795CVQ AT 10.48.45>, and another entry dated 02/23/2010 stating "RECEIVED REQUEST FROM LOAN OFFICER AND REGIONAL TO UINITIATE sic FORECLOSURE PROCEEDINGS. REFERRED MATTER TO LEATHER WOOD (KEVIN MCCARRELL) <BY RMT0795CVQ AT 14.01.42>. This second entry shows that the foreclosure was initiated on February 23, 2010. Why on that date?

Plaintiff's representative testified that the loan payments were 90 days past due on or before the 19th of February 2010. In support of Ms. Stewart's claim that there was no agreement, the 19th was on a Friday so the first day they could have foreclosed after that date would have been on Monday the 22nd. While it is possible that the foreclosure was delayed a day for some reason an analysis of other foreclosures could determine if the extra day's delay was usual and if not if there was some reason for the delay. In support of the Defendant, the 23rd was the first day after the date that Defendant testified that Ms. Stewart erroneously first entered as the date that Defendant would resume making payments so the date is more consistent with Defendant's testimony.

Ms. Stewart testified, again under oath, that she never entered any information into Defendant's account and that in fact changes to any accounts from her computer were not possible. Therefore, information could only be entered into Defendant's account by the person she contacted by phone each time she received an ok from the department she called and then confirmed that the information was changed. In the "Debtor Comments" document, every entry is logged with what looks like the terminal that accessed the account. While it is possible that Ms. Stewart was deliberately setting up the Defendant and did not get an ok from the department she called when Defendant discussed the February 24th payment with her and then lied to Defendant both about getting an ok and in stating that she had me down for the 22nd, assuming Ms. Stewart was not lying to the Defendant and that the February 22nd date was entered into Defendant's account, the terminal of the person entering the data would have been logged with the entered data and the person using that terminal to enter the data would have had to "login" so the person who modified Defendant's account can be identified. There is therefore an independent witness who can verify who is telling the truth. Not only is there a witness, but if Ms. Stewart was not lying to Defendant when she said she had me down for the 22nd and the entry was made into Defendant's account, the verbal agreement would also be a written agreement and the logging of the person making these entries into Defendant's account who could only be a representative of the Bank, would constitute a signing of the entry. That this information is not contained in the "Debtor Comments" document supplied by Plaintiff's attorney only means that the document is either incomplete or that this account information is not output by the print routine used to produce the "Debtor Comments" document.

Because perjury is a felony and it is likely that not only does documentary evidence of the

crime exist on Plaintiff's computer system and that a witness does in fact exist, Defendant does insist that this matter be turned over to the proper authority having jurisdiction in this matter and having access to competent forensic computer experts, to determine if the evidence outlined above does exist and is sufficient to charge Ms. Stewart with perjury. Also, that steps be taken to protect any evidence remaining in the bank's computer system and any internal bank communication that is pertinent.

4) When originating the loan, Ms Stewart said that she would pay off the existing two mortgages and close them out. She did this with the first mortgage but only paid off the second mortgage, she did not close it. I assume that it was Ms. Stewart who had the second mortgage lien removed from the county records.

When it was discovered several months later that the second mortgage, an equity line of credit was not closed, Defendant stopped by the local Bank of America branch down the street from Ms. Stewart's bank branch. A Bank of America representative stated that he had no problem with the line of credit remaining open and when I returned to Ms. Stewart's office and told her that they had no problem with it remaining open and that I did not close it she voiced no objection to it remaining open either. I have been paying on this account up until the court order was signed by Judge Simmons.

Judge Simmons in his ruling gave the Plaintiff's attorneys time to check on the Bank of America equity line of credit and they responded by simply including a copy of the original Plaintiff's loan agreement which said that both mortgages would be closed as proof that only the Plaintiff's exists. Judge Simmons ruled not only that the Plaintiff's mortgage was the first mortgage but that the Bank of America mortgage was not even a second mortgage. This is not right.

If an error has been committed here it was committed by Ms. Stewart first in not closing the Bank of America loan and then later not informing Defendant that it must be closed. Bank of America is totally innocent in this matter, had a valid loan, and was unaware of the actions of the Plaintiff in removing the lien from the county records as was Defendant until this foreclosure action occurred.

In this matter the Court is only looking at information supplied by the Plaintiff and not giving who should be an opposing party, Bank of America, the opportunity to present their case. The need to be informed of this action.

ISSUES OF LAW

1) Defendant filed a motion to have the case returned to the jury trial docket in response to Plaintiff's attorney's refusal to agree to a continuance. The motion was filed the Friday before the foreclosure hearing scheduled for the following Wednesday. Plaintiff's attorney filed an objection to the motion which Defendant received the following Monday afternoon. Defendant did prepare an answer to Plaintiff's objection but there was no time to file it before the hearing on the motion. The

hearing on the motion was held a half hour before the foreclosure hearing on Wednesday March 30th, 2011. Without hearing any arguments Judge Simmons simply denied the motion without giving any reason for the denial and immediately began the trial.

In the original motion filed by Defendant to return the case to the jury trial docket, Defendant countered the all the arguments Plaintiff raised in his Motion for Reference. In fact, Plaintiff's attorney agreed with Defendant's analysis of the issues and that returning the case to the jury trial docket would depend on whether the counterclaim was permissive or compulsory.

In Plaintiff's objection to the motion to restore the case to the jury trial docket, Plaintiff introduced new arguments and misstated Defendant's answer to Plaintiff's original summons. Again, Defendant was given no opportunity to rebut Plaintiff's new arguments and that is patently unfair. Defendant's rebuttal follows:

Plaintiff in his objection to the motion to return the case to the trial jury docket states:

"INTRODUCTION

Plaintiff filed this foreclosure action on certain real property (the "Mortgaged Property") secured by a Mortgage (the "Mortgage") because of the payment default by Defendant/Counter claimant Walter T. Cardwell, Jr. ("Cardwell"). Cardwell filed an Answer and Counterclaim alleging that he had entered into an oral forbearance agreement with Plaintiff, whereby Plaintiff agreed not to foreclose on the Mortgaged Property, but rather, agreed that Cardwell could gradually catch up on his mortgage payments once Cardwell began receiving his social security payments (the "Alleged Agreement"). Cardwell raises the Alleged Agreement both as a defense to the foreclosure action, and as a claim for damages allegedly resulting from Plaintiff's reporting of his account to consumer credit bureaus."

Defendant at no time claimed "damages from Plaintiff's reporting of his account to consumer credit bureaus" Defendant stated. "By their actions in reneging on our agreement (foreclosing on the mortgage) *and* (emphasis added) the cancellation of the American Express Card, all work on the prototype ceased as we now had to devote all of our efforts in fund-raising and me seeking employment elsewhere. In addition, Plaintiff misstates Defendant's statement about the nature of the agreement. As stated in Defendant's Answer to Plaintiff's Summons Defendant stated that Plaintiff's agent Ms. Stewart confirmed that the requested forbearance was entered into Defendant's loan record thus the oral forbearance was also in writing.

Plaintiff continues:

"While Plaintiff did initially attempt to work with Cardwell before his account became ninety (90) days delinquent and, therefore, subject to non-accrual status as required by the FDIC, Plaintiff denies that it agreed to the terms alleged by Cardwell."

While not a banker or accountant, Defendant understands non-accrual status means that the Bank can no longer list the interest on the loan as income as far as bank regulators are concerned. The Plaintiff testified that the account became 90 days past on or before February 19th. The agreement with the Plaintiff was to begin making payments again on February 24th, one week later. If this was a problem, the Plaintiff's representative should not have entered into the agreement.

Plaintiff continues:

"More importantly, even if Cardwell's factual allegations are assumed to be true, such allegations fail to establish a legal defense or a legal counter-claim."

If this were true it would mean that Plaintiff is free to mislead/lie to anyone and not be held accountable.

"Because Cardwell does not have a valid counterclaim, he does not have a right to a jury trial."

Defendant challenges this assertion.

"Even if Cardwell's allegations were sufficient to allege a counterclaim, such a counterclaim would be permissive, rather than compulsory, and he would not be entitled to a jury trial."

If the counterclaim arises out of the Plaintiff's transaction (the foreclosure) it would be compulsory.

Plaintiff continues:

"PERTINENT FACTS ALLEGED

On or about April 10, 2008, Cardwell, executed and delivered his Prime Access Interest Only Note to Plaintiff writing, and thereby, for value received, promised to pay to Plaintiff, or order, the sum of \$104,000.00 (the "Note"), to be repaid according to the terms of the Note (Amended Compl. 2; Cardwell Ans. 1ft 2.) In order to secure the payment of the Note, Cardwell executed and delivered to Plaintiff a Mortgage of Real Estate (the "Mortgage" or collectively with the Note, the "Mortgage Loan") dated April 10, 2008, thereby granting a lien on certain real property as more fully described therein (the "Mortgaged Property"). (Amended Compl. 11 4; Cardwell Ans. 1g 4.) At one time, Cardwell and Nancy Cardwell held the fee simple title with joint rights of survivorship. However, because Nancy Cardwell became deceased prior to the execution of the Mortgage, Cardwell became the sole fee simple owner of the Mortgaged Property subject to Plaintiff's lien. (Amended Compl. 6 & 7.) Cardwell is in default on the Note and Mortgage for failure to make payments when due. (Amended Compl. 11 9.) Specifically, Cardwell has failed to make any payments since October 19, 2009. "

Defendant stated that there was a forbearance agreement that the bank reneged on..

Plaintiff continues:

“Cardwell admits failing to make the payments when due on the Mortgage Loan (Cardwell Ans. 1[3b.]) However, Cardwell claims that, in or around January 2010, he reached an oral agreement with a representative of Plaintiff Essentially, he claims that Plaintiff agreed to forbear from foreclosing on the Mortgage until Cardwell began receiving Social Security payments, at which point he would gradually catch up the delinquent payments. (Cardwell Ans. 411- 3c.) According to Cardwell, he attempted to make one monthly payment on or about February 24, 2010 When he began receiving his Social Security funds, but Plaintiff refused his payment, requiring payment of all past due amounts before reinstating his delinquent account. (Cardwell Ans. 4g1g 3d & 3e.) Cardwell alleges that, as a result of Plaintiff's reporting his account as delinquent, his American Express credit card was cancelled. (Cardwell Ans. 3h.) Cardwell further alleges that, due to the cancellation of his American Express credit card, his research on a "new transportation system" has been delayed, causing economic damages to him personally(Cardwell Ans. 3j.)”

Defendant stated, “By their actions in reneging on our agreement and the cancellation of the American Express Card all work on the prototype ceased as we now had to devote all of our efforts in fund-raising and me seeking employment elsewhere.” While it was the cancellation of the card that was the immediate cause of cessation of work on the prototype, it alone would only have delayed work for a month or two due to the loss of the up to two month's “float” provided by the card. It was the “reneging” on the agreement, the foreclosure itself, that caused us to shift to fund-raising and Defendant looking for employment to try and save the shop and lab located in Defendant's home..

Plaintiff continues (reference numbers corrected):

LAW

“1. CARDWELL IS NOT ENTITLED TO A JURY TRIAL ON HIS COUNTERCLAIMS

For the reasons stated below in this section, Cardwell's counterclaims would never be presented to a jury for determination. Cardwell's counterclaims against Plaintiff must fail as a matter of law for at least three reasons: (A) the Alleged Agreement lacks any proximate cause to Cardwell's alleged damages from Plaintiffs reporting Cardwell's delinquency to the credit reporting companies; (B) the Alleged Agreement is unenforceable for lack of consideration; © the Alleged Agreement is unenforceable under the Statute of Frauds:”

“A. Lack of Proximate Cause

In an action for breach of contract, "the burden [is] upon the [claimant] to prove the

contract, its breach, and the damages caused by such breach. [citation omitted]. The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." Fuller v. Eastern Fire & Cas. Ins. Co., 240 S.C. 75 89, 124 S.E.2d 602, 610 (S.C.1962)."

"Cardwell cannot prove that any alleged breach of the Alleged Agreement resulted in the alleged damages. Cardwell admits being delinquent in his payments (Cardwell Ans. 'ff 2). Plaintiff has the absolute right to report any account that is delinquent Any alleged agreement not to foreclose on the Mortgaged Property has no effect on whether the account was delinquent. Therefore, even if we were to assume that Plaintiffs reporting Cardwell's account as delinquent to credit bureaus lead to the cancellation of his American Express, there was nothing improper with Plaintiff so reporting his account. Because Plaintiffs reporting the account as delinquent was not improper, no cause of action can arise for such reporting. Therefore, any failure to honor the Alleged Agreement did not proximately cause the damages alleged by Cardwell, and Cardwell's claims fail as a matter of law."

Plaintiff continues to argue that it was *only* (emphasis added) the cancellation of the credit card that was the cause of suspension of work on the project and our having to devote full time to fund raising. The American Express card requires full payment each month so the funds must be available each month to pay the balance. The card can provide up to two months of float but the speed of development is controlled by the anticipated money available to pay the card. After a month or two we could have continued without the "float".

The foreclosure on the other hand had much more serious consequences. If the foreclosure went through before our proof of concept was completed we estimated that it would take us at least three years before we would be in a position to resume work on the project. While we do not know with 100% certainty that the project will be a success we do know what the implications are if it is successful and why that left us no choice but to try and protect the "lab"(house).

Our design studies indicate that its capabilities are so far superior to any other form of transportation and that, if successful, it would replace the automobile. By transporting people in complete safety it would save the lives of 45,000 Americans each year and will in time save the lives of an estimate 1 million people worldwide each year. The year delay that the foreclosure has already caused will, if the technology is successful, mean that a million people will die needlessly. If the Plaintiff is successful in foreclosing on the property, again if the technology is successful, an additional three million people will die needlessly. That is why we had no choice but to try and protect the house against the Plaintiff's misconduct.

Because lives are at stake we feel we are morally bound to continue this project until we know if it will be successful or not. Until we know if it will be successful we continue to suffer losses as we receive no income until either funding is obtained or our proof of concept is completed. This is a

loss to us caused directly by the filing of the foreclosure by the Plaintiff breaching our agreement and is the basis of our counterclaim.

B. Lack of Consideration

It is well-settled that "(t)he necessary elements of a contract are an offer, acceptance, and valuable consideration." *Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (S.C. Ct. App. 1997). Under South Carolina law, "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. *Plantation A D LLC v. Gerald Builders of Conway, Inc.*, 386 S.C. 198, 206, 687 S.E.2d 714, 718 (S.C. Ct. App. 2009) (quoting *Prestwick Golf Club Inc. v. Prestwick Ltd. P'ship*, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998)). Moreover, a promise to do something that a party is already legally bound to do is not sufficient consideration. *Rabon v State Finance Corporation* 203 S.C. 183, 26 S.E.2d 501

(1943). In *Rabon* the maker of a promissory note sued the payor for breach of an alleged contract to extend the time for payment of the note. *Id.* at 183, 26 S.E.2d at 501. After the payor filed an assignment of wages to secure payment of the promissory note, the maker filed suit, alleging that, although he was delinquent on his payments, the payor had told him he could "catch up the two payments" at a later time. *Id.* at 183, 26 S.E.2d at 502. The court held that, because the maker was already legally obligated to pay the note, a promise to pay the debt owed was not sufficient consideration to form a new contract. *Id.* The Alleged Agreement contains no hint of consideration given by Cardwell. Rather, Cardwell merely requested that Plaintiff forbear from foreclosing on the Mortgage until Cardwell's financial situation brightened. (Cardwell Ans. 'ft 3c: "I asked if it would be okay for me to resume payments after [my first social security] check arrived.") Under *Rabon* Cardwell's promise to "catch up" the missed payments, which he was already legally obligated to pay, is not sufficient consideration to form a new contract. Therefore, the Alleged Agreement is unenforceable due to lack of consideration.

Of course there was consideration given by Defendant (Cardwell) to the Plaintiff. As stated above by the Plaintiff, "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." In the case cited by Plaintiff, *Rabon v State Finance Corporation* 203 S.C. 183, 26 S.E.2d 501, there was no real property involved and thus no other consideration was involved than the promise to pay. In the case where real property is involved the avoidance of lengthy and expensive foreclosure litigation is certainly a benefit to both parties. Otherwise, all banks would foreclose the day after a payment was late. If Plaintiff's argument were to prevail, it would mean that all real property forbearances entered into by a bank are simply a con and license to steal.

In addition, in dealing with another matter with Plaintiff's representative, Plaintiff was made aware of the new transportation system. Defendant on many occasions made Plaintiff's representative aware of the great benefit that Plaintiff would receive from a continuing banking relationship that of course would be lost if the bank foreclosed and Defendant left the state. While it is only the potential for great profit that is conveyed to Plaintiff, is the potential of millions of dollars in profits for the Plaintiff not sufficient consideration to delay a payment of under \$300 for one week? Defendant clearly is not obligated to do other business with the bank.

C. Statute of Frauds

South Carolina law has long required that certain agreements be in writing in order to be enforceable, and has explicitly set forth those types of agreement by statute. S.C. Code § 32-3

10. Specifically, South Carolina law provides as follows:

No action shall be brought whereby

...

(4) To charge any person upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them...

Unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

Id. Furthermore, it is well-settled that "a contract required to be in writing by the South Carolina Statute of Frauds cannot be orally modified." *Player v. Chandler* 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989)(citing *Windham I/ Honeycutt*, 279 C.S. 109, 302 S.E.2d 856 (1983)). It is axiomatic that a mortgage is a contract concerning an interest in real estate which is subject to the Statute of Frauds. Therefore, any modification of a mortgage would further be subject to the Statute of Frauds.

Cardwell alleges that he entered an oral agreement with Plaintiff to modify the terms of the Mortgage so that Plaintiff would forbear from foreclosing on the Mortgage until Cardwell received his social security payments. (Cardwell 3c.) Even if the alleged facts are true, the oral forbearance agreement to modify the Mortgage is unenforceable under the Statute of Frauds. See e.g., *Secrest v. Security National*, 167 Ca. App. 4th 544 (Cal. Ct. App. 4th Dist. 2008)(following several courts that have explicitly held mortgage forbearance agreements must be in writing to be enforceable under the respective state's Statute of Frauds).

Defendant had never charged Plaintiff nor Plaintiff's representative with fraud. Defendant's only mention of fraud was that, "Whether this action was due to negligence or fraud is immaterial as the action cannot be undone and the Defendant's only remedy is to seek money damages as was done

in the Counterclaim.” and that clearly defendant is not categorizing Plaintiff’s misbehavior as fraud. Therefore, unless fraud is charged, the state’s Statute of Frauds would not apply. However, Plaintiff’s representative did call and get approval for the agreement and Plaintiff’s representative did confirm that the information was entered into Defendant’s loan information in their computer. This entry of course would have to have been in writing. In addition, as shown by the “Debtor Comments” document supplied by Plaintiff’s attorney at trial, a record of the person who modified the account was also entered and since the person entering the information could only be an authorized agent of the bank, this would constitute an authorized signature on the agreement.

EVEN IF CARDWELL'S COUNTERCLAIMS COULD SURVIVE DISMISSAL AS A MATTER OF LAW THOSE COUNTERCLAIMS WOULD BE PERMISSIVE AND THEREFORE CARDWELL WOULD NOT BE ENTITLED TO A JURY TRIAL.

Cardwell cites a treatise which properly outlines the analysis for determining whether a defendant is entitled to a jury trial on a counterclaim in a foreclosure action as set forth in C&S Real Estate Services, Inc. v. Messenaale, 290 S.C. 299, 350 S.E.2d 191 (1986). Because Plaintiffs claims for foreclosure and reformation are equitable and Cardwell's claims for breach of contract are legal, the question becomes whether Cardwell's counterclaims are compulsory or permissive: if compulsory, then Cardwell would be entitled to assert his right to a jury trial; if permissive, then Cardwell would be deemed to have waived his right to a jury trial. *Id.* at 301, 350 S.E.2d at 192.

Rule 13(a) states that a counterclaim is compulsory "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Otherwise, a counterclaim is permissive.

Cardwell's counterclaims do not arise out of the Note and Mortgage which are the subject of the foreclosure action, but rather they arise out of Plaintiffs reporting of Cardwell's account to the credit bureaus. Therefore, Cardwell's counterclaims are permissive, and therefore, Cardwell has waived his right to a jury trial.

As Plaintiff states Rule 13(a) states that a counterclaim is compulsory "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Otherwise, a counterclaim is permissive. As stated above, Defendant’s counterclaim does not “arise out of Plaintiff’s reporting of Cardwell’s accounts to the credit bureaus” but does arise out of the foreclosure itself and are therefore compulsory. Once again Plaintiff misstates Defendant’s basis for his counter claim.

Finally, in dealing with Ms. Stewart’s alleged perjury, it must be asked why she would do this? All she would have had to say was, “Yes there was an agreement. He promised to pay on February 22nd 2010 and did not so we foreclosed on the 23rd.” Even if she had lied to Defendant and

no information was entered into Defendant's account simply agreeing with Defendant but challenging the February 24th date, the case would be over. It would seem to make no sense that she would commit perjury for no reason. But the fact is, Plaintiff's attorneys have always stressed that it was a verbal agreement which Defendant originally stated that it was and they have tried to suppress any hint that it was also a written agreement thus Ms. Stewart had to commit perjury and say there was no agreement to keep this case away from a jury where the actual date of the agreement would have been decided by the jury along with any damages arising from the counterclaim. Facing a large damage claim and possible punitive damage, it is easy to see why Plaintiff has gone to such extreme lengths (perjury) to keep this away from a jury.

ISSUES OF FAIRNESS

1) Lack of Discovery: Between the filing of the action and November of 2010, Defendant was incapacitated with health issues that were only resolved by several surgical procedures in October of 2010. Plaintiff requested a settlement meeting which Defendant was able to schedule after recovery from surgery in November where an attempt was made to try and resolve the case. At the end of the meeting Defendant offered several options to the Plaintiff and while Plaintiff and his attorney stated that settlement was unlikely, Defendant said for them to check with the Bank and if they were not interested to contact Defendant to inform him of the fact so that discovery could begin. Defendant was informed of the Bank's rejection by the filing of the Motion for Reference in February transferring the case to the Master in Equity Court. Defendant was given no opportunity to challenge the order of Reference as it was signed before Defendant was even notified of its existence.

Defendant was told by the Clerk of Court's office that he could file a motion to have the case returned to the trial roster. Not being a lawyer it took Defendant several weeks to research the issues involved. At the same time Defendant found two attorneys who said they might represent the Defendant. The first declined for fear of losing a business relationship it had with the Plaintiff but the second stated he needed time to study the case before committing to it. Defendant contacted the Master in Equity's office to try and obtain a continuance. Defendant was told that the Attorney needed to contact the Plaintiff's attorney and get their approval and if he could not that the attorney should then contact the Master in Equity's office. Unfortunately, Plaintiff did not respond to the request for a continuance until the Attorney was at the airport for a flight to Hawaii to be in court there. There was therefore no time for him to contact the Master in Equity's office for the continuance. This was on the Friday before a hearing was scheduled the following Wednesday. Defendant was left with no choice but to file the Motion to return the case to the Jury Trial Roster on that Friday.

2) Hearing on Defendant's Motion to Return Case to Jury Trial Roster: As discussed above, it is not fair to allow one party to submit new arguments and not allow the opposing party a chance to challenge them.

3) Misunderstanding of the Rules that Apply: At the beginning of the trial Judge Simmons

asked Defendant if he knew that the hearing was before a Master in Equity and a Magistrates court. Defendant said he did not. Judge Simmons then stated that the difference was that there was no Jury in Master in Equity court. There is still confusion as to which rules apply.

According to the Clerk of Court's office the rules of civil court apply and in these rules, Rule 53C, it states that "the master or special referee shall exercise all power and authority which a circuit judge sitting without a jury would have in a similar matter. the master or special referee shall exercise all power and authority which a circuit judge sitting without a jury would have in a similar matter." Because Judge Simmons did not state which rules did apply Defendant has no way of knowing which rules to go by and is following the rules that the Clerk of Court's office said should be followed.

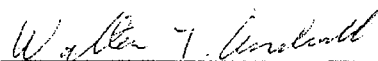
4) Misunderstanding of the Nature of the Hearing: Defendant was served notice of the hearing which stated only that the hearing was an attempt to collect a debt. Calling it a hearing and not a trial led Defendant to believe that this was a pre-trial hearing and not the trial itself. Nowhere in the South Carolina Rules of Civil Procedures can Defendant find any reference to the use of the word hearing as a synonym for trial. The use of the term hearing rather than trial by Plaintiff's attorney Defendant believes was a deliberate attempt to mislead Defendant as to the nature of the Master in Equity Action.

5) It is completely unjust to reward Plaintiff for Plaintiff's mistake with regard to Bank of America's legitimate interest in this action by not allowing Bank of America to present their claims to the court for consideration.

THEREFORE

In view of the issues outlined above, Defendant requests that the Order signed by Judge Simmons either be set aside or stayed until a thorough investigation of the perjury charges can be conducted and that should any evidence be found during that investigation that the alleged agreement did exist that either the case be returned to the trial jury roster or that a new Trial be held.

Dated April 18, 2011



Dr. Walter T. Cardwell, Jr
15 Dawnwood Drive,
Greenville, S. C. 29615

Motion for Relief from Judgement or Order

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. NO. <u>2010-CP-23-4560</u>
	)	
The Palmetto Bank,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	MOTION FOR RELIEF FROM
	)	JUDGEMENT OR ORDER
	)	
Walter T. Cardwell, Jr.	)	
Coach Hills Homeowner's Association	)	
United States of America,	)	
	)	
Defendants.	)	
	}	

The Defendant Walter T. Cardwell, Jr. Files this motion pursuant to Rule 60b requesting relief from Judge Simmons' Judgement citing reasons (1) surprise, (2) newly discovered evidence, and (3) misconduct by Plaintiff's representative.

1) **Surprise:** Before trial, Defendant received no notification as to witnesses to be called by the Plaintiff. Also, at the start of the Trial Defendant was presented with a stack of papers many of which Defendant had never seen before and was given no time to even read these documents much less evaluate them. Of even greater consequence, Defendant did not even know that this was a trial until it began as it was characterized by Plaintiff's attorney's notification to the Defendant as a hearing not a trial.

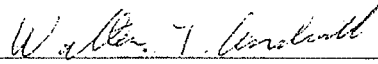
2) **Newly Discovered Evidence:** At trial, Plaintiff provided documentation and testimony about Bank procedures that show that there should be evidence in Plaintiff's computer system that will confirm that Defendant did have a forbearance agreement in writing with Plaintiff's representative, Ms Josie Stewart who testified under oath and that the individual who entered this information into Plaintiff's computer system can be identified. Because this person could not possibly be Ms. Stewart by her own testimony, this person is a witness to the existence of the forbearance agreement .

3) **Misconduct by Plaintiff's Representative:** Because the Defendant was present at the meeting where the forbearance was discussed with Ms. Stewart, Defendant knows as a fact that Ms. Stewart lied under oath as to the existence of an agreement. By her own testimony, unless she was

lying to Defendant during this meeting when she told Defendant that the information was in their computer system, not only should written corroborating evidence of the agreement exist on Plaintiff's computer system unless it has been destroyed, a witness to Ms. Stewart's perjury should exist as the information had to be entered into their computer system by a third party.

WHEREFORE, Defendant is filing formal Criminal charges against Ms. Stewart for perjury and asks that Judge Simmons' order and Judgement be suspended until the proper authorities have had time to thoroughly investigate the charges against Ms. Stewart.

Dated April 18, 2011



Dr. Walter T. Cardwell, Jr
15 Dawnwood Drive,
Greenville, S. C. 29615

Response to Defendant Walter T. Cardwell, Jr.'s Motion for Relief from Judgement or Order and Motion for a New Trial

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. NO. 2010-CP-23-4560
	)	
The Palmetto Bank,	)	
	)	
Plaintiff,	)	RESPONSE TO DEFENDANT
	)	WALTER T. CARDWELL, JR.'S
-vs-	)	MOTION FOR RELIEF FROM
	)	JUDGMENT OR ORDER
Walter T. Cardwell, Jr.,	)	And
Coach Hills Homeowner's Association, Inc.,	)	MOTION FOR NEW TRIAL
United States of America,	)	
	)	
Defendants.	)	

Plaintiff, The Palmetto Bank ("Plaintiff"), files this response to (i) the Motion for Relief from Judgment or Order and (ii) the Motion for New Trial of Defendant Walter T. Cardwell, Jr. ("Cardwell"). This response does not attempt to address every issue raised in Cardwell's Motions because the majority of those issues were before the Court at the time of its ruling and were directly ruled upon by the Court.

As to Cardwell's Motion for a New Trial

Cardwell's disturbing threats that he intends to prosecute Plaintiff's representative, Josie Stewart, for perjury are groundless and moot. It is not surprising that Cardwell and Ms. Stewart have differing versions of the events surrounding the subject loan. In almost every contested matter, parties have differing versions of facts. Cardwell's sole "evidence" of perjury is that he and Ms. Stewart have different recollections of events. The Court heard both versions of the facts and concluded that Plaintiff is entitled to foreclose.

Cardwell continues to assert that Bank of America was a necessary party to this action. However, Plaintiff provided to the Court and to Cardwell (i) the HUD Statement from the closing of the subject loan that shows a disbursement was made to pay off the Bank of America.

loan and (ii) the Mortgage Lien Satisfaction recorded with the register of deeds on December 12, 2008 in Book SAT 384 at Page 1544. These documents are re-attached hereto as **Exhibit A**.

Finally, with respect to Cardwell's allegations regarding his attempts to find an attorney, Plaintiff's counsel received a voicemail on March 23, 2011 from attorney Grant Gibson who stated that he was considering representing Cardwell. Plaintiff's counsel immediately returned Mr. Gibson's telephone call, left a message for him, but did not hear back from Mr. Gibson on the 23rd. On the following morning of March 24, Plaintiff's counsel sent an e-mail attached as **Exhibit B** to Mr. Gibson. Mr. Gibson telephoned Plaintiff's counsel shortly after he received the e-mail. Mr. Gibson stated that he had not decided whether he would represent Cardwell. He was requesting a continuance to consider whether to represent Cardwell while he was in Hawaii teaching a course (not appearing in court as represented by Cardwell). Plaintiff's counsel declined to consent to a continuance while Mr. Gibson mulled over the possibility of representing Cardwell. E-mail correspondence from Plaintiff's counsel to Mr. Gibson confirming the discussion is attached hereto as **Exhibit C**.

As to Cardwell's Motion for Relief from Judgment or Order

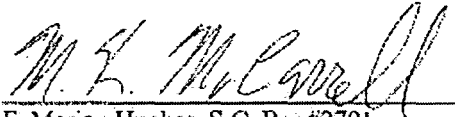
Cardwell asserts that there was surprise and newly discovered evidence due to documentation he received for the first time at the foreclosure hearing. However, Cardwell chose not to participate in the discovery process. This action was filed on June 2, 2010 and served upon Cardwell on June 7, 2010. Plaintiff served Interrogatories and Requests for Production on Cardwell on July 29, 2010. Cardwell did not respond to Plaintiff's discovery requests. Also, Cardwell did not serve any discovery requests on Plaintiff. By choosing not to participate in discovery, Cardwell cannot now assert that he was "surprised" or has "newly discovered evidence."

Furthermore, Cardwell's groundless accusations of perjury fail to merit relief under Rule 60(b).

CONCLUSION

For the reasons stated above, Cardwell's Motions should be denied.

Respectfully submitted,



F. Marion Hughes, S.C. Bar #2791

M. Kevin McCarrell, S.C. Bar#76255

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kevin.mccarrell@smithmoorelaw.com

(864) 242-6440; (864) 240-2474 (fax)

ATTORNEYS FOR PLAINTIFF

Dated: April __, 2011

EXHIBIT "A"

A. U.S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT

B. TYPE OF LOAN: 1. ☐ FHA 2. ☐ FmHA 3. ☒ CONV. UNINS. 4. ☐ VA 5. ☐ CONV. INS.

SETTLEMENT STATEMENT

6. FILE NUMBER: CARDWELL SAH 7. LOAN NUMBER: 8. MORTGAGE INS CASE NUMBER:

C. NOTE: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "POC" were paid outside the closing; they are shown here for informational purposes and are not included in the totals.

D. NAME AND ADDRESS OF BORROWER: **E. NAME AND ADDRESS OF SELLER:** **F. NAME AND ADDRESS OF LENDER:**

Walter T. Cardwell, Jr.
15 Danwood Drive
Greenville, SC 29615

The Palmetto Bank
P.O. Box 289
Laurens, SC 29368

G. PROPERTY LOCATION: 15 Danwood Drive
Greenville, SC 29615
Greenville County, South Carolina
Lot 101 Coach Hills
Sheet 2 of 2

H. SETTLEMENT AGENT: S. Allan Hill, Attorney at Law
PLACE OF SETTLEMENT: 815 East North Street
Greenville, SC 29601

I. SETTLEMENT DATE: April 10, 2008
Disbursed 04/15/08

J. SUMMARY OF BORROWER'S TRANSACTION		K. SUMMARY OF SELLER'S TRANSACTION	
100. GROSS AMOUNT DUE FROM BORROWER:		400. GROSS AMOUNT DUE TO SELLER:	
101. Contract Sales Price		401. Contract Sales Price	
102. Personal Property		402. Personal Property	
103. Settlement Charges to Borrower (Line 1400)		403.	
104. Payoff first mortgage to Homecomings Financial	4,870.94	404.	
105. Payoff second mortgage to Bank of America	23,713.65	405.	
Adjustments For Items Paid By Seller in advance		Adjustments For Items Paid By Seller in advance	
106. City/Town Taxes	to	406. City/Town Taxes	to
107. County Taxes	to	407. County Taxes	to
108. Assessments	to	408. Assessments	to
109. HOA Dues		409. HOA Dues	
110.		410.	
111.		411.	
112.		412.	
120. GROSS AMOUNT DUE FROM BORROWER	28,584.59	420. GROSS AMOUNT DUE TO SELLER	
200. AMOUNTS PAID BY OR IN BEHALF OF BORROWER:		500. REDUCTIONS IN AMOUNT DUE TO SELLER:	
201. Deposit or earnest money		501. Excess Deposit (See Instructions)	
202. Principal Amount of New Loan(s)	104,000.00	502. Settlement Charges to Seller (Line 1400)	
203. Existing loan(s) taken subject to		503. Existing loan(s) taken subject to	
204.		504. Payoff First Mortgage	
205.		505. Payoff Second Mortgage	
206.		506.	
207. Construction Draw	28,584.59	507.	
208.		508.	
209.		509.	
Adjustments For Items Unpaid By Seller		Adjustments For Items Unpaid By Seller	
210. City/Town Taxes	to	510. City/Town Taxes	to
211. County Taxes	to	511. County Taxes	to
212. Assessments	to	512. Assessments	to
213.		513.	
214.		514.	
215.		515.	
216.		516.	
217.		517.	
218.		518.	
219.		519.	
220. TOTAL PAID BY/FOR BORROWER	28,584.59	520. TOTAL REDUCTION AMOUNT DUE SELLER	
300. CASH AT SETTLEMENT FROM/TO BORROWER:		600. CASH AT SETTLEMENT TO/FROM SELLER:	
301. Gross Amount Due From Borrower (Line 120)	28,584.59	601. Gross Amount Due To Seller (Line 420)	
302. Less Amount Paid By/FOR Borrower (Line 220)	(28,584.59)	602. Less Reductions Due Seller (Line 520)	
303. CASH (FROM) (TO) BORROWER	0.00	603. CASH (TO) (FROM) SELLER	0.00

The undersigned hereby acknowledge receipt of a completed copy of pages 1&2 of this statement & any attachments referred to herein.

Borrower Walter T. Cardwell, Jr.
Walter T. Cardwell, Jr.

Seller

L. SETTLEMENT CHARGES

700. TOTAL COMMISSION Based on Price		\$	@	%	PAY FROM BORROWER'S FUNDS AT SETTLEMENT	PAY FROM SELLER'S FUNDS AT SETTLEMENT
701. \$ _____ to _____						
702. \$ _____ to _____						
703. Commission Paid at Settlement						
704. _____ to _____						
800. ITEMS PAYABLE IN CONNECTION WITH LOAN						
801. Loan Origination Fee % to _____						
802. Loan Discount % to _____						
803. Appraisal Fee _____ to _____						
804. Credit Report _____ to _____						
805. Lender's Inspection Fee _____ to _____						
806. Flood Status Determination _____ to The Palmetto Bank POCL8.00						
807. Assumption Fee _____ to _____						
808. _____						
809. _____						
810. _____						
811. _____						
900. ITEMS REQUIRED BY LENDER TO BE PAID IN ADVANCE						
901. Interest From 04/15/08 to 05/01/08 @ \$ _____ Day (16 days %)						
902. Mortgage Insurance Premium for _____ months to _____						
903. Hazard Insurance Premium for 1.0 years to _____						
904. _____						
905. _____						
1000. RESERVES DEPOSITED WITH LENDER						
1001. Hazard Insurance _____ months @ \$ _____ per month						
1002. Mortgage Insurance _____ months @ \$ _____ per month						
1003. City/Town Taxes _____ months @ \$ _____ per month						
1004. County Taxes _____ months @ \$ _____ per month						
1005. Assessments _____ months @ \$ _____ per month						
1006. _____ months @ \$ _____ per month						
1007. _____ months @ \$ _____ per month						
1008. Aggregate Adjustment _____ months @ \$ _____ per month						
1100. TITLE CHARGES						
1101. Settlement or Closing Fee _____ to _____						
1102. Abstract or Title Search _____ to _____						
1103. Title Examination _____ to Jean Gray						
1104. Title Insurance Binder _____ to Secure Title LLC						
1105. Document Preparation _____ to Secure Title LLC						
1106. Notary Fees _____ to _____						
1107. Attorney's Fees _____ to S. Alan Hill, Attorney at Law POCL350.00						
Includes above item numbers: _____						
1108. Title Insurance _____ to Commonwealth Land Title Insurance Company						
Includes above item numbers: _____						
1109. Lender's Coverage \$ _____						
1110. Owner's Coverage \$ _____						
1111. _____						
1112. _____						
1113. _____						
1114. Dead Preparation Fee _____						
1115. Copies, Fax, Long Distance _____ Secure Title, LLC						
1116. _____						
1117. _____						
1118. _____						
1200. GOVERNMENT RECORDING AND TRANSFER CHARGES						
1201. Recording Fees: Deed \$ _____ Mortgage \$ _____ Releases \$ _____						
1202. City/County Tax/Stamp: Deed _____ Mortgage _____						
1203. State Tax/Stamp: Revenue Stamps _____ Mortgage _____						
1204. _____						
1205. _____						
1300. ADDITIONAL SETTLEMENT CHARGES						
1301. Survey _____ to _____						
1302. Pest Inspection _____ to _____						
1303. _____						
1304. Overnight Del. Loan Pkg-Feeoff _____ Secure Title LLC						
1305. _____						
1400. TOTAL SETTLEMENT CHARGES (Enter on Lines 102, Section J and 502, Section K) 0.00						

By signing page 1 of this instrument, the signatories acknowledge receipt of a complete copy of page 2 of this two page statement.

S. Alan Hill, Attorney at Law, Settlement Agent

Certified to be a true copy.

(CARDWELL/SAH/CARDWELL/SAH/18)

BORROWER CERTIFICATION

Borrower: Walter T. Cardwell, Jr.
Lender: The Palmetto Bank
Settlement Date: April 10, 2008
Disbursement Date: April 16, 2008
Property Location: 15 Dawnwood Drive
Greenville, SC 29615
Greenville County, South Carolina
Lot 101 Coach Hills
Sheet 2 of 2

The Borrower this date has checked, reviewed and approved the figures appearing on the Disclosure/Settlement Statement (Statement of Actual Costs), consisting of two (2) pages. Borrower acknowledges receipt of the payment of the loan proceeds in full.

Borrower understands that the payoff figure(s) shown on the first page of the Settlement Statement are figures supplied by the Settlement Agent by the borrower's lender(s) and is/are subject to confirmation upon tender of payment. If the payoff figure(s) are inaccurate, Borrower agrees to immediately pay any shortage(s) that may exist.

I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction. I further certify that I have received a copy of the HUD-1 Settlement Statement.

Walter T. Cardwell, Jr.
Walter T. Cardwell, Jr.

To the best of my knowledge, the HUD-1 Settlement Statement which I have prepared is a true and accurate account of the funds which were received and have been or will be disbursed by the undersigned as part of the settlement of this transaction.

S. Allan Hill
S. Allan Hill, Attorney at Law
Settlement Agent

WARNING: It is a crime to knowingly make false statements to the United States on this or any similar form. Penalties upon conviction can include a fine and imprisonment. For details see: Title 18 U. S. Code Section 1001 & Section 1010.

(CARDWELL.SAH.PFD.CARDWELL.SAH7)



2008106540 SAT/AFFIT
1 PG
Book: SAT 384 Page: 1544-1544
December 12, 2008 01:44:35 PM
Rec: \$5.00 Cnty Tax: \$0.00 State Tax: \$0.00

FILED IN GREENVILLE COUNTY, SC

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

MORTGAGE LIEN
SATISFACTION AFFIDAVIT
(Pursuant to SC Code Section 29-3-330)
FOR MORTGAGE BOOK 3116 PAGE 88

The undersigned on oath, being first duly sworn, hereby certifies as follows

- 1 The undersigned is a licensed attorney admitted to practice in the State of South Carolina.
- 2 That with respect to the mortgage given by WALTER T. CARDWELL JR & NANCY CARDWELL to NATIONSBANK, NA dated July 16, 1998 and recorded in the offices of the Register of Deeds in Mortgage Book and Page referenced above:
 - a. [X] That the undersigned was given written payoff information and made such payoff and is in possession of a canceled check or other evidence of payment to the mortgagee, holder of record, or representative servicer;
 - b. [] That the undersigned was given written payoff information and made such pay off by wire transfer or other electronic means to the mortgagee, holder of record, or representative servicer and has confirmation from the undersigned's bank of the transfer to the account provided by the mortgagee, holder of record, or representative servicer.

The Register of Deeds is hereby requested and directed to cancel the above referenced Mortgage and mark the records accordingly.

Under penalties of perjury, I declare that I have examined this affidavit to the best of my knowledge and belief, it is true, correct, and complete.

WITNESS the grantor's(s) hand(s) and seal(s) this 3rd day of December, 2008

SIGNED, SEALED AND DELIVERED IN THE PRESENCE OF:

James P. Ballou
Rebecca Jones

S. Allan Hill
S. Allan Hill
SC Bar #10256
819 E. North St.
Greenville, SC 29601

(SEAL)

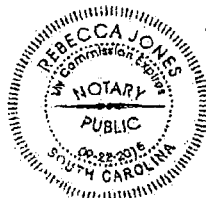
STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

ACKNOWLEDGMENT

I, a Notary Public, within and for the State and County aforesaid, do hereby certify that the foregoing instrument of writing was this day produced to me in the above State and County by the Principals and was executed and acknowledged to be the free act and voluntary deed of the Principals.

WITNESS my signature this 3rd day of December, 2008



Rebecca Jones
Notary Public for South Carolina
My Commission expires: 9/22/2015

FILED FOR RECORD IN GREENVILLE COUNTY, SC ROD
2008106540 Book: SAT 384 Page: 1544-1544
December 12, 2008 01:44:35 PM

Timothy J. Henning

EXHIBIT "B"

Kevin McCarrell

From: Marion Hughes
Sent: Thursday, March 24, 2011 9:19 AM
To: Grant Gibson
Cc: Kevin McCarrell
Subject: Palmetto Bank v. Cardwell, C.A. No. 2010-CP-23-4560
Grant,

The foreclosure hearing in the above matter is scheduled for next week. We are receiving messages from Mr. Cardwell that you are "considering" representing him and that you are asking for a continuance. I tried to reach you by telephone, left a message, but I haven't heard back. Before we can make a decision about possibly consenting to a continuance, we need to know:

1. Are you, in fact, representing Mr. Cardwell? If so, you need to enter a formal appearance in the case.
2. If you have entered an appearance, how long a continuance are you requesting? This case has already been referred to the Master, and we don't think the issues are that complicated. If it's just a matter of your needing a few days to review the file, we are not going to have a problem with a short continuance. If you plan to undertake discovery and delay the case for a long period, we will have a different reaction.

F. Marion Hughes
Smith Moore Leatherwood LLP

300 East McBee Avenue
Suite 500
Greenville, SC 29601
864.240.2445 (voice)
864.240.2474 (direct fax)
www.smithmoorelaw.com



SMITH MOORE
LEATHERWOOD

EXHIBIT "C"

Kevin McCarrell

From: Marion Hughes
Sent: Thursday, March 24, 2011 10:09 AM
To: Grant Gibson
Cc: Kevin McCarrell
Subject: FW: Palmetto Bank v. Cardwell, C.A. No. 2010-CP-23-4530

I enjoyed speaking with you this morning after you received my email below.

This will confirm that you have not entered an appearance in this case on behalf of Dr. Cardwell and that you have not even decided whether you will represent him. From our discussion, you understand I cannot consent to a continuance based on the possibility that you might represent Dr. Cardwell. You stated that you would so inform Dr. Cardwell.

F. Marion Hughes
Smith Moore Leatherwood LLP

300 East McBee Avenue
Suite 500
Greenville, SC 29601
864.240.2445 (voice)
864.240.2474 (direct fax)
www.smithmoorelaw.com



SMITH MOORE
LEATHERWOOD®

From: Marion Hughes
Sent: Thursday, March 24, 2011 9:19 AM
To: Grant Gibson
Cc: Kevin McCarrell
Subject: Palmetto Bank v. Cardwell, C.A. No. 2010-CP-23-4560

Grant,

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1. Are you, in fact, representing Mr. Cardwell? If so, you need to enter a formal appearance in the case.
2. If you have entered an appearance, how long a continuance are you requesting? This case has already been referred to the Master, and we don't think the issues are that complicated. If it's just a matter of your needing a few days to review the file, we are not going to have a problem with a short continuance. If you plan to undertake discovery and delay the case for a long period, we will have a different reaction.

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864.240.2445 (voice)
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Defendant's Answer to Plaintiff's Response to Defendant's Request for a New Trial

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)
The Palmetto Bank,)
Plaintiff,)
- vs-)
Walter T. Cardwell, Jr.)
Coach Hills Homeowner's Association)
United States of America,)
Defendants.)

2011 APR 25 PM 4:33
FILED - CLERK OF COURT
GREENVILLE, S.C.

C.A. NO. 2010-CP-23-4560

DEFENDANT'S ANSWER TO
PLAINTIFF'S RESPONSE TO
DEFENDANT'S REQUEST
FOR A NEW TRIAL

Defendant, Walter T. Cardwell files this answer to Plaintiff, The Palmetto Bank ("Plaintiff"), response to (i) the Motion for Relief from Judgment or Order and (ii) the Motion for New Trial of Defendant Walter T. Cardwell, Jr. ("Cardwell").

Throughout these proceedings, Plaintiff's Attorney has consistently misrepresented Defendant's statements and he continues to do so here.

Plaintiff first states:

This response does not attempt to address every issue raised in Cardwell's Motions because the majority of those issues were before the Court at the time of its ruling and were directly ruled upon by the Court.

Without specifics there is no way to address which issues he feels were before the court at the time of the trial.

Plaintiff then states:

As to Cardwell's Motion for a New Trial
Cardwell's disturbing threats that he intends to prosecute Plaintiff's representative, Josie Stewart, for perjury are groundless and moot. It is not surprising that Cardwell and Ms. Stewart have differing versions of the events surrounding the subject loan. In almost every contested matter, parties have differing versions of facts. Cardwell's sole "evidence" of perjury is that he and Ms. Stewart have different recollections of events. The Court heard both versions of the facts and concluded that Plaintiff is entitled to foreclose.

First, Defendant never said that *he* (emphasis added) intends to prosecute Ms. Stewart. That of course is absurd. Defendant has no authority to prosecute anyone. Defendant only stated that based on information provided to him by Ms. Stewart that a record of the alleged agreement should exist on Plaintiff's computer system which will determine who is telling the truth. Defendant has learned since the filing of the motions that not only can he not prosecute anyone, that because the issue of perjury is now before Judge Simmons' court, he can't even file a criminal complaint against Ms. Stewart. Only Judge Simmons can do that and if the evidence supports charging Ms. Stewart with perjury, if he cares whether people lie to him under oath, he should file charges.

Second, the issue here is not just one of differing versions of the events. Each stated categorically the event did or did not occur. There was no "to the best of my recollection" or other such mitigating statement by either party. Should the record of the alleged agreement be found is it reasonable to believe that this information would have been kept from Ms. Stewart before she testified? While clearly not admissible as evidence in court, all during Ms. Stewart's testimony she looked directly at either the Judge or the questioner except when she testified that there was only a vague mention of a payment in February. After almost 30 years on bench, if Judge Simmons was watching her closely, he does know who is telling the truth and the computer records will prove it.

With regard to Bank of America Plaintiff states:

Cardwell continues to assert that Bank of America was a necessary party to this action. However, Plaintiff provided to the Court and to Cardwell (i) the HUD Statement from the closing of the subject loan that shows a disbursement was made to pay off the Bank of America loan and (ii) the Mortgage Lien Satisfaction recorded with the register of deeds on December 12, 2008 in Book SAT 384 at Page 1544. These documents are re-attached hereto as Exhibit A.

With all of Plaintiff's misstatements clearly Defendant is suspicious of anything Plaintiff's attorney says and the willingness of the court to accept all of Plaintiff's statements without challenge was and is disturbing to the Defendant. Since filing the motion, Defendant has contacted Bank of America and explained the situation too them. There is some indication that they may have been at fault but at least now they are aware of what is happening and they can now at least defend themselves if they so wish.

With regard to an attempt to find an attorney Plaintiff states:

Finally, with respect to Cardwell's allegations regarding his attempts to find an attorney, Plaintiff's counsel received a voice mail on March 23, 2011 from attorney Grant Gibson who stated that he was considering representing Cardwell. Plaintiff's counsel immediately returned Mr. Gibson's telephone call, left a message for him, but did not hear back from Mr. Gibson on the 23rd. On the following morning of March 24, Plaintiff's counsel sent an e-mail attached as Exhibit B to Mr. Gibson. Mr. Gibson telephoned Plaintiff's counsel shortly after he received the e-mail. Mr. Gibson stated that he had not decided whether he would represent Cardwell. He was requesting a continuance to consider whether to represent Cardwell while he was in Hawaii teaching a course (not appearing in court as represented by Cardwell). Plaintiff's counsel declined to consent to a continuance while Mr. Gibson mulled over the possibility of representing Cardwell. E-mail correspondence from Plaintiff's counsel to Mr. Gibson confirming the discussion is attached hereto as Exhibit C.

Defendant made no allegations with regard to finding an attorney. Defendant was merely stating for the record the events that occurred before trial which prevented him from even beginning discovery.

Plaintiff also states that Defendant incorrectly stated that Mr. Gibson had to return to Hawaii for trial instead of to teach a course. Mr. Gibson told the Defendant that he had to return for a trial he was involved in and of course it is quite possible that he returned for both reasons. In any case it is not relevant here.

With regard to the issue of surprise Plaintiff states:

As to Cardwell's Motion for Relief from Judgment or Order Cardwell asserts that there was surprise and newly discovered evidence due to documentation he received for the first time at the foreclosure hearing. However, Cardwell chose not to participate in the discovery process. This action was filed on June 2, 2010 and served upon Cardwell on June 7, 2010. Plaintiff served Interrogatories (sic) and Requests for Production on Cardwell on July 29, 2010. Cardwell did not respond to Plaintiff's discovery requests. Also, Cardwell did not serve any discovery requests on Plaintiff. By choosing not to participate in discovery, Cardwell cannot now assert that he was "surprised" or has "newly discovered evidence."

There is nothing else to say here but that it is a bald face lie. Defendant did receive Plaintiff's Interrogatories and Requests for Production. Before Defendant could reply to this request Defendant received a request from Plaintiff's for a settlement meeting. Defendant did respond to both requests

in a letter marked Exhibit A. Once Defendant was sufficiently recovered from his surgical procedures he sent the letter marked Exhibit B to Mr. McCarrell.

A meeting was arranged and we met in Mr. McCarrell's Offices sometime in November. Mr. Tomison was also at that meeting. The initial part of the meeting was Mr. McCarrell asking for documents which did not exist and for information about my financial situation. I complied fully with Mr. McCarrell and when he had no further requests for information from me we moved on to try and settle the case. For Mr. McCarrell to state that Defendant "did not respond to Plaintiffs discovery requests" is a bald faced lie. There is a witness Mr. Tomison who may or may not tell the truth and at the start of the meeting Mr. McCarrell was kind enough to give me free legal advice when I asked to record the meeting, he said that he had no problem with me recording the meeting but it was not admissible in court. I of course did not ask if it was admissible in his disbarment hearing.

With regard to my not serving them with any discovery request it was because at the end of the meeting I asked Mr. Tomison to get back to me on the bank's response to my settlement offer one way or another because if they did not want to settle I would have to begin Discovery. I waited for their answer and assumed the long delay was due to the holidays. They never did respond and it was not until Mr. McCarrell filed the Motion of Referral that it was clear that they were not going to respond. The foreclosure hearing was scheduled four to six weeks after the Motion was granted. That time was spent trying to find an attorney and learning enough to file the motion to return the case to the trial docket. It should be quite clear that Plaintiff and his attorney are playing the system to deprive Defendant who, not having an attorney, is inexperienced in these matters.

In any case, this statement by Mr. McCarrell is a provable lie and a copy of the recording made at the settlement meeting does exist should it be admissible in some context.

Finally, Plaintiff states:

Furthermore, Cardwell's groundless accusations of perjury fail to merit relief under Rule 60(b).

The accusation of perjury is hardly groundless and the proof is in the Plaintiff's computer system if it has not been destroyed.

CONCLUSION

A full unbiased review of all the documents filed in this case should make it abundantly clear that the Plaintiff's attorney has through his misrepresentations and now out and out lie has also been engaging in misbehavior to deny Defendant his right to justice in the courts. As Defendant did testify under oath in court the importance of this case and the possibility that lives will be lost if the Plaintiff prevails makes it all the more imperative that justice be done here. The evidence is out there. If the Master in Equity Court does not wish to find the truth so that justice will prevail then it should be returned to the Jury docket where we hope justice will be done. The Master in Equity Court should not become Plaintiff's accomplice in this travesty of justice.

Respectfully submitted,

Walter T. Cardwell 4/25/11
Dr. Walter T. Cardwell, Jr.

EXHIBIT A

Dr. Walter T. Cardwell
15 Dawnwood Drive
Greenville, S.C. 29615

Smith Moore Leatherwood
Attn Mr. Michael Kevin McCarrell
The Leatherwood Plaza
300 East McBee Avenue, Suite 500
Greenville, SC 29601

Dear Mr. McCarrell,

With regard to your letter dated July 29, 2010 requesting that we discuss settling this case, I am certainly willing to meet with you and/or representatives of the Bank to discuss this matter. My delay in responding to you was due to the fact that I was awaiting word from my doctors about the scheduling of two planned surgical procedures. They have been scheduled for September 2, 2010 and I am told I should allow at least two weeks for recovery from this surgery. Until these procedures are performed, I am unable to schedule anything as I suffer debilitating pain almost every other day. With your approval I will arrange to meet with you or the bank at the earliest date following my recovery.

With regard to your request for information relating to the disclosure you have requested in the pending lawsuit, I ask also that it be delayed until after my recovery. I would also like to discuss with you just exactly what information you require to better comply with your request. While the surgery to be performed is considered routine, what little functional time I have between now and the pending surgery I must use to make sure my affairs are in order should things not go well.

Yours Truly,
Dr. Walter T. Cardwell

EXHIBIT B

Dr. Walter T. Cardwell
15 Dawnwood Drive
Greenville, S.C. 29615

Smith Moore Leatherwood
Attn Mr. Michael Kevin McCarrell
The Leatherwood Plaza
300 East McBee Avenue, Suite 500
Greenville, SC 29601

Dear Mr. McCarrell,

As promised in my previous letter to you I have recovered from my recent surgery to where I am now able to meet with people. I am sorry for the long delay. A matter for another law suit.

I will be happy to meet with you at any time at your convenience to discuss any possible settlement and if that cannot be arranged, the specifics of your discovery request.

I will need at least two days notice so that I can adjust my schedule.

Thank you for your patience.

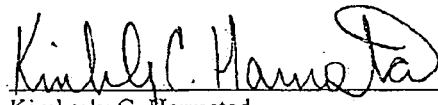
Yours Truly,
Dr. Walter T. Cardwell

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. NO. 2010-CP-23-4560
	)	
The Palmetto Bank,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	CERTIFICATE OF SERVICE
	)	
Walter T. Cardwell, Jr.,	)	
Coach Hills Homeowner's Association, Inc.,	)	
United States of America,	)	
	)	
Defendants.	)	
	)	

IT IS HEREBY CERTIFIED that a copy of the foregoing **Motion for Compulsory Order of Reference and proposed Compulsory Order of Reference** was served upon all attorneys of record this 7th day of February, 2011 by placing the same in the United States Mail, with sufficient postage affixed thereto, addressed as follows:

Dr. Walter T. Cardwell, Jr.
15 Dawnwood Drive
Greenville, SC 29615
Pro Se Attorney

William N. Nettles
U.S. Attorney's Office
P.O. Box 10067
Greenville, SC 29603



Kimberly C. Hamstad
Legal Assistant to M. Kevin McCarrell (#76255)
Legal Assistant to F. Marion Hughes (#2791)
Smith Moore Leatherwood LLP
300 East McBee Avenue, Suite 500 (29601)
Post Office Box 87
Greenville, SC 29602
Telephone: 864-552-4520
Facsimile: 864-240-2474

Transcript of the Trial

 COPY

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF GREENVILLE) COURT OF COMMON PLEAS
3
4 The Palmetto Bank,) Case No.: 10-CP-23-4560
5 Plaintiff,) TRANSCRIPT OF TESTIMONY
6 vs.)
7 Walter T. Cardwell, Jr., Coach) March 30th, 2011
8 Hills Homeowners Association) Greenville, South Carolina
9 and United States of America,)
10 Defendants,)

11 B E F O R E:

12 The Honorable Charles B. Simmons, Jr.
13 Master in Equity for Greenville County

14 A P P E A R A N C E S:

15 F. Marion Hughes, Esquire
16 M. Kevin McCarrell, Esquire
17 Smith Moore Leatherwood
18 Attorney for Plaintiff

19 Walter T. Cardwell, Jr., Pro se
20
21
22
23
24
25

Ann Dickey Campbell, CVR
Court Reporter

GREENVILLE COUNTY COURTHOUSE

2

1 BY THE COURT: Are you Mr. Cardwell?

2 MR. CARDWELL: I am.

3 BY THE COURT: Mr. Cardwell, come up here and have a

4 seat right there, if you will, please sir (indicating counsel

5 table).

6 MR. CARDWELL: Thank you.

7 BY THE COURT: All right, Mr. Cardwell, let me start by

8 asking, for my court reporter, if you would state your full

9 name, please, sir.

10 MR. CARDWELL: It's Dr. Walter T. Cardwell, Jr. ---

11 Timmons Cardwell, Jr.

12 BY THE COURT: All right, and you are one of the

13 Defendants in this lawsuit, correct?

14 MR. CARDWELL: Yes, I am.

15 BY THE COURT: And tell me your understanding, first,

16 of what this lawsuit is involving, and second, what we are here

17 for this morning.

18 MR. CARDWELL: Okay. Basically, in the end of 2009, I

19 began to fall behind in making payments.

20 BY THE COURT: I'm not asking you about the facts

21 behind it. I'm just asking kind of the 64,000 ---

22 MR. CARDWELL: You mean why we are here.

23 BY THE COURT: Yes, sir.

24 MR. CARDWELL: Well, we're here now because Mister ---

25 well, the Plaintiff has moved that the trial be conducted here

GREENVILLE COUNTY COURTHOUSE

1 in Magistrate's Court rather than a trial in the civil court.
2 BY THE COURT: Okay.
3 MR. CARDWELL: A jury trial in a civil court.
4 BY THE COURT: Okay.
5 MR. CARDWELL: In my response to their Complaint, I
6 asked for a jury trial.
7 BY THE COURT: All right.
8 MR. CARDWELL: I responded with a motion to have it
9 moved back to the jury trial docket.
10 BY THE COURT: All right, and also just to make sure
11 you understand, this really is part of Circuit Court. We are not
12 part of the Magistrate's Court. The Master in Equity is the non-
13 jury side of the Circuit Court, so I just want to make sure you
14 understood that.
15 MR. CARDWELL: No, I did not.
16 BY THE COURT: Okay, and second, you have, in your
17 pleadings, as well as when you stated your name, you stated that
18 you are a doctor. What type of doctorate?
19 MR. CARDWELL: It's electrical and computer
20 engineering.
21 BY THE COURT: Okay, and part of the reason I'm asking
22 this question is I have to make a determination that you
23 understand what this is and that you are competent to proceed
24 here and represent yourself, and I have also reviewed your
25 Motion, which sets out the reasons for your request and it's, I

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4
1 believe, a six-page document and it cites different legal
2 authorities. So do you feel competent and do you feel like you
3 understand what the issues are so as to represent yourself here
4 this morning?

5 MR. CARDWELL: Well, part of the problem, of course,
6 for anyone who isn't a lawyer, you are, you know, at a
7 tremendous disadvantage, obviously, because the things that I
8 put in my Motion, those are the things that I was able to dig
9 up.

10 BY THE COURT: Sure.

11 MR. CARDWELL: Now, whether they are correct, you know,
12 to the best of my ability. Are there other considerations? There
13 could be that I'm not aware of.

14 BY THE COURT: All right, well, let me summarize what I
15 understand your position to be, just to make sure that I am
16 understanding correctly. You agree that, at some point, and I
17 don't have all the documents right in front of me, but I believe
18 it was in 2008, that you took out an equity line?

19 MR. CARDWELL: Yes.

20 BY THE COURT: And that that account went into
21 delinquency, in other words, wasn't paid timely?

22 MR. CARDWELL: Yes.

23 BY THE COURT: And I believe there was some business, a
24 new business opportunity that you were involved with during that
25 time?

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1 MR. CARDWELL: Well, it's been ongoing since 2004.

2 BY THE COURT: Okay, and the sum and substance of your
3 request for jury trial is arguing that there was some type of
4 oral agreement made with you and someone at the bank ---

5 MR. CARDWELL: Yes.

6 BY THE COURT: --- to modify. Is that correct?

7 MR. CARDWELL: Yes.

8 BY THE COURT: Okay, anything other than that?

9 MR. CARDWELL: No. As far as my understanding is that
10 what this centers around was I made every effort to keep the
11 bank informed of what was going on. The minute before I was even
12 late in the payment, I contacted Ms. Stewart and told her that
13 would be a problem, but that in January I was eligible for
14 social security. I kept informing her every time I had new
15 information about when I was eligible, when I applied, when I
16 did all of this, I went in and contacted Ms. Stewart to keep the
17 bank up to date with what was going on.

18 BY THE COURT: Okay.

19 MR. CARDWELL: I received notification of when the
20 first check would come in, and the moment I got that, I
21 contacted Ms. Stewart and I said to her, "I will be able to
22 resume making payments as soon as the first check comes in."
23 Now, my records indicate that the mortgage was --- would be 90
24 days late a week before I would receive the social security
25 check. So I went in and contacted Ms. Stewart and asked would it

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1 be all right for me to make the payment two days after the
2 social security check came in, and she called one of the loan
3 officers or whatever there at the bank, and said yes, it would
4 be. Had the bank or Ms. Stewart said, "No, you have to make the
5 payment now," they did ask could I make the payment now, and I
6 said it would be a problem, and then they said it would be all
7 right. Had they said no, I would have obviously gone in and
8 scraped around and tried to borrow the money from someone to
9 make that payment. By them telling me that it was okay for me to
10 wait to make that payment until after the check came in, when I
11 went in to make that payment, they informed me that they had
12 already foreclosed on the property.

13 BY THE COURT: Okay. All right, well, let me hear, and
14 who is going to argue?

15 MR. MCCARRELL: I am, Your Honor.

16 BY THE COURT: What is your understanding of the issue
17 today? It is simply Mr. Cardwell's motion to transfer it back to
18 jury trial?

19 MR. MCCARRELL: Well, Your Honor, we were hoping that
20 if Dr. Cardwell's motion is denied, that we would go forward
21 with the foreclosure hearing today.

22 BY THE COURT: Was he provided with notice that that
23 may very well be a result of today's hearing?

24 MR. MCCARRELL: We provided him with notice of the
25 hearing, Your Honor. His motion was filed, I think, the end of

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7
1 Friday. We filed a response to that motion asking that it be
2 denied.

3 BY THE COURT: All right, so, Dr. Cardwell, do you
4 understand that if your request for a jury trial is denied, then
5 we would go into the substance of the case, the foreclosure
6 case?

7 MR. CARDWELL: I understand that now.

8 BY THE COURT: Okay.

9 MR. CARDWELL: My understanding was that this was a
10 hearing, and since I have no knowledge of that, there are other
11 issues here as far as in preparing for this for a full hearing
12 or trial or whatever that actually, because of a settlement
13 hearing with the bank. When I left the settlement hearing, I
14 made a counteroffer to the bank and I said to them, to their
15 representative, they needed to go back and check with the bank
16 because of the impact of what this case would mean to the bank.
17 They shouldn't make a determination now. And they said, "Well, I
18 don't think the bank is going to agree to this." But I said,
19 "Well, go back and check to them. If the bank does not agree to
20 this, contact me and let me know so that we can begin
21 discovery." The very first thing that I heard from them, which
22 is what this bank does, they never respond to anything. Ever.
23 And the first indication that I got that the bank was not going
24 to do that was when they went and filed the Motion for Referral
25 here to this Court.

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1 BY THE COURT: All right, have you filed, Dr. Cardwell,
2 any type of formal discovery request?

3 MR. CARDWELL: Not yet.

4 BY THE COURT: Okay. All right, and do you have a copy
5 of the Notice of Hearing?

6 MR. MCCARRELL: Yes, Your Honor.

7 BY THE COURT: May I see that, please, sir?

8 MR. MCCARRELL: This is a copy that was pre-marked,
9 Your Honor, Plaintiff's Exhibit #3.

10 BY THE COURT: All right. Now, Dr. Cardwell, is there
11 anything else you would like to state or argue relative to your
12 motion to have the case sent back for a jury trial?

13 MR. CARDWELL: Well, I did prepare --- I received their
14 objection Monday afternoon. I did prepare an answer to their
15 objection, obviously very rushed, so my understanding is that
16 their objections run down, you know, center around three issues.
17 One is whether or not the damages that I claim were related to
18 the foreclosure. They are claiming that it was related to the
19 cancellation of my credit card because of them reporting the
20 delinquency to the credit bureau. In my answer I said that was
21 all --- you know, that the damages, that was only one of them.
22 And of course, they naturally ignored the other one. The other
23 one was that the filing of the foreclosure itself that caused
24 the damages.

25 The other issue that they seem to be arguing not to do it

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9
1 is that the contract is not valid because there was no
2 consideration given to the bank. My understanding, first, in the
3 case they cited, you know, expressing did not involve property.
4 It involved a promissory note, and they ruled that you can't
5 give consideration for value something that was already owed to
6 them. The bank did receive something of value from me that was
7 not obligated. I mean, there were a lot of issues. But one of
8 the questions that the Court needs to answer is, why do banks
9 enter into these agreements if they're not given something for
10 value? One of the reasons why it is different between a real
11 estate, a mortgage agreement and a promissory note is precisely
12 because there is property involved and precisely because we are
13 here in court today. What did the bank get of value in exchange
14 for their forbearance?

15 Incidentally, the forbearance that was asked was for one
16 week to delay making a payment of \$300.00. What does the bank
17 get?

18 BY THE COURT: All right, any other issues that you
19 want to raise relative to the jury trial?

20 MR. CARDWELL: Relative to the jury trial? No. In my
21 Answer I requested a jury trial.

22 BY THE COURT: All right, and I know you're not going
23 to agree with this, but I am going to deny the motion because
24 historically in South Carolina, mortgage foreclosure cases are
25 tried nonjury as well as any counterclaims that directly relate

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1 or flow from them, so we're going to go ahead and proceed with
2 the case here this morning since notice was sent to you, it
3 appears, by way of this letter from the law firm on March 7th.
4 And so I'm going to hear from them. I will be glad to hear from
5 you and then make my decision at that point, and then if you
6 disagree with whatever I feel the law and the facts require me
7 to do, you certainly have a right to appeal to our Appellate
8 Courts.

9 MR. CARDWELL: There was one other issue that is
10 involved that the Court needs to be made aware of. You
11 understand my reluctance to deal with these people because in my
12 opinion I do not think they are honorable. There is another
13 Defendant in this case who they did not list on these papers.

14 BY THE COURT: And who would that be?

15 MR. CARDWELL: There's another equity loan with Bank of
16 America with the house as the property securing that loan.

17 BY THE COURT: Mr. McCarrell?

18 MR. MCCARRELL: Your Honor, our title search did not
19 reveal anything about a Bank of America mortgage.

20 BY THE COURT: All right, well, then, Dr. Cardwell,
21 we'll go ahead, and I am sure that after the hearing here this
22 morning, they will research the title again and see if there is
23 any such interest, and if so, that wouldn't have any direct
24 bearing on liability issues between you and The Palmetto Bank,
25 but it certainly may impact the larger view of the case.

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1 MR. CARDWELL: Well, again, I don't know the, you know,
2 the law in the case. The Bank of America mortgage, equity loan,
3 was taken out years before The Palmetto Bank equity loan was
4 taken out.

5 BY THE COURT: Okay.

6 MR. CARDWELL: So whoever has priority, that, I don't
7 know.

8 BY THE COURT: All right, Mr. McCarrell, you can call
9 your first witness.

10 MR. MCCARRELL: Thank you, Your Honor. Your Honor,
11 Plaintiff would like to call to the stand Robin Thomason.

12 BY THE COURT: If you would come around and place your
13 left hand on the Bible and raise your right hand for me.

14 Do you swear to tell the truth, the whole truth and nothing
15 but the truth?

16 MR. THOMASON: I do.

17 BY THE COURT: If you would come around and have a
18 seat, please.

19 And if you would state your full name?

20 MR. THOMASON: My name is Robert M. Thomason, Jr.

21 COURT REPORTER: Could you spell your last name?

22 MR. THOMASON: Thomason, T-H-O-M-A-S-O-N.

23 BY THE COURT: All right, your witness.

24 ROBERT M. THOMASON, JR., being first
25 duly sworn, testified as follows:

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Robert M. Thomason, Jr. -- Direct Examination by Mr. McCarrell

12

1 DIRECT EXAMINATION BY MR. MCCARRELL:

2 Q Mr. Thomason, are you employed by The Palmetto Bank?

3 A I am.

4 Q How long have you been with the bank?

5 A Twelve years.

6 Q And what is your position there?

7 A I'm Assistant Vice President of the Loss Mitigation and
8 Recovery Department, which is a division of our Special
9 Assets Department.

10 Q And in the course and conduct of your business, are you
11 familiar with Dr. Cardwell's account with the bank?

12 A I am.

13 Q I may have gotten ahead of myself a little bit. Dr.
14 Cardwell does, in fact, have a loan with the bank?

15 A He, in fact, does.

16 Q Mr. Thomason, I am presenting you what's been marked as
17 Plaintiff's Exhibit #1. Can you tell me what that document
18 is, please?

19 A This appears to be the note.

20 Q And who is the borrower on that promissory note?

21 A Walter T. Cardwell.

22 Q And what is the date of that note?

23 A The day of the agreement is April 10th, 2008.

24 Q Can you tell me the original principal amount of the note?

25 A \$104,000.

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100

- 1 Q Did that note provide that the bank could recover
2 attorney's fees in the event that it seeks to collect on
3 the note?
4 A It does.
5 Q Does the note also establish a monthly payment?
6 A It does.
7 Q Mr. Thomason, I now show you what's been marked as
8 Plaintiff's Exhibit #2. Mr. Thomason, can you tell me what
9 this document is?
10 A This is the mortgage.
11 Q And who is the mortgagor on that mortgage?
12 A Would be Dr. Cardwell.
13 Q And what is the date on that mortgage?
14 A The mortgage was recorded on April 22nd, 2008.
15 Q That's when it was recorded?
16 A Yes. The mortgage was dated April 10th, 2008.
17 Q Thank you. So that mortgage is secured by the note that is
18 Plaintiff's Exhibit #2, is that correct?
19 A It is.
20 Q Mr. Thomason, let me show you what's been marked as
21 Plaintiff's Exhibit #4. Can you tell me what this document
22 appears to be?
23 A This document is a payment history of the account.
24 Q What kind of information is recorded on the payment
25 history?

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- 1 A. Payments made and disbursements made against the loan.
- 2 Q. Is that a document kept in the regular course of The
- 3 Palmetto Bank's business?
- 4 A. It is.
- 5 Q. Can you tell me by looking at that payment history if Dr.
- 6 Cardwell is currently in default on his loan?
- 7 A. That is correct.
- 8 Q. Dr. Cardwell is in default?
- 9 A. He is in default.
- 10 Q. What was the date of his last payment?
- 11 A. The date of last payment was October 19th, 2009.
- 12 Q. Can you tell me the principal amount owed as of today?
- 13 A. The principal amount is \$104,466.90.
- 14 Q. And can you tell me the interest owed as of today?
- 15 A. The interest is \$5,156.41.
- 16 Q. Can you give me the total owed of principal and interest?
- 17 A. Certainly. The total amount owed is \$109,623.31.
- 18 Q. Is the bank seeking attorney's fees?
- 19 A. We are.
- 20 MR. MCCARRELL: And, Your Honor, we would submit an
- 21 Affidavit of Attorney's Fees at the end of the hearing, or
- 22 another time.
- 23 Q. Mr. Thomason, this note and mortgage, Plaintiff's Exhibit
- 24 #1 and #2, was that loan ever sold to a third party?
- 25 A. No, it was not.

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- 1 Q Were the note and mortgage guaranteed by Fannie Mae,
2 Freddie Mac or another government entity?
- 3 A No.
- 4 Q Did The Palmetto Bank enter into an agreement to
5 participate in the Home Affordable Modification Program?
- 6 A We did not.
- 7 Q Mr. Thomason, I am going to show you what's been marked as
8 Plaintiff's Exhibit #5. Can you tell me what that document
9 is?
- 10 A This document are debtor comments generated from the
11 Special Assets Department in The Palmetto Bank's collection
12 system.
- 13 Q And what kind of information is entered on that record?
- 14 A There are comments made by the collector as to certain
15 conversations or agreements they would have with the
16 customer or any other pertinent information that needed to
17 be noted to the account.
- 18 Q Is that a document kept in the regular course of The
19 Palmetto Bank's business?
- 20 A It is.
- 21 Q And of course, this document generally starts reading from
22 the bottom up, is that correct?
- 23 A That is correct.
- 24 Q As far as the dates are concerned? With the first entry
25 dated December 24th, 2009, can you tell me what Dr. Cardwell

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1 told your collector on that date?

2 A Certainly. The customer advised that they would make one
3 payment on January 5th, and that they would be receiving
4 funds in the month of February that they would continue to
5 make payments to bring the loan current.

6 Q So Dr. Cardwell promised to make the payment on January 5th,
7 is that correct?

8 A That's correct.

9 Q Can you tell me the entry dated January 15th, what your
10 representative entered on the account comments?

11 A I can. The ---

12 Q With respect to the promise to make a payment on January
13 5th?

14 A Right. The borrower, it was noted that the borrower had
15 broken his promise and did not make a payment on the 5th of
16 January and that a demand letter would have been generated.

17 MR. MCCARRELL: Your Honor, at this time, I would like
18 to submit that all of the documents in Mr. Thomason's
19 possession be submitted as evidence.

20 BY THE COURT: All right.

21 (Prime Access Interest Only Agreement - \$104,000 -
22 entered into evidence as Plaintiff's Exhibit #1)

23 (Mortgage - 4945/2282 - entered into evidence as
24 Plaintiff's Exhibit #2)

25 (Notice of Hearing entered into evidence as

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1 Plaintiff's Exhibit #3).

2 (Payment history entered into evidence as Plaintiff's
3 Exhibit #4)

4 (Debtor Comments - 9/9/2008 - 7/2/2010 entered into
5 evidence as Plaintiff's Exhibit #5)

6 Q Mr. Thomason, are you familiar with the bank's practice for
7 reporting to consumer credit bureaus?

8 A I am.

9 Q How is information transmitted from the bank to credit
10 bureaus?

11 A It is transmitted as a file or a tape. It's an automated
12 process.

13 Q So does the bank representative manually decide to report
14 to the credit bureau?

15 A No.

16 Q If an account shows up as 30 days delinquent in your
17 computer system, how is that reported to the credit bureau?

18 A It is reported as 30 days delinquent.

19 Q If a customer is delinquent on an account, can the bank
20 institute a foreclosure?

21 A Yes.

22 Q If a customer is 90 days delinquent on his loan and the
23 bank decides not to proceed to foreclosure, forbears the
24 foreclosure, does the loan still get reported to the
25 consumer credit bureaus as 90 days delinquent?

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Robert M. Thomason, Jr. - Cross Examination by Dr. Cardwell

18

1 A It does.

2 Q Thank you, Mr. Thomason, that's all the questions I have
3 for you.

4 A Thank you.

5 BY THE COURT: All right, now, Dr. Cardwell, now is
6 your opportunity to ask this gentleman any questions you
7 have. And if you have questions, you need to be standing
8 while you are asking them, please, sir.

9 MR. CARDWELL: Yes, I'm sorry.

10 CROSS EXAMINATION BY MR. CARDWELL:

11 Q These notations here or wherever they came from, how were
12 these generated? You know, it says here that I made a
13 promise to make a payment on, was it January 5th?

14 A I believe that's ---

15 Q Where was that promise made?

16 A That would have been on the telephone with one of my, or
17 one of the bank's representatives.

18 Q Do you know who the representative is?

19 A I would ---

20 Q --- who made that call?

21 A I would be able to identify that by looking at the exhibit.

22 MR. MCCARRELL: Your Honor, I believe that's
23 Plaintiff's Exhibit #5.

24 Q Now, it says here that I promised that by telephone I
25 promised to make this payment on January 5th. That's what

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1 you're telling us?

2 A Correct.

3 Q That it was this call, that I made a call to someone at the
4 bank, or I talked to somebody on the phone on January 5th
5 and promised to make the loan. When did I promise to make
6 the payment?

7 A When did --- the entry was made on December the 24th, and
8 the notation is that you were to make one payment on
9 January 5th.

10 Q And you are saying that that was entered by somebody
11 talking to me on the telephone?

12 A That's what I'm saying.

13 Q Okay, thank you.

14 BY THE COURT: All right, any other questions of this
15 gentleman?

16 MR. CARDWELL: No, Your Honor.

17 BY THE COURT: Mr. McCarrell, anything else?

18 MR. MCCARRELL: Not from Mr. Thomason, Your Honor.

19 BY THE COURT: Thank you, sir, you can step down.

20 A Yes, sir, would you like this exhibit back?

21 BY THE COURT: You can leave it there, will be fine.

22 All right, any other witnesses?

23 MR. MCCARRELL: Yes, Your Honor, Plaintiff would like
24 to call Josie Stewart.

25 BY THE COURT: If you would place your left hand on the

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Josie M. Stewart – Direct Examination by Mr. McCarrell

20

1 Bible and raise your right for me.

2 Do you swear to tell the truth, the whole truth and
3 nothing but the truth?

4 MS. STEWART: I do.

5 BY THE COURT: Thank you. You can come around and have
6 a seat, please. And if you will state your full name,
7 please?

8 MS. STEWART: Josie Monique Stewart.

9 COURT REPORTER: Would you spell your last name?

10 MS. STEWART: S-T-E-W-A-R-T.

11 BY THE COURT: All right, Mr. McCarrell.

12 MR. MCCARRELL: Thank you, Your Honor.

13

14 JOSIE MONIQUE STEWART, being first duly
15 sworn, testified as follows:

16 DIRECT EXAMINATION BY MR. MCCARRELL:

17 Q Ms. Stewart, who is your employer?

18 A The Palmetto Bank.

19 Q And how long have you been with The Palmetto Bank?

20 A Almost four years.

21 Q And what is your position within the bank?

22 A I am Branch Manager at the Woodruff Road location.

23 Q Are you familiar with Dr. Cardwell?

24 A I am familiar with Dr. Cardwell.

25 Q Okay, are you familiar with his mortgage account at the

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- 1 bank?
- 2 A I am familiar with it.
- 3 Q Aside from Dr. Cardwell, just generally speaking, is the
4 bank willing to work with customers when they are
5 delinquent on their account?
- 6 A We are willing to work with customers.
- 7 Q In what ways are you willing to work with customers?
- 8 A Well, a lot of times customers will call and let us know
9 that they can't make a payment on the due date, and we'll
10 just talk with them, when can they make their payment, and
11 on that date we expect a payment. Most of the customers
12 will follow up with us and say, "You know, I can't make it
13 on this day. This is what I can do." So we do work with
14 customers.
- 15 Q So is it possible that a customer could be delinquent and
16 be allowed to gradually catch up on their account?
- 17 A It is possible.
- 18 Q So if they are 30 days delinquent and they are gradually
19 catching up their account, would they remain delinquent
20 through that time period?
- 21 A They would remain delinquent.
- 22 Q Getting back to Dr. Cardwell's account, did you have any
23 discussions with Dr. Cardwell in late December or early
24 January?
- 25 A I did. I recall Dr. Cardwell coming in kind of frustrated.

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- 1 It was either late December or early January. I don't know
2 the exact time frame. But he said he was going to --- he
3 got a call from somebody and was going to make a payment
4 around the 5th of --- I don't know if it was the 5th, but in
5 early January, he was going to make a payment, and he let
6 me know that he was qualified for social security.
- 7 Q Was Dr. Cardwell delinquent on his mortgage loan at that
8 time?
- 9 A Yes, he was.
- 10 Q Did Dr. Cardwell have a credit card account with the bank?
- 11 A He did.
- 12 Q Was he also delinquent on that credit card account?
- 13 A Yes, he was.
- 14 Q You mentioned that Dr. Cardwell promised to make a payment
15 in January. Did Dr. Cardwell make a payment on January 1st?
- 16 A No.
- 17 Q Did he make a payment on January 6th?
- 18 A No.
- 19 Q Did he make a payment in January at all?
- 20 A No.
- 21 BY THE COURT: Which year is this?
- 22 MR. MCCARRELL: I'm sorry, Your Honor, January of 2010.
- 23 BY THE COURT: All right, thank you.
- 24 Q Did you have a subsequent conversation with Dr. Cardwell
25 later on in January at some point?

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- 1 A Later on in January, he said his social security will be
2 starting in February.
- 3 Q And did Dr. Cardwell promise to make a payment at some
4 point in the future during that conversation?
- 5 A That he would make a payment in February.
- 6 Q All right, did you have any reason to believe that Dr.
7 Cardwell would follow through with that promise?
- 8 A No, because he didn't make the payment in January.
- 9 Q During your conversation with Dr. Cardwell, did you make
10 any promises not to proceed to foreclosure of his account
11 if Dr. Cardwell made a payment in February?
- 12 A No.
- 13 Q Did you make any notes on Dr. Cardwell's account?
- 14 A No, I don't have access to that department.
- 15 Q Do you have the ability to make notes on the account?
- 16 A No.
- 17 Q Do you recall a subsequent conversation, which you've read
18 Dr. Cardwell's pleadings and you know he alleges it was on
19 February 24th, but do you recall a conversation later on in
20 January?
- 21 A I recall Dr. Cardwell coming in, asking for a business
22 loan. At that point he knew this promissory note was past
23 due, delinquent. And for the business loan, he was going to
24 use some of those funds to bring the promissory note
25 current. But we were not interested in pursuing a business

GREENVILLE COUNTY COURTHOUSE

- 1 loan with him at that time.
- 2 Q Do you recall another conversation you might have had with
- 3 Dr. Cardwell regarding his promise to make a payment in
- 4 February?
- 5 A He was going to make a payment when his social security
- 6 came in, and I believe he came to the bank around the 24th
- 7 of the month, February, 2010, and at that time when I
- 8 called the Special Assets or the Collection Department ---
- 9 it's all the same department --- they said that we could
- 10 stop the foreclosure process if he brought the total loan
- 11 current, including legal fees. And he declined to do so.
- 12 Q All right, and backing up just a little bit with regard to
- 13 Special Assets, do you know when Dr. Cardwell's last
- 14 payment was made?
- 15 A His last payment was October 19th of 2009.
- 16 Q So by February 19th, 2010, how many days delinquent was his
- 17 account?
- 18 A February 19th, he'd have been 90 days past due.
- 19 Q Typically by the time an account is 90 days past due, what
- 20 has happened to that account?
- 21 A It goes into Collections. We don't work with the customer
- 22 any more in the branch. It's out of our hands. It goes to
- 23 the Special Assets Department, and they take care of it.
- 24 Q In the conversation you had with Dr. Cardwell on or about
- 25 February 24th, had his loan been transferred to Special

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1 Assets?

2 A Yes, it had been transferred.

3 Q Once the loan is transferred to Special Assets, I believe
4 you just testified to this, do you have any control over
5 that account at that point?

6 A No, I don't. Any loan payment would have to go through
7 Special Assets.

8 Q Thank you, Ms. Stewart.

9 BY THE COURT: Any other questions?

10 MR. MCCARRELL: No, Your Honor.

11 BY THE COURT: All right, Dr. Cardwell, any questions
12 of this lady?

13 MR. CARDWELL: Yes, several.

14

15 CROSS EXAMINATION BY MR. CARDWELL:

16 Q Do you remember me coming in, I believe it was sometime
17 either in October or November and discussing with you a
18 trip that I had just taken to Michigan? Do you remember
19 anything at all about that?

20 A Not particularly, no.

21 Q You don't?

22 A No.

23 Q Do you remember when I informed you that I would be late on
24 the next payment? Do you remember me coming into your
25 office and informing you that I would be late on --- this

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- 1 would be, obviously, after the October 19th payment, that it
2 was sometime after that or it may even have been before
3 that, but do you remember me coming into your office and
4 talking to you, that I would be late making the next
5 payment? Do you remember that?
- 6 A No. When was that?
- 7 Q As I said, it was sometime either in October or November.
8 It was before the next payment was due. It was before
9 November 19th or 17th, or whenever it was due, and you don't
10 remember that, me coming in and talking to you about that?
- 11 A No.
- 12 Q You don't remember thanking me for coming in and informing
13 you about that?
- 14 A (Witness shakes head negatively).
- 15 Q Do you remember the discussions that I mentioned to you
16 about why this arrived in --- you know, why we arrived in
17 that state?
- 18 A I don't understand what you're saying.
- 19 Q Well, do you remember my discussion with you about why I
20 would be late for the payments? You don't remember me
21 discussing with you at any time before then or after then
22 that we were pursuing fund raising with this new technology
23 we're working on?
- 24 A And that's when you came in? I don't know when that was---
- 25 Q No, I'm saying, you know, we had a ---

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1 A Can I answer the question?

2 BY THE COURT: Sure.

3 Q I'm sorry. We had a, you know, what I would say, at least a
4 year and a half relationship that was friendly and cordial
5 and I would come in and we would discuss and every time I
6 would walk in, you'd say, "Hi, how are you doing," you
7 know?

8 A Right.

9 Q And it was all nice and friendly. You don't recall even any
10 discussions that I had with you about what we were doing?

11 A I recall you coming in and telling me about a business loan
12 that you were looking for after you were already past due
13 and some of the proceeds that you were asking for would be
14 used to bring this loan current ---

15 Q I'm talking about ---

16 A --- I don't know, I don't recall if that was November ---

17 Q No.

18 A --- October, December.

19 Q That's fine. That's not what I'm asking you about. I'm
20 asking you about whether or not we had discussed
21 previously, not about that bank loan, but about the
22 business that I was involved in. What we were doing, what
23 the issues were that we were attempting to go and obtain
24 funding?

25 A I recall that, yes.

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1 Q Do you remember discussions about me --- you transferring
2 money from this account for me to send up to my partner for
3 patent expenses?

4 A I don't recall what the purpose of the funds were for.

5 Q So you don't remember, actually, the conversation, but you
6 do remember transferring some funds for me when the loan
7 was initially established?

8 A No.

9 Q Okay.

10 A That was in 2008, April of 2008?

11 Q It would be after April of 2008. So you don't remember
12 that?

13 A (Witness shakes head negatively.)

14 COURT REPORTER: I'm sorry, I didn't hear your answer.

15 Q I'm sorry?

16 A No, I don't remember.

17 Q Okay. Do you remember me coming into your office and
18 telling you that the payments --- you know, that I was
19 eligible for social security and I would begin making
20 payments when the first check came in? Do you remember me
21 saying that to you?

22 A I remember, yes, I do.

23 Q You do remember that?

24 A And that was in January when you said you were going to
25 make a payment in January ---

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- 1 Q No ---
- 2 A --- when your social security would start in February.
- 3 Q No, it was before that. This would be sometime in December,
- 4 because I informed you that I would be eligible for social
- 5 security in January, but that I couldn't apply until a
- 6 month before my birthday, so that was the first
- 7 notification that I gave to the bank of --- that I was
- 8 basically waiting for social security to resume making
- 9 payments to the bank. Do you remember that?
- 10 A I remember you saying that you were going to make payments
- 11 when your social security would start.
- 12 Q You don't remember me --- you don't remember that
- 13 conversation of me telling you that I would --- that I
- 14 couldn't apply until a month before my birthday?
- 15 A You were eligible for social security in January.
- 16 Q I was eligible, but --- okay. Now, do you remember another
- 17 conversation we had, because the moment that I contacted
- 18 social security I came into your office and told you I had
- 19 just applied for social security and that they would get
- 20 back to me on whether or not I was eligible and when the
- 21 first payment would come. Do you remember that
- 22 conversation?
- 23 A I don't recall --- I don't remember that conversation.
- 24 Q Okay.
- 25 A You do remember me coming in and telling you that I had

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1 received notification from social security that the first
2 check would arrive February 22nd. Do you remember me coming
3 in and telling you that?

4 A I remember you saying that your social security was going
5 to start in February.

6 Q Do you remember me when I came into your office on many of
7 these occasions, do you remember you telling me, "Well,
8 I've entered that into your account," for whatever the
9 issue was, that when I would go in and talk to you, you
10 would go and say, "You know, well, I've entered that into
11 your account"?

12 A No.

13 Q You don't remember that?

14 A No.

15 Q You don't remember that?

16 A No.

17 Q There were three times --- there were either two or three
18 times that you called whatever the loan office was or
19 whoever you had to get approval from, and every single time
20 that you got an okay from whoever it was that you called,
21 you turned, entered something in your computer, and said,
22 "I've entered that into your account"?

23 A No, I don't ---

24 Q You don't --- now, are you saying you don't remember?

25 BY THE COURT: Just answer the question.

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- 1 A I didn't do that, no.
- 2 Q You didn't do what? You didn't say that to me ---
- 3 A I did not ---
- 4 Q --- or you didn't enter it into the account?
- 5 A I have no way of entering into the account.
- 6 Q But, now, are you saying that also that you did not tell me
- 7 that you were entering this information in my account?
- 8 A That's exactly what I'm saying.
- 9 Q You're saying you did not tell me that?
- 10 A I did not tell you.
- 11 Q And you're swearing to that under oath?
- 12 A Yes, I am.
- 13 Q So all of the times that I came in there and asked you
- 14 something and you accessed my account, can you access my
- 15 account?
- 16 A I can pull up your account, Dr. Cardwell.
- 17 Q And you cannot enter anything whatsoever in that account?
- 18 A No, because it's your loan. Even when you make a loan
- 19 payment, I can't change it.
- 20 Q No, but a notation? Can you enter a notation in my account?
- 21 A No.
- 22 Q And yet, each time that I went in there about that, you
- 23 told me, "Well, I've entered this into your account."
- 24 A I'm going to disagree with that. I don't recall ever saying
- 25 that to you.

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1 Q Now, it says here that I made a promise on January 5th that
2 I would make a payment. You are all claiming that I
3 promised to make a payment on January 5th, and that I
4 reneged on that agreement?

5 A Where are you getting that information?

6 Q Well, isn't that what you just said?

7 MR. MCCARRELL: Your Honor, I believe that Dr. Cardwell
8 is referring to Plaintiff's Exhibit #5, which were
9 testified to by Robin Thomason.

10 BY THE COURT: You can ask her if she has any knowledge
11 of what's on that document.

12 A Can I look at the document?

13 BY THE COURT: Certainly, it's right there.

14 Q Well, it's kind of hard, because of the brief notations
15 here, to understand what exactly these things are. However,
16 you testified, "Customer said he will make one payment on
17 January 5th." I guess this is the third from the bottom. And
18 you're claiming, or they're claiming that that was made by
19 phone by me agreeing to someone on the phone?

20 A That's correct.

21 Q And that the other, if I had made that agreement and I came
22 to you on the 15th, and I had reneged on that agreement, do
23 you deny saying that it was okay for me to make the
24 payment on the 24th? In other words, to begin paying off
25 this loan on the 24th?

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- 1 A Repeat the question?
- 2 Q All right, let me rephrase it. You do agree that I informed
- 3 you that I would be receiving the social security check?
- 4 A Right.
- 5 Q In February?
- 6 A That you were eligible in January.
- 7 Q But do you also not --- do you remember me coming in and
- 8 telling you that I would receive the first social security
- 9 check on February 22nd?
- 10 A I remember you telling me that you were going to make a
- 11 payment in January and your social security would begin ---
- 12 you were eligible for social security starting in January.
- 13 You were going to make a payment in January.
- 14 Q Okay, so now you're testifying that you're the one who said
- 15 that I promised to make a payment on January 5th?
- 16 A That is not what I'm saying at all, and I'm not testifying
- 17 to that. If you look at Exhibit #5 ---
- 18 Q Okay.
- 19 A --- it's the initials of the person that you spoke to over
- 20 the phone.
- 21 Q And the person is HE? Is that the initials?
- 22 A No, H-E would spell "he." The initial would be KDC, and ---
- 23 Q At 2 12 17?
- 24 A At 12 21 17, I believe, would be the time.
- 25 Q And this was on --- when was this? This was on?

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1 A 12/24/2009.
2 Q On the day before Christmas?
3 A (No response from witness).
4 Q The day before Christmas?
5 A Yes.
6 Q Yes. Do you --- well, obviously it doesn't say there where
7 I was contacted.
8 A This would be ---
9 Q There's no information about ---
10 A Can I finish?
11 Q Yeah, sure.
12 A Okay. This would be the Special Assets Department, the
13 Collection Department, when we contact our customers who
14 are delinquent on their payment.
15 Q Uh-huh, yes. But what I'm saying here is it doesn't say
16 what number they called me at.
17 BY THE COURT: Did you have anything to do with the
18 creation of this document?
19 A No, I have nothing --- no.
20 BY THE COURT: Then, Dr. Cardwell, since she says she
21 doesn't have anything to do with any creation of this, and
22 she's not familiar with it, we just need to move on to a
23 different topic, sir.
24 MR. CARDWELL: Very well. Very well.
25 Q Now, what you do have knowledge of, however, is my

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1 arranging with you, my going in and telling you that I
2 would receive the social security check on the 22nd

3 A I don't recall what day you said you were going to receive
4 social security.

5 Q Okay.

6 A I recall you telling me you were going to make a payment in
7 January and you were eligible for your social security in
8 January as well.

9 MR. CARDWELL: Okay, now, before we move on, Your
10 Honor, what she is saying here is she ---

11 BY THE COURT: All right, hold on. You can't
12 editorialize. You will be allowed to testify ---

13 MR. CARDWELL: Okay.

14 BY THE COURT: --- and present your side ---

15 MR. CARDWELL: Yes.

16 BY THE COURT: --- Hopefully in just a very few
17 minutes.

18 MR. CARDWELL: Well, what I'm trying to clear up here
19 is who --- who it is who said that I would make a payment
20 on January 5th. Now, she just immediately before testified
21 that she didn't, that I didn't tell her that I would make
22 the payment on January 5th and just now she said I did, she
23 remembered a conversation where I did tell her. It's
24 inconsistent.

25 MR. MCCARRELL: Your Honor, I believe that ---

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1 BY THE COURT: All right, hold on. Do you have any
2 recollection of any conversation when you told Dr. Cardwell
3 January 5th?

4 A That he was going to make a payment on January 5th?

5 BY THE COURT: Yes..

6 A I recall him saying he was going to make a payment in
7 January and that starting in January he was eligible for
8 his social security. That's the conversation I recall with
9 Dr. Cardwell.

10 MR. CARDWELL: So she is saying ---

11 BY THE COURT: Dr. Cardwell, you can't editorialize.

12 MR. CARDWELL: I'm not ---

13 BY THE COURT: Sure, you are. You're telling me what,
14 you're trying to translate what she said ---

15 MR. CARDWELL: No ---

16 BY THE COURT: --- which is an editorialization ---

17 MR. CARDWELL: --- what I ---

18 BY THE COURT: If you have questions, ask her.

19 MR. CARDWELL: What I'm trying to do ---

20 BY THE COURT: If you have a question, ask her.

21 MR. CARDWELL: Very well. No further questions, Your
22 Honor.

23 BY THE COURT: All right, but you understand, if you
24 want to ask her any other questions that are relevant and
25 she knows, has a factual basis to answer, you have every

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1 right to do that.

2 MR. CARDWELL: Well, what I was attempting to ask of
3 her is for her to confirm what my understanding is of what
4 she had just testified and that there is an inconsistency
5 in two statements that she had just made.

6 BY THE COURT: All right, you may ask her about the
7 inconsistency of two statements.

8 Q Well, on one of the statements, you said that I did not
9 talk to you about making a payment on January 5th, that that
10 promise to pay came from a telephone call from someone
11 else. Was that you who made that telephone call to me?

12 A That was not me who made that phone call ---

13 Q It was not you, but you are now saying that I also made a
14 promise to you that I would pay on January 5th.

15 A You made a promise to me that you would pay, make a
16 payment, in January.

17 Q Now, you are testifying that I specifically stated that
18 yes, I will definitely make a payment in January or did I
19 say to you that I am expecting, you know, I will be
20 eligible for social security in January and I will make a
21 payment as soon as the first check comes in.

22 A Repeat your question.

23 Q Did I come in and specifically state to you that I would
24 make a payment in January, or did I come in and state to
25 you that I would be --- that I had been found eligible for

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1 social security and I would be in to make the first payment
2 when the first check arrived?

3 A You told me that you were going to make a payment in
4 January and that you were eligible for social security in
5 January. That's what you said.

6 Q That's what you're testifying to?

7 A That's what I'm testifying to.

8 Q No further questions.

9 BY THE COURT: Do you have any very brief questions?

10 MR. MCCARRELL: Quick redirect, Your Honor.

11 REDIRECT EXAMINATION BY MR. MCCARRELL:

12 Q Ms. Stewart, did you have a conversation with Dr. Cardwell
13 about making the payments in January?

14 A I had conversation when he came into the bank.

15 Q Does it appear from the account comments that another
16 person had a conversation?

17 A Yes.

18 Q About Dr. Cardwell making a payment on January 5th?

19 A Yes, on 12/24/2009, an employee of The Palmetto Bank spoke
20 with him and customer said he will make one payment on
21 January 5th and that he would be receiving some funds in the
22 month of February that he will use to bring loan current.

23 Q And you were just reading from Plaintiff's Exhibit #5?

24 A I'm just reading from Exhibit #5, yes.

25 Q So two separate conversations, is that correct?

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1 A Yes.

2 MR. MCCARRELL: No further questions, Your Honor.

3 BY THE COURT: All right, thank you. You can step down.
4 Anything else from Plaintiff?

5 MR. MCCARRELL: Yes, Your Honor, one matter on the
6 final record to clear up. The deed into Dr. Cardwell was to
7 Dr. Cardwell and what I believe to be his sister, Nancy
8 Jean Cardwell with joint right of survivorship. I don't
9 recall the date on that deed, but it was well prior to the
10 mortgage. Ms. Cardwell passed away in 2004, leaving Dr.
11 Cardwell as the sole owner of the property, and the bank's
12 mortgage was, of course, taken in 2008 as has been
13 testified to, but at the time the bank took its mortgage,
14 Dr. Cardwell was the sole owner of the property, and we
15 have here Plaintiff's Exhibit #6, Your Honor, the death
16 certificate for Nancy Jean Cardwell, I would like to submit
17 into evidence.

18 BY THE COURT: So is Plaintiff asking for any type of
19 affirmative relief relative to the deed?

20 MR. MCCARRELL: No, Your Honor, I just wanted to
21 clarify for the record that although the deed is in both
22 Nancy and Walter Cardwell's names, the mortgage is solely
23 in Walter Cardwell's name. Nancy Cardwell, of course, is
24 not a party to this action because she is deceased.

25 MR. HUGHES: It's for information purposes only, Your

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1 Honor. No relief is needed because at the time the mortgage
2 was taken, Mr. Cardwell was the sole owner of the property.

3 (Death Certificate of Nancy Jean Cardwell entered into
4 evidence as Plaintiff's Exhibit #6)

5 BY THE COURT: All right, anything else from Plaintiff?

6 MR. MCCARRELL: No, Your Honor, that completes our
7 case.

8 BY THE COURT: All right, Dr. Cardwell, now is your
9 opportunity to testify if there is any evidence or
10 testimony you may so desire.

11 If you would place your left hand on the Bible and
12 raise your right hand for me.

13 Do you swear to tell the truth, the whole truth and
14 nothing but the truth?

15 MR. CARDWELL: I do.

16 BY THE COURT: Thank you. If you would come around and
17 have a seat, please, sir. And if you would state your full
18 name, please, sir.

19 MR. CARDWELL: Dr. Walter Timmons Cardwell, Jr.

20 BY THE COURT: All right, and now is certainly your
21 opportunity to present whatever testimony you want to
22 relative to this.

23 WALTER T. CARDWELL, JR., being
24 first duly sworn, testified as follows:

25 Beginning in, I would say October of 2009 ---

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1 MR. HUGHES: Your Honor, could you ask him to speak up,
2 please?

3 MR. CARDWELL: I'm sorry. Well, let's get a little
4 closer.

5 MR. HUGHES: Yes, that will be good.

6 MR. CARDWELL: In October or November of 2009, I had
7 returned from an unsuccessful funding trip to Michigan in
8 relation to this project we were working on. When I
9 returned, I contacted Ms. Stewart and informed her that I
10 would be late on the next payment because of that. I
11 informed her that I was eligible for social security in
12 January and that I would resume making payments in January
13 --- not in January, I would resume making payments when the
14 first social security check arrived. That was the first
15 communication I had with Ms. Stewart.

16 Now, I don't expect her to remember every, you know,
17 little detail of conversations that we had. We were, as I
18 said, it was a friendly relationship; however, the
19 pertinent information, the one thing that she testified to
20 here, under oath, here I court, was that she never entered
21 anything in my account on her computer.

22 I am testifying here under oath that she told me on
23 numerous occasions, "I'm entering this into your account.
24 I've just entered this into your account." I would see her
25 type on the computer, on her computer, and she said, "I

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1 have entered this into your account." Did I ever see what
2 she was doing? No. The monitor was always turned away from
3 me. But on numerous occasions that is what she said, "Well,
4 I'm entering this into your account. And I'm swearing to
5 you under oath that that is what she said.

6 On the issue of me making a promise to make a payment
7 on January 5th in that phone conversation, that phone
8 conversation, if I remember correctly, was in Florida. They
9 had gotten in contact with me in Florida. I did not make
10 the promise to pay them on the 5th. What I said to the
11 representative was that I was in contact with Ms. Stewart
12 and that, after the holidays when I got back, I will
13 contact her again. That is the only phone conversation that
14 I remember ever having with any representative of the bank
15 concerning this matter. It is the only phone conversation.

16 Now, Ms. Stewart states that I told her that I would
17 make a payment on January 5th. Well, to the best --- not
18 only do I have no recollection of that, clearly until the
19 social security check came in, I would not have the means
20 to make that payment other than by borrowing it from
21 someone. I would not have made that commitment to them.
22 There is no --- there never was, at any time, a commitment
23 that I remember that I said I would pay anytime before the
24 social security check came in.

25 There were three or four events that began. The first

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1 thing I informed Ms. Stewart that I would be late on the
2 payment and informed her that the social security, that I
3 was eligible for social security. The month before my
4 birthday was in a few days. I went to social security and
5 they said that they would be informing me whether or not I
6 was eligible. From the social security office I went down
7 to Ms. Stewart, and I informed her that I had just applied
8 for social security. I then received a notification from
9 social security that yes, I was, you know, that they had
10 confirmed eligibility and they also confirmed that I would
11 receive the first check on February 22nd. I went in to Ms.
12 Stewart's office, and I stated to her --- and again, I am
13 swearing this under oath --- that I said to her, "My first
14 social security check with come in on February 22nd. I will
15 deposit it on the 23rd, and I will be in on the 24th to make
16 a payment." I said, "Would that be all right?" She went, as
17 she did numerous times before, went and called there,
18 whoever it is in the bank, to okay this. While she was on
19 the phone, she stated to that person that I wanted to make
20 the payment on February 22nd. While she was on the phone I
21 stated to her, no, it would be on the --- that I would get
22 the check on the 22nd, deposit it on the 23rd and would be in
23 on the 24th. She made no comment to the person. She just,
24 she hung up the phone and said, "Okay." You know, she had
25 gotten the approval for the payment to be made, and she

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1 said, "I'm marking it down that you will make a payment on
2 February 22nd, and I repeated again, no, it would be on the
3 24th. Receive the check on the 22nd, deposit it on the 23rd
4 and be in on the 24th to make that payment. She smiled. She
5 turned around. I don't remember whether or not she just
6 shuffled papers or whether or not she entered, was at her
7 computer and entered something in her computer, but she
8 smiled and the clear assumption there was that we had an
9 agreement that I would begin making the payments on the
10 24th.

11 Now, if, as claimed, that that payment on the 5th was
12 not made that I had promised to make, and if that meant,
13 therefore, that they were going to foreclose anyway and not
14 honor this agreement on the 24th, they had no business
15 making it. They should have said no, you have to make the
16 payment now. They did not. They requested that I do, and I
17 said that it would be a problem, meaning to make a payment
18 before the check came in, I would have to borrow it from
19 friends or family or whatever else is there. And I am
20 swearing under oath that I got an agreement from Ms.
21 Stewart that it was okay for me to make that payment. And
22 that's exactly - exactly. I still have a mental image in my
23 mind of that entire conversation, because when I came in on
24 the 24th to make that payment, Ms. Stewart informed me that
25 they had already foreclosed on the property. She then gave

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1 me a card that said I was to contact --- she wrote two
2 names on there. Robin and Carter. And I had to call them. I
3 immediately went home and called them. And I asked for Mr.
4 Carter. I believe I spoke to, is it Thomason?

5 MR. MCCARRELL: Mr. Robin Thomason.

6 MR. CARDWELL: I believe that I spoke to him, and he
7 didn't know who Mr. Carter was, but then he figured out,
8 oh, the person I was to contact or that I was trying to
9 contact was somebody actually named Carter Ballentine. And
10 he transferred me to Carter Ballentine. I stated to Mr.
11 Ballentine the conditions of what happened, the agreement
12 that we had, and he said, "Well, you just have to make the
13 full payments plus the legal fees." And I said to him, "Do
14 you not honor the agreements made by representatives of
15 your bank," and he said yes and he continued to insist on
16 the payment and then I finally said, "Well, we'll let a
17 jury decide." With that he said, "Okay, I will have to
18 check into it and I will get back to you the next week." He
19 never did. I received a call from the bank about the credit
20 card, and I had mentioned that I was, you know, expecting a
21 call from Mr. Ballentine. I said Mr. Carter, because I
22 didn't know who it was at the time, and the person said he
23 would check into it and have somebody call me back about
24 it. They never did. They never did. I sent them a certified
25 letter stating, you know, clarification. Never received a

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1 response from the bank. Never received a response from the
2 bank. Now, whether or not this is just procedural screw-ups
3 at the bank or whether or not this was a deliberate attempt
4 to get rid of quote, questionable loans, I don't know now
5 because, obviously, I was unable, because of the bank not
6 calling, not contacting me, to go through full discovery.
7 At the time, the bank, we found out apparently that the
8 bank was in some kind of trouble. They had lost \$30 million
9 in bad loans and that it appears that the feds were ---
10 they were changing the rules and they were doing all kinds
11 of things. In July of 2010, there's a big article in The
12 Greenville Newspaper about how the bank holding company for
13 The Palmetto Bank got a hundred million dollars, you know,
14 in investment and they were on top of the world again.

15 So the question here is, is all of this here a
16 subterfuge for them to go and get rid of troubling loans to
17 go and shore up their bank from the standpoint of what the
18 feds are doing.

19 Now, I am swearing to you under oath that this is
20 exactly what happened. If at any time the bank had told me
21 no, we won't do that, I would go --- I would have gone and
22 through my partner or through someone else, obtained a
23 loan, done something to try and make that payment. Never
24 once did. Never once, to the best of my knowledge, did I
25 ever promise to make a payment on January 5th because, of

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1 course, I didn't have the money then. The check didn't come
 2 in.

3 Now, obviously, I can't question under oath the person
 4 on that --- on that list who says that they called me and
 5 that I promised to make the payment. What I remember of
 6 that conversation while I was in Florida was I said that I
 7 was in contact with Ms. Stewart and that I will check with
 8 her when I get back. That is my memory of the conversation
 9 when I was there in Florida and that is the only
 10 conversation about this matter that I have had with the
 11 bank.

12 I am going to make one more comment, and you need to
 13 take this seriously, whether I sound like, you know, a
 14 member of the tinfoil hat brigade, you need to take this
 15 seriously. The bank doesn't. Most other people don't. This
 16 is probably, or this has the potential to be, the single
 17 most important case that was ever tried in South Carolina.
 18 Potentially, the future of South Carolina depends on the
 19 outcome of this trial. The project that my partner and I
 20 are involved with is a new transportation system. We have
 21 received patents in it. I have them right in my briefcase
 22 there, a whole list of Ph.D.'s and department heads who
 23 have reviewed the technology. We don't know yet whether we
 24 will be successful. My best estimate is that there is
 25 probably a three to one chance that this technology will

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1 work. If this technology does work, what this will mean is
2 that it will replace the automobile. Now, people will say,
3 oh, that's ridiculous, it won't. The performance, the cost,
4 the characteristics, every single thing about this means
5 it's the difference between people, between the automobile
6 and the horse and buggy. And people can say all the time,
7 no, I won't do this. You know, I would never, you know,
8 ride in an automobile. But eventually, the overwhelming
9 benefits make it impossible for people not to.

10 Right now, this technology is here in South Carolina.
11 It remains in South Carolina. If the technology succeeds,
12 what this will bring to South Carolina is full employment
13 for the next twenty years. If the technology succeeds and
14 the bank prevails on this case, if they are committed to
15 foreclose on this case based upon their --- what they are
16 testifying here in court, actually it doesn't matter. If
17 they prevail and they take the house, I will leave South
18 Carolina forever.

19 This technology will be forever denied to South
20 Carolina. The economy of South Carolina, you figure it out.
21 If the technology succeeds, BMW will no longer be a viable
22 company, nor will Boeing, nor will --- Michelin may move
23 into other areas, but it certainly isn't going to making
24 automobile tires. The economic impact on South Carolina is
25 the difference between full employment and probably 20%

GREENVILLE COUNTY COURTHOUSE

1 unemployment for the next twenty years. It's that
2 important. It's that important.

3 What this bank has done in the one year that this has
4 gone on, again, Ms. Stewart was well aware that we were
5 pushing to finish this proof of concept within the next
6 several months when they file the foreclosure. Now, that's
7 irrelevant on whether they file the foreclosure or not, but
8 she and the bank --- I assume the bank --- she certainly
9 was aware. In the one year that this has been delayed,
10 because we have had to go and try to raise funds to, quite
11 frankly, pay off this bank and get rid of them. In the one
12 year delay, if this technology is successful, 45,000 people
13 will eventually die on the highways who didn't need to
14 because of the safety of this technology. A million people
15 will, worldwide, will have died because of what this bank
16 has done.

17 In addition, if the bank prevails here, it will
18 probably take us another two or three years before we can
19 get back up and running again to get to this proof of
20 concept. That three year delay, another hundred and
21 approximately fifty thousand American lives will be lost
22 and 3 million people's lives will be lost because of what
23 this bank is doing.

24 BY THE COURT: All right, now, the bank's lawyers are
25 entitled to ask you any questions, so Mr. McCarrell, any

GREENVILLE COUNTY COURTHOUSE

1 questions?

2 MR. MCCARRELL: No questions, Your Honor.

3 BY THE COURT: All right, Doctor, thank you. You can
4 have your seat, sir.

5 So, Dr. Cardwell, any other evidence or witnesses that
6 you wish to call here today?

7 MR. CARDWELL: Not now.

8 BY THE COURT: Anything else from Plaintiff?

9 MR. MCCARRELL: No, Your Honor.

10 BY THE COURT: All right, Dr. Cardwell, obviously, you
11 are a brilliant fellow in the field that you are in, and you are
12 articulate and you present good and compelling argument. What I
13 am required to do is consider the facts and the law as produced
14 here by the testimony, and I really see no option but to grant
15 the foreclosure, and I know you don't understand that and I know
16 you disagree with it very strongly, but the fact is the loan is
17 delinquent. The last payment, according to the uncontroverted
18 testimony, was October of 2009, and while I hear what you're
19 saying as far as what you believe an agreement was, there is
20 simply nothing in writing, there's nothing in the bank records,
21 there's nothing in the testimony of Ms. Stewart or Mr. Thomason,
22 and so I find by a preponderance of the evidence that the
23 Plaintiff is entitled to proceed.

24 The next sale is actually in May, but however, the cutoff
25 is tomorrow in order to get all the Orders in and move towards

GREENVILLE COUNTY COURTHOUSE

1 publication. I am going to move this to the June sale simply
2 because I do want the question, the issue raised by Dr. Cardwell
3 are there any other liens or mortgages on this property, and I
4 am also, Dr. Cardwell, what my strong recommendation would be is
5 to continue and see if you can work out some type of agreement
6 with the bank. From the notes, Plaintiff's Exhibit #5 it appears
7 that the biggest issue has always been the bank's willingness to
8 take the money but stating that you would have to pay the
9 attorney's fees, and apparently that's where the real friction
10 point has come in, if you will.

11 But you have until June 13th. That's when the property would
12 be set for sale. Mr. McCarrell is going to send me a copy of a
13 proposed Court Order. He will also send it to you at the same
14 time he sends it to me.

15 Again, you have appeal rights if you feel like I am making
16 a decision based in error of the facts or the law. There are
17 some quick time frames, so you need to be aware of that. I
18 really do appreciate you being here and I understand your
19 frustration with the process and with the ruling that I'm having
20 to enter in.

21 MR. CARDWELL: May I ask you, what is the time frame
22 for me to file appeal? I am basically stating that I do intend
23 to file an appeal with your decision.

24 BY THE COURT: All right.

25 MR. CARDWELL: And what is the time frame?

GREENVILLE COUNTY COURTHOUSE

1 BY THE COURT: And I tell you, I've been on the bench
2 22 years now, and I don't have to pay attention, thankfully, to
3 what the time limits are any more on appeal cases.

4 MR. CARDWELL: Where can I find that information?

5 BY THE COURT: To the best of my knowledge it is still
6 thirty days you have to file an appeal with the Clerk of the
7 Appellate Courts, thirty days from the date you get the written
8 Order. And you can certainly determine, go to the South Carolina
9 Judicial Department website and that should provide you
10 information about that. But again, there are very quick
11 technical time limits where, if things are not filed, then the
12 case will be dismissed.

13 MR. CARDWELL: Will the filing of the appeal, will the
14 sale of the property be delayed until the appeal is heard?

15 BY THE COURT: No, sir. The sale of real property,
16 under the Appellate Court rules, is not stayed by the appeal.
17 You will then have a right to come either to this Court or the
18 Appellate Court and ask for a stay of the sale and the statutory
19 process provides that a bond, a monetary bond, has to be posted
20 in order to stay the sale of the real property.

21 MR. CARDWELL: And if the bond cannot be posted, that
22 means I cannot stay the sale or that I can't appeal?

23 BY THE COURT: You can appeal, but you could not stay
24 the sale of the real property.

25 MR. CARDWELL: And what is the bond that is required?

GREENVILLE COUNTY COURTHOUSE

1 BY THE COURT: I would have to look at the statute. I'm
2 just not real sure. There are any number of different appellate
3 bonds that are proper and appropriate, and I would have to see
4 which one this falls under. But again, the onus would be on you
5 to file the appeal and to file a Motion for Stay.

6 And, Mr. McCarrell, if you could look into that lien issue
7 and also send a copy of the Order to Dr. Cardwell at the same
8 time you send it to the Court.

9 MR. MCCARRELL: Yes, sir.

10 BY THE COURT: And if you all would be sure and go
11 through the exhibits with Ms. Campbell, my court reporter, to
12 make sure that all are properly in the record.

13 MR. MCCARRELL: Thank you, Your Honor.

14 BY THE COURT: Thank you.

15 ----- END OF TRANSCRIPT -----

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GREENVILLE COUNTY COURTHOUSE

1 I, the undersigned Ann D. Campbell, Court Reporter, Office
2 of Master in Equity for Greenville County, South Carolina, do
3 hereby certify that the foregoing is a true, accurate and
4 complete transcript of record of all the proceedings had and
5 evidence introduced in the hearing of the captioned case,
6 relative to appeal, before The Honorable Charles B. Simmons,
7 Jr., as Master in Equity for Greenville County, South Carolina,
8 on the 30th day of March, 2011.

9 I do further certify that I am neither of kin, counsel, nor
10 any interest to any parties hereto.

11 April 15th, 2011

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13 
14 Ann Dickey Campbell, CVR

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GREENVILLE COUNTY COURTHOUSE

Defendant's Exhibit 1, Plaintiff's Exhibit 5: Debtor's Comments document

Page: 1 of 1

Program ID: ScheduledPrint2

Date: 07/02/2010 Time: 14:51:28

Debtor Comments
For the period 09/09/2008 to 07/02/2010

A Type Comments

Date	Text
03/09/2010	SPOKE WITH CUSTOMER FROM 6:55 LAST NIGHT 3/8/10 UNTIL 6:15. HE STATED <BY DHB1049C AT 10.03.29 >
03/09/2010	THAT IF THE PALMETTO BANK WAVED THE ATTORNEY FEES FROM FORECLOSURE ON <BY DHB1049C AT 10.03.29 >
03/09/2010	HIS 1ST MORTGAGE THAT HE WOULD CATCH THE ACCOUNT UP AND CONTINUE <BY DHB1049C AT 10.03.29 >
03/09/2010	MAKING PAYMENTS. MR CARDWELL ALSO STATED THAT WE DID NOT WANT THIS <BY DHB1049C AT 10.03.29 >
03/09/2010	HOME BACK AND IF WE CONTINUED WITH FORECLOSURE AND FILED FOR JUDGMENT <BY DHB1049C AT 10.03.29 >
03/09/2010	ON THE CREDIT CARD THAT THE PALMETTO BANK WOULD GO OUT OF BUSINESS <BY DHB1049C AT 10.03.29 >
03/09/2010	BECAUSE OF SOME WEBSITE THAT HE HAD CONNECTIONS TO THROUGH OTHER LARGE <BY DHB1049C AT 10.03.29 >
03/09/2010	INDUSTRIES IN THE AREA. <BY DHB1049C AT 10.03.29 >
02/23/2010	RECIEVED REQUEST FROM LOAN OFFICER AND REGIONAL TO <BY RMT0795CVQ AT 14.01.42 >
02/23/2010	UNITIATE FORECLOSURE PROCEEDINGS. REFERRED MATTER TO <BY RMT0795CVQ AT 14.01.42 >
02/23/2010	LEATHER WOOD (KEVIN MCCARRELL). <BY RMT0795CVQ AT 14.01.42 >
02/04/2010	NO ANSWER <BY DHB1049C AT 14.02.31 >
02/02/2010	BORROWER IS NOT RESPONSIVE TO ANY CONTACT EFFORTS. I HAD <BY RMT0795CVQ AT 12.08.00 >
02/02/2010	SHEILA PLACE PR ON AS 400. CCB <BY RMT0795CVQ AT 12.08.00 >
01/15/2010	LO INFORMED ME THAT THIS WAS THE ONLY LIEN ON HIS HOME WHEN <BY RMT0795CVQ AT 10.52.20 >
01/15/2010	THE LOAN WAS DONE. CCB <BY RMT0795CVQ AT 10.52.20 >
01/15/2010	SPOKE WITH LO AND SHE SAID HE IS SUPPOSED TO GET A SSCHECK <BY RMT0795CVQ AT 10.48.45 >
01/15/2010	STARTING IN FEBRUARY AND WILL MAKE A PAYMENT. I AM SENDING <BY RMT0795CVQ AT 10.48.45 >
01/15/2010	A DEMAND LETTER GOOD THRU 01/29/2010. CCB <BY RMT0795CVQ AT 10.48.45 >
01/15/2010	BORROWER BROKE HIS PROMISE AND DID NOT MAKE A PAYMENT ON <BY RMT0795CVQ AT 10.09.56 >
01/15/2010	THE 5TH OF JANUARY. I LM FOR LO TO CALL ME TO DISCUSS. CCB <BY RMT0795CVQ AT 10.09.56 >
12/24/2009	CUSTOMER SAID WILL MAKE ONE PAYMENT ON JANUARY 5TH. HE <BY KDC0992CVQ AT 12.21.17 >
12/24/2009	WILL BE RECIEVING SOME FUNDS IN THE MONTH OF FEBRUARY THAT <BY KDC0992CVQ AT 12.21.17 >
12/24/2009	HE WILL USE TO BRING LOAN CURRENT. <BY KDC0992CVQ AT 12.21.17 >

Page 1 of 1

Plaintiff's Exhibit 1: the Note



0360



The Palmetto Bank PRIME ACCESS INTEREST ONLY

Principal	Loan Date	Maturity	Loan No.	Account	Office	Initials
\$104,000.00	04-10-2008	04-10-2023	43708286	1017AG	2408	

References in the boxes above are for our use only and do not limit the applicability of this document to any particular loan or item.
Any item above containing ***** has been omitted due to text length limitations.

Borrower: Walter T. Cardwell
18 Dawnwood Drive
Greenville, SC 29615

Lender: The Palmetto Bank
Woodruff Road
2101 Woodruff Rd
Greenville, SC 29607

CREDIT LIMIT: \$104,000.00

DATE OF AGREEMENT: April 10, 2008

Introduction. This Prime Access Interest Only ("Agreement") governs your line of credit (the "Credit Line" or the "Credit Line Account") issued through The Palmetto Bank. In this Agreement, the words "Borrower," "you," "your," and "Applicant" mean each and every person who signs this Agreement, including all Borrowers named above. The words "we," "us," "our," and "Lender" mean The Palmetto Bank. You agree to the following terms and conditions:

Promise to Pay. You promise to pay The Palmetto Bank, or order, the total of all credit advances and FINANCE CHARGES, together with all costs and expenses for which you are responsible under this Agreement or under the "Mortgage" which secures your Credit Line. You will pay your Credit Line according to the payment terms set forth below. If there is more than one Borrower, each is jointly and severally liable on this Agreement. This means we can require any Borrower to pay all amounts due under this Agreement, including credit advances made to any Borrower. Each Borrower authorizes any other Borrower, on his or her signature alone, to cancel the Credit Line, to request and receive credit advances, and to do all other things necessary to carry out the terms of this Agreement. We can release any Borrower from responsibility under this Agreement, and the others will remain responsible.

Terms. The term of your Credit Line will begin as of the date of this Agreement ("Opening Date") and will continue until April 10, 2023 ("Maturity Date"). All indebtedness under this Agreement, if not already paid pursuant to the payment provisions below, will be due and payable upon maturity. The draw period of your Credit Line will begin on a date, after the Opening Date, when the Agreement is accepted by us in the State of South Carolina, following the expiration of the right to cancel, the perfection of the Mortgage, the receipt of all required certificates of noncancellation, and the meeting of all of our other conditions and will continue as follows: Fifteen Years. You may obtain credit advances during this period ("Draw Period"). You agree that we may renew or extend the period during which you may obtain credit advances or make payments. You further agree that we may renew or extend your Credit Line Account.

Minimum Payment. Your "Regular Payment" will equal the amount of your accrued FINANCE CHARGES or \$10.00, whichever is greater ("First Payment Stream"). You will make 60 of these payments. Your payments will be due monthly. Your "Minimum Payment" will be the Regular Payment, plus any amount due and all other charges. An increase in the ANNUAL PERCENTAGE RATE may increase the amount of your Regular Payment.

After completion of the First Payment Stream, your "Regular Payment" will be based on a percentage of your outstanding balance as shown below or \$10.00, whichever is greater ("Second Payment Stream"). Your payments will be due monthly.

Range of Balances	Number of Payments	Regular Payment Calculation
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All Balances	120	1.000% of your outstanding balance
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Your "Minimum Payment" will be the Regular Payment, plus any amount past due and all other charges. The Minimum Payment will not fully repay the principal that is outstanding on your Credit Line and your final payment will be a single balloon payment.

A change in the ANNUAL PERCENTAGE RATE can cause the balance to be repaid more quickly or more slowly. When rates decrease, less interest is due, so more of the payment repays the principal balance. When rates increase, more interest is due, so less of the payment repays the principal balance. If this happens, we may adjust your payment as follows: your final payment may be increased. Each time the ANNUAL PERCENTAGE RATE increases, we will check to see if your payment is sufficient to pay the interest due. If it is not, your payment will be increased by an amount sufficient to cover all accrued FINANCE CHARGES.

In any event, if your Credit Line balance falls below \$10.00, you agree to pay your balance in full. You agree to pay not less than the Minimum Payment on or before the due date indicated on your periodic billing statement.

Balloon Payment. Your Credit Line Account is payable in full upon maturity in a single balloon payment. You must pay the entire outstanding principal, interest and any other charges then due. Unless otherwise required by applicable law, we are under no obligation to refinance the balloon payment at that time. You may be required to make payments out of other assets you own or find a lender, which may be us, willing to lend you the money. If you refinance the balloon, you may have to pay some or all of the closing costs normally associated with a new credit line account, even if you obtain refinancing from us.

How Your Payments Are Applied. Unless otherwise agreed or required by applicable law, payments and other credits will be applied first to Finance Charges; and then to unpaid principal.

Receipt of Payments. All payments must be made by a check, automatic account debit, electronic funds transfer, money order, or other instrument in U.S. dollars and must be received by us at the remittance address shown on your periodic billing statement. Payments received at that address on any business day will be credited to your Credit Line as of the date received.

Credit Limit. This Agreement covers a revolving line of credit for the principal amount of One Hundred Four Thousand & 00/100 Dollars (\$104,000.00), which will be your "Credit Limit" under this Agreement. During the Draw Period we will honor your request for credit advances subject to the section below on Lender's Rights. You may borrow against the Credit Line, repay any portion of the amount borrowed, and re-borrow up to the amount of the Credit Limit. Your Credit Limit is the maximum amount you may have outstanding at any one time. You agree not to attempt, request, or obtain a credit advance that will make your Credit Line Account balance exceed your Credit Limit. Your Credit Limit will not be increased should you overdraw your Credit Line Account. If you exceed your Credit Limit, you agree to repay immediately the amount by which your Credit Line Account exceeds your Credit Limit, even if we have not yet billed you. Any credit advances in excess of your Credit Limit will not be secured by the Mortgage covering your principal dwelling.

Charges to your Credit Line. We may charge your Credit Line to pay other fees and costs that you are obligated to pay under this Agreement, the Mortgage or any other document related to your Credit Line. In addition, we may charge your Credit Line for funds required for continuing insurance coverage as described in the paragraph titled "Insurance" below or as described in the Mortgage for this transaction. We may also, at our option, charge your Credit Line to pay any costs or expenses to protect or perfect our security interest in your principal dwelling. These costs or expenses include, without limitation, payments to cure defaults under any existing liens on your principal dwelling. If you do not pay your property taxes, we may charge your Credit Line and pay the delinquent taxes. Any amount so charged to your Credit Line will be a credit advance and will decrease the funds available, if any, under the Credit Line. However, we have no obligation to provide any of the credit advances referred to in this paragraph.

Credit Advances. After the Effective Disbursement Date of this Agreement, you may obtain credit advances under your Credit Line as follows:

Credit Line Checks. Writing a preprinted "Prime Access Check" that we will supply to you.

Requests in Person. Requesting a credit advance in person at any of our authorized locations.

Credit Card Access. Using your "Prime Access Card" to receive cash advances or to make purchases.

If there is more than one person authorized to use this Credit Line Account, you agree not to give us conflicting instructions, such as one Borrower telling us not to give advances to the other.

Limitations on the Use of Checks. We reserve the right not to honor Prime Access Checks in the following circumstances:

Credit Limit Violation. Your Credit Limit has been or would be exceeded by paying the Prime Access Check.

Post-dated Checks. Your Prime Access Check is post-dated. If a post-dated Prime Access Check is paid and as a result any other check is returned or not paid, we are not responsible.

Stolen Checks. Your Prime Access Checks have been reported lost or stolen.

Unauthorized Signatures. Your Prime Access Check is not signed by an "Authorized Signer" as defined below.

Termination or Suspension. Your Credit Line has been terminated or suspended as provided in this Agreement or could be if we paid the Prime Access Check.

If we pay any Prime Access Check under these conditions, you must repay us, subject to applicable laws, for the amount of the Prime Access Check. The Prime Access Check itself will be evidence of your debt to us together with this Agreement. Our liability, if any, for wrongful dishonor of a check is limited to your actual damages. Dishonor for any reason as provided in this Agreement is not wrongful dishonor. We may choose not to return Prime Access Checks along with your periodic billing statements; however, your use of each Prime Access Check will be reflected on your periodic statement as a credit advance. We do not "debit" Prime Access Checks drawn on your Credit Line.

Limitations on the Use of Credit Cards. We reserve the right not to honor Prime Access Cards in the following circumstances:

If we pay any advance requested by use of the Prime Access Card under these conditions, you must repay us, subject to applicable laws, for the amount of the advance. The advance itself will be evidence of your debt to us together with this Agreement. Our liability, if any, for wrongful dishonor of an advance is limited to your actual damages. Dishonor for any reason as provided in this Agreement is not wrongful dishonor. Your use of the Prime Access Card will be reflected on your periodic statement as a credit advance.

Transaction Requirements. The following transaction limitations will apply to the use of your Credit Line:

Credit Line Prime Access Check, In Person Request and Credit Card Limitations. There are no transaction limitations for the writing of Prime Access Checks, requesting an advance in person or using a Credit Card.

Limitation on All Access Devices. You may not use any access device, whether described above or added in the future, for any illegal or unlawful transaction, and we may decline to authorize any transaction that we believe poses an undue risk of illegality or unlawfulness. Notwithstanding the foregoing, we may collect on any debt arising out of any illegal or unlawful transaction.

Authorized Signers. The words "Authorized Signer" on Prime Access Checks and Prime Access Cards as used in this Agreement mean and include each person who (a) signs the application for this Credit Line, (b) signs this Agreement, or (c) has executed a separate signature authorization card for the Credit Line Account.

Lost Prime Access Checks and Prime Access Cards. If you lose your Prime Access Check or Prime Access Card or if someone is using them without your permission, you agree to let us know immediately. The fastest way to notify us is by calling us at (864) 240-4489. You also can notify us at our address shown at the beginning of this Agreement.

Liability for Unauthorized Use. You may be liable for the unauthorized use of your Prime Access Card access device which accesses your Credit Line. You will not be liable for unauthorized use that occurs after you notify us or our designee at The Palmetto Bank, Woodruff Road, 2101 Woodruff Rd, Greenville, SC 29607, orally or in writing, of the loss, theft, or possible unauthorized use. In any case, your liability for unauthorized use of your Prime Access Card will not exceed \$50.00.

If you use an access card which debits a checking account (or other consumer asset account) but also draws on an overdraft line of credit, Regulation E provisions apply, as well as sections 228.13(d) and (g) of Regulation Z. In such a transaction, you might be liable for up to \$50.00 under Regulation Z. Also, you might be liable for \$50.00, \$500.00, or an unlimited amount under Regulation E, or a lesser amount under applicable state law. Please refer to your electronic fund transfers disclosure for liability limitations and error-resolution procedures for transactions covered by the Federal Electronic Fund Transfers Act.

Future Credit Line Services. Your application for this Credit Line also serves as a request to receive any new services (such as access devices) which may be available at some future time as one of our services in connection with this Credit Line. You understand that this request is voluntary and that you may refuse any of these new services at the time they are offered. You further understand that the terms and conditions of this Agreement will govern any transactions made pursuant to any of these new services.

Collateral. You acknowledge this Agreement is secured by the following collateral described in the security instrument filed herein: a Mortgage dated April 10, 2008, to us on real property located in Greenville County, State of South Carolina.

Insurance. You must obtain insurance on the Property securing this Agreement that is reasonably satisfactory to us. You may obtain property insurance through any company of your choice that is reasonably satisfactory to us. You have the option of providing any insurance required under this Agreement through an existing policy or a policy independently obtained and paid for by you, subject to our right, for reasonable cause before credit is extended, to decline any insurance provided by you. Subject to applicable law, if you fail to obtain or maintain insurance as required in the Mortgage, we may purchase insurance to protect our own interest, add the premium to your balance, pursue any other remedies available to us, or do any one or more of these things.

Periodic Statements. If you have a balance owing on your Credit Line Account or have any account activity, we will send you a periodic statement. It will show, among other things, credit advances, FINANCE CHARGES, other charges, payments made, other credits, your "Previous Balance," and your "New Balance." Your statement also will identify the Minimum Payment you must make for that billing period and the date it is due.

When FINANCE CHARGES Begin to Accrue. Periodic FINANCE CHARGES for credit advances under your Credit Line will begin to accrue on the date credit advances are posted to your Credit Line. There is no "free ride period" which would allow you to avoid a FINANCE CHARGE on your Credit Line credit advances.

Method Used to Determine the Balance on Which the FINANCE CHARGE Will Be Computed. A daily FINANCE CHARGE will be imposed on all credit advances made under your Credit Line imposed from the date of each credit advance based on the "average daily balance" method. To get the average daily balance, we take the beginning balance of your Credit Line Account each day, add any new advances and subtract any payments or credits. This gives us a daily balance. Then, we add up all the daily balances for the billing cycle and divide the total by the number of days in the billing cycle. This gives us the "average daily balance."

Method of Determining the Amount of FINANCE CHARGE. Any FINANCE CHARGE is determined by applying the "Periodic Rate" to the balance described herein. This is your FINANCE CHARGE calculated by applying a Periodic Rate.

You also agree to pay FINANCE CHARGES, not calculated by applying a Periodic Rate, as set forth below:

Additional Finance Charges. The following additional FINANCE CHARGES will be charged to your Credit Line or paid in cash:

Flood Determination:	In Cash	\$8.00
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Periodic Rate and Corresponding ANNUAL PERCENTAGE RATE. We will determine the Periodic Rate and the corresponding ANNUAL PERCENTAGE RATE as follows. We start with an independent index which is the Wall Street Journal Prime Rate (the "Index"). We will use the most recent index value available to us as of the date of any ANNUAL PERCENTAGE RATE adjustment. The Index is not necessarily the lowest rate charged by us on our loans. If the Index becomes unavailable during the term of this Credit Line Account, we may designate a substitute index after notice to you. To determine the Periodic Rate that will apply to your First Payment Stream, we take the value of the Index, then divide the value by the number of days in a year (daily). To obtain the ANNUAL PERCENTAGE RATE we multiply the Periodic Rate by the number of days in a year (daily). This result is the ANNUAL PERCENTAGE RATE for your First Payment Stream. To determine the Periodic Rate that will apply to your Second Payment Stream, we take the value of the Index, then divide the value by the number of days in a year (daily). To obtain the ANNUAL PERCENTAGE RATE we multiply the Periodic Rate by the number of days in a year (daily). This result is the ANNUAL PERCENTAGE RATE for your Second Payment Stream. The ANNUAL PERCENTAGE RATE includes only interest and no other costs.

The Periodic Rate and the corresponding ANNUAL PERCENTAGE RATE on your Credit Line will increase or decrease as the Index increases or decreases from time to time. Any increase in the Periodic Rate will take the form of a higher final payment. Adjustments to the Periodic Rate and the corresponding ANNUAL PERCENTAGE RATE resulting from changes in the Index will take effect monthly. In no event will the corresponding ANNUAL PERCENTAGE RATE be more than the lesser of 18.000% or the maximum rate allowed by applicable law. Today the Index is 5.250% per annum, and therefore the initial Periodic Rate and the corresponding ANNUAL PERCENTAGE RATE on your Credit Line are as stated below:

Current Rates for the First Payment Stream			
Range of Balance or Conditions	Margin Added to Index	ANNUAL PERCENTAGE RATE	Daily Periodic Rate
All Balances	0.000%	6.250%	0.01438%

Current Rates for the Second Payment Stream			
Range of Balance or Conditions	Margin Added to Index	ANNUAL PERCENTAGE RATE	Daily Periodic Rate
All Balances	0.000%	8.250%	0.01438%

Notwithstanding any other provision of this Agreement, we will not charge interest on any undisbursed loan proceeds, except as may be permitted during any right of rescission period.

Conditions Under Which Other Charges May Be Imposed. You agree to pay all the other fees and charges related to your Credit Line as set forth below:

Security Interest Charges. You agree to pay all security interest charges related to your Credit Line as set forth below:

Attorney Fee - John Chero	\$250.00
Total	\$250.00

Lender's Rights. Under this Agreement, we have the following rights:

Termination and Acceleration. We can terminate your Credit Line Account and require you to pay us the entire outstanding balance in one payment, and charge you certain fees, if any of the following happens: (1) You commit fraud or make a material misrepresentation at any time in connection with this Credit Agreement. This can include, for example, a false statement about your income, assets, liabilities, or any other aspects of your financial condition. (2) You do not meet the repayment terms of this Credit Agreement. (3) Your action or inaction adversely affects the collateral for this plan or our rights in the collateral. This can include, for example, failure to maintain required insurance, waste or destructive use of the dwelling, failure to pay taxes, death of all persons liable on the account, transfer of title or sale of the dwelling, creation of a senior lien on the dwelling without our permission, foreclosure by the holder of another lien, or the use of funds or the dwelling for prohibited purposes.

Suspension or Reduction. In addition to any other rights we may have, we can suspend additional extensions of credit or reduce your Credit Limit during any period in which any of the following are in effect:

(1) The value of your property declines significantly below the property's appraised value for purposes of this Credit Line Account. This includes, for example, a decline such that the initial difference between the Credit Limit and the available equity is reduced by fifty percent, and may include a smaller decline depending on the individual circumstances.

(2) We reasonably believe that you will be unable to fulfill your payment obligations under your Credit Line Account due to a material change in your financial circumstances.

(3) You are in default under any material obligations of this Credit Line Account. We consider all of your obligations to be material. Categories of material obligations include the events described above under Termination and Acceleration, obligations to pay fees and charges, obligations and limitations on the receipt of credit advances, obligations concerning maintenance or use of the property or proceeds, obligations to pay and perform the terms of any other deed of trust, mortgage or lease of the property, obligations to notify us and to provide documents or information to us (such as updated financial information), obligations to comply with applicable laws (such as zoning restrictions), and obligations of any covenant. No default will occur until we mail or deliver a notice of default to you, so you can restore your right to credit advances.

(4) We are precluded by government action from imposing the ANNUAL PERCENTAGE RATE provided for under this Agreement.

(5) The priority of our security interest is adversely affected by government action to the extent that the value of the security interest is less than one hundred twenty percent (120%) of the Credit Limit.

(6) We have been notified by governmental authority that continued advances may constitute an unsafe and unsound business practice.

Change in Terms. We may make changes to the terms of this Agreement if you agree in the change in writing at that time, if the change will unequivocally benefit you throughout the remainder of your Credit Line Account, or if the change is insignificant (such as changes relating to our data processing systems). If the index is no longer available, we will choose a new index and margin. The new index will have an historical movement substantially similar to the original index, and the new index and margin will result in an ANNUAL PERCENTAGE RATE that is substantially similar to the rate in effect at the time the original index becomes unavailable. We may prohibit additional extensions of credit or reduce your Credit Limit during any period in which the maximum ANNUAL PERCENTAGE RATE under your Credit Line Account is reached.

Collection Costs. We may hire or pay someone else to help collect this Agreement if you do not pay. You will pay us that amount. This includes our reasonable attorneys' fees in an amount not less than fifteen percent (15%) of the amount owing on this Agreement and our legal expenses whether or not there is a lawsuit, including reasonable attorneys' fees and legal expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), and appeals. If not prohibited by applicable law, you also will pay any court costs, in addition to all other sums provided by law.

Access Devices. If your Credit Line is suspended or terminated, you must immediately return to us all Prime Access Checks and any other access devices. Any use of Prime Access Checks or other access devices following suspension or termination may be considered fraudulent. You will also remain liable for any further use of Prime Access Checks or other Credit Line access devices not returned to us.

Delay in Enforcement. We may delay or waive the enforcement of any of our rights under this Agreement without losing that right or any other right. If we delay or waive any of our rights, we may enforce that right at any time in the future without advance notice. For example, not terminating your account for non-payment will not be a waiver of our right to terminate your account in the future if you have not paid.

Cancellation by you. If you cancel your right to credit advances under this Agreement, you must notify us and return all Prime Access Checks and any other access devices to us. Despite cancellation, your obligations under this Agreement will remain in full force and effect until you have paid us all amounts due under this Agreement.

Prepayment. You may prepay all or any amount owing under this Credit Line at any time without penalty, except we will be entitled to receive all accrued FINANCE CHARGES, and other charges, if any. Payments in excess of your Minimum Payment will not relieve you of your obligation to continue to make your Minimum Payments; instead, they will reduce the principal balance owed on the Credit Line. You agree not to send us payments marked "paid in full", "without recourse", or similar language. If you send such a payment, we may accept it without losing any of our rights under this Agreement, and you will remain obligated to pay any further amounts owed to us. All written communications concerning disputed amounts, including any check or other payment instrument that indicates that the payment constitutes "payment in full" of the amount owed or that is tendered with other conditions or limitations or as full satisfaction of a disputed amount must be mailed or delivered to: The Palmetto Bank, Woodruff Road, 2101 Woodruff Rd, Greenville, SC 29607.

Notices. All notices will be sent to your address as shown in this Agreement. Notices will be mailed to you at a different address if you give us written notice of a different address. You agree to advise us promptly if you change your mailing address.

Credit Information and Related Matters. You authorize us to release information about you to third parties as described in our privacy policy and our Fair Credit Reporting Act notice, provided you did not opt out of the applicable policy, or as permitted by law. You agree that, upon our request, you will provide us with a current financial statement, a new credit application, or both, on forms provided by us. You also agree we may obtain credit reports on you at any time, at our sole option and expense, for any reason, including but not limited to determining whether there has been an adverse change in your financial condition. We may require a new appraisal of the Property which secures your Credit Line at any time, including an internal inspection, at our sole option and expense.

Transfer or Assignment. Without prior notice or approval from you, we reserve the right to sell or transfer your Credit Line Account and our rights and obligations under this Agreement to another lender, entity, or person, and to assign our rights under the mortgage. Your rights under this Agreement belong to you only and may not be transferred or assigned. Your obligations, however, are binding on your heirs and legal

PRIME ACCESS INTEREST ONLY
(Continued)

Loan No: 43708285

Page 4

representatives. Upon any such sale or transfer, we will have no further obligation to provide you with credit advances or to perform any other obligation under this Agreement.

Tax Consequences. You understand that neither we, nor any of our employees or agents, make any representation or warranty whatsoever concerning the tax consequences of your establishing and using your Credit Line, including the deductibility of interest, and that neither we nor our employees or agents will be liable in the event interest on your Credit Line is not deductible. You should consult your own tax advisor for guidance on this subject.

Jury Waiver. We and you hereby waive the right to any jury trial in any action, proceeding, or counterclaim brought by either us or you against the other. (Initial Here _____)

Governing Law. This Agreement will be governed by federal law applicable to us and, to the extent not preempted by federal law, the laws of the State of South Carolina without regard to its conflicts of law provisions. This Agreement has been accepted by us in the State of South Carolina.

Caption Headings. Caption headings in this Agreement are for convenience purposes only and are not to be used to interpret or define the provisions of this Agreement.

Interpretation. You agree that this Agreement, together with the Mortgage, is the best evidence of your agreements with us. If we go to court for any reason, we can use a copy, filmed or electronic, of any periodic statement, this Agreement, the Mortgage or any other document to prove what you owe us or that a transaction has taken place. The copy, microfilm, microfiche, or optical image will have the same validity as the original. You agree that, except to the extent you can show there is a billing error, your most current periodic statement is the best evidence of your obligation to pay.

Severability. If a court finds that any provision of this Agreement is not valid or should not be enforced, that fact by itself will not mean that the rest of this Agreement will not be valid or enforced. Therefore, a court will enforce the rest of the provisions of this Agreement even if a provision of this Agreement may be found to be invalid or unenforceable.

Acknowledgment. You understand and agree to the terms and conditions in this Agreement. By signing this Agreement, you acknowledge that you have read this Agreement. You also acknowledge receipt of a completed copy of this Agreement, including the Fair Credit Billing Notice and the early home equity line of credit application disclosure, in addition to the handbook entitled "What you should know about Home Equity Lines of Credit," given with the application.

BORROWER:

x Walter T. Cardwell Jr.
Walter T. Cardwell

Effective Disbursement Date: 4/15/08

BILLING ERROR RIGHTS**YOUR BILLING RIGHTS****KEEP THIS NOTICE FOR FUTURE USE**

This notice contains important information about your rights and our responsibilities under the Fair Credit Billing Act.

Notify us in case of errors or questions about your bill.

If you think your bill is wrong, or if you need more information about a transaction on your bill, write us on a separate sheet at

The Palmetto Bank
PO Box 49
Leurens, SC 29360

or at the address listed on your bill. Write to us as soon as possible. We must hear from you no later than sixty (60) days after we sent you the first bill on which the error or problem appeared. You can telephone us, but doing so will not preserve your rights.

In your letter, give us the following information:

Your name and account number.

The dollar amount of the suspected error.

Describe the error and explain, if you can, why you believe there is an error. If you need more information, describe the item you are not sure about.

If you have authorized us to pay your bill automatically from your savings or checking account, you can stop the payment on any amount you think is wrong. To stop the payment, your letter must reach us three (3) business days before the automatic payment is scheduled to occur.

Your rights and our responsibilities after we receive your written notice.

We must acknowledge your letter within thirty (30) days, unless we have corrected the error by then. Within ninety (90) days, we must either correct the error or explain why we believe the bill was correct.

After we receive your letter, we cannot try to collect any amount you question, or report you as delinquent. We can continue to bill you for the amount you question, including finance charges, and we can apply any unpaid amount against your Credit Limit. You do not have to pay any questioned amount while we are investigating, but you are still obligated to pay the parts of your bill that are not in question.

If we find that we made a mistake on your bill, you will not have to pay any finance charges related to any questioned amount. If we didn't make a mistake, you may have to pay finance charges, and you will have to make up any missed payments on the questioned amount. In either case, we will send you a statement of the amount you owe and the date on which it is due.

If you fail to pay the amount that we think you owe, we may report you as delinquent. However, if our explanation does not satisfy you and you write to us within ten (10) days telling us that you still refuse to pay, we must tell anyone we report you to that you have a question about your bill. And, we must tell you the name of anyone we reported you to. We must tell anyone we report you to that the matter has been settled between us when it finally is.

If we don't follow these rules, we can't collect the first \$50 of the questioned amount, even if your bill was correct.

Special Rule for Credit Card Purchases

If you have a problem with the quality of property or services that you purchased with a credit card, and you have tried in good faith to correct the problem with the merchant, you may have the right not to pay the remaining amount due on the property or services. There are two limitations on this right:

- (a) You must have made the purchase in your home state or, if not within your home state within 100 miles of your current mailing address; and
- (b) The purchase price must have been more than \$50.00.

These limitations do not apply if we own or operate the merchant, or if we mailed you the advertisement of the property or services.

Plaintiff's First Set of Interrogatories to Defendant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. NO. 2010-CP-23-4560
	)	
The Palmetto Bank,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	
	)	PLAINTIFF'S FIRST SET OF
	)	INTERROGATORIES TO DEFENDANT
Walter T. Cardwell, Jr.,	)	WALTER T. CARDWELL, JR.
Coach Hills Homeowner's Association, Inc.,	)	
United States of America,	)	
	)	
Defendants.	)	

TO: DEFENDANT WALTER T. CARDWELL, JR.

Plaintiff The Palmetto Bank("Palmetto") hereby submits the following Interrogatories pursuant to Rule 33(b) of the South Carolina Rules of Civil Procedure and hereby request(s) a response within thirty (30) days of service thereon:

1. Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.
2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the party that relate to the claim or defense in the case.
3. List the names and addresses of any expert witnesses whom the party proposes to use as a witness at the trial of this case. As to each such witness, set forth in detail the opinions to be expressed by the witness and the bases and reasons therefore.
4. For each person known to the parties or counsel to be an expert witness or a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the

important facts known to or observed by such witness or provide a copy of any written or requested statements taken from such witnesses.

5. Identify each individual who has participated in supplying information to answer these interrogatories, and what information was supplied by each.

6. If you have ever been arrested or convicted of a criminal offense, please set forth the date, charge, court, and disposition of all such criminal offenses.

7. Identify each representative of Plaintiff with which you dealt, spoke, or discussed the subject Note and Mortgage (i.e. your account).

8. Set forth an itemized statement of all damages claimed to have been sustained you.



F. Marion Hughes (S.C. Bar #2791)

M. Kevin McCarrell (S.C. Bar #76255)

Smith Moore Leatherwood LLP

300 East McBee Avenue, Suite 500 (29601)

Post Office Box 87

Greenville, SC 29602-0087

Telephone: (864) 242-6440

Fax: (864) 240-2498

marion.hughes@smithmoorelaw.com

kevin.mccarrell@smithmoorelaw.com

ATTORNEYS FOR PLAINTIFF

July 29, 2010

Plaintiff's First Set of Requests for Production to Defendant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. NO. 2010-CP-23-4560
	)	
The Palmetto Bank,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	
	)	
Walter T. Cardwell, Jr.,	)	PLAINTIFF'S FIRST SET OF
Coach Hills Homeowner's Association, Inc.,	)	REQUESTS FOR PRODUCTION TO
United States of America,	)	WALTER T. CARDWELL, JR.'S
	)	
Defendants.	)	

TO: DEFENDANT WALTER T. CARDWELL, JR.

Pursuant to Rule 34 of the Rules of Civil Procedure, as amended, Plaintiff is hereby requested to produce for inspection and copying by his representatives within thirty (30) days from the date of service hereof, the production and copying to take place at the office of Smith Moore Leatherwood LLP, 300 E. McBee Ave., Suite 500, Greenville, South Carolina 29601, or at such other place as may be agreed upon by the parties, to produce the following documents in its possession or reasonably available to it and its agents, servants and employees:

DOCUMENT REQUESTS

1. All documents related to or referred to in Answers to Interrogatories.
2. Copies of all documents and tangible things which you might seek to introduce as exhibits, or for impeachment or demonstrative purposes, at the trial of this case.
3. All photographs, plats, sketches and other prepared documents within your possession or control which relate in any way to your claims or defenses in this case.

4. Copies of all correspondence, e-mails, memoranda, notes, and other documents (including electronic information) concerning any communications you have had with any representative of The Palmetto Bank (the "Bank") regarding your account with the Bank.

5. All notes, memoranda, diary entries, calendar entries, or other writings (including electronic), or recordings concerning any conversations you have had with any representatives of the Bank.

6. Copies of all documents and information provided to any expert witness and all documents and information provided by any expert witness, particularly including any report or correspondence for such expert.



F. Marion Hughes (S.C. Bar #2791)
M. Kevin McCarrell (S.C. Bar #76255)
Smith Moore Leatherwood LLP
300 East McBee Avenue, Suite 500 (29601)
Post Office Box 87
Greenville, SC 29602-0087
Telephone: (864) 242-6440
Fax: (864) 240-2498
marion.hughes@smithmoorelaw.com
kevin.mccarrell@smithmoorelaw.com
ATTORNEYS FOR PLAINTIFF

July 29, 2010

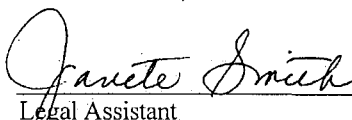
Certificate of Service for Interrogatories and Request for Production

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. NO. 2010-CP-23-4560
	)	
The Palmetto Bank,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	CERTIFICATE OF SERVICE
	)	
Walter T. Cardwell, Jr.,	)	
Coach Hills Homeowner's Association, Inc.,	)	
United States of America,	)	
	)	
Defendants.	)	

I hereby certify that a copy of **Plaintiff's First Set of Interrogatories to Defendant Walter T. Cardwell, Jr. and Plaintiff's First Set of Requests for Production to Walter T. Cardwell, Jr.** were served upon Defendant Walter T. Cardwell, Jr. and counsel for Defendant United States of America this **29th day of July 2010**, by placing the same in the United States Postal Service with proper, first-class postage affixed and addressed as follows:

Dr. Walter T. Cardwell, Jr.
15 Dawnwood Drive
Greenville, SC 29615

William N. Nettles
United States Attorney
P.O. Box 10067
Greenville, SC 29603

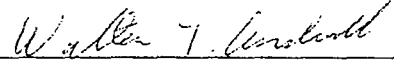


Legal Assistant
SMITH MOORE LEATHERWOOD LLP
300 East McBee Avenue, Suite 500, PO Box 87
Greenville, South Carolina 29602
(864) 242-6440; (864) 240-2474 (fax)
ATTORNEYS FOR PLAINTIFF

Certificate of Appellant

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

December 30, 2011



Dr. Walter T. Cardwell, Jr
15 Dawnwood Drive
Greenville, South Carolina 29615
(864) 567-3441
Appellant Pro Se

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
In The Court OF Common Pleas

Charles B. Simmons, Jr. Master in Equity

Case No. 2010-CP-23-4560

Palmetto Bank,

Respondent,

v.

Dr. Walter T. Cardwell, Jr., Coach Hills
Homeowner's Association, Inc. United States
of America

Defendants.

Of Whom Dr. Walter T. Cardwell, Jr. Is the

Appellant.

FINAL BRIEF OF APPELLANT

Dr. Walter T. Cardwell, Jr
15 Dawnwood Drive
Greenville, South Carolina 29615
(864) 567-3441
Appellant Pro Se

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL JUDGE ERR IN NOT RETURNING THE CASE TO THE JURY ROSTER
2. WAS APPELLANT PREVENTED FROM ENGAGING IN DISCOVERY BY IMPROPER ACTION OF RESPONDENT, RESPONDENT'S ATTORNEY AND THE COURT.
3. WAS THE ADMISSION OF SURPRISE EVIDENCE PROPER IN VIEW OF RESPONDENT, RESPONDENT'S ATTORNEY, AND THE COURT IN PREVENTING APPELLANT FROM ENGAGING IN DISCOVERY.
4. DOES THE COURT HAVE AN OBLIGATION TO INVESTIGATE AN ACCUSATION OF PERJURY AGAINST ONE OF RESPONDENT'S AGENTS BY APPELLANT WHEN POTENTIAL CORROBORATING EVIDENCE IS UNCOVERED AT TRIAL.
5. DID RESPONDENT'S ATTORNEY KNOWINGLY SUBMIT FALSE INFORMATION ON HIS RESPONSE TO APPELLANT'S MOTION FOR A NEW TRIAL
6. DID THE FAILURE OF MASTER IN EQUITY COURT AND CLERK OF COURT'S OFFICE TO PROVIDE CLEAR INSTRUCTIONS AS TO PROCEDURES TO BE FOLLOWED AND EVEN THE PURPOSE OF THE "HEARING" ITSELF PREVENT APPELLANT FROM RECEIVING A FAIR TRIAL

STATEMENT OF THE CASE

On April 10 of 2008 Appellant secured an equity line of credit from the Palmetto Bank. At the time Appellant was employed doing research into a new transportation system with a partner living in Massachusetts who was funding the research including paying all immediate financial needs of Appellant. As the economy moved deeper into recession in 2009 all research funding had dried up and Appellant's partner's architectural business also declined to the point where he could no longer fund the research.

Appellant contacted the Bank informing them he would be late in making the November payments but that he would become eligible for social security in January. Social Security informed Appellant that his first payment would be on February 22, 2010. Appellant contacted the Bank loan officer and reached and reached an agreement with the loan officer that it would be ok to begin payments on the 24th when the Social Security check cleared. When Appellant went to make the payment of the 24th he was told that the house had already been foreclosed on. The loan officer told Appellant to discuss the matter with the Bank's loan department and after being told by the loan department that they would look into the agreement Appellant had made with the loan officer and they would get back to him. They never did. Other calls where they said they would again look into the matter and would get back to Appellant but they never did. A letter sent by Appellant to the loan department was never answered.

On June 2, 2010 Respondent filed the foreclosure complaint against Appellant and Appellant was served in the middle of June and Appellant's answer was filed with the court on July 1, 2010. In the answer Appellant filed a counter claim for damages caused by the Bank reneging on their agreement and did demand a trial by jury. Also on July 1, 2010 Respondent filed an amended complaint and on July 29, 2010 Respondent filed their reply to Appellant's counter claim.

In a letter sent in early July of 2010 Appellant received a letter from the Bank's attorney, Mr. Michael Kevin McCarrell, requesting discovery of Appellant's finances. It was

followed by a letter from Mr. McCarrell dated July 29, 2010 requesting a meeting to discuss settling the dispute. Appellant informed Mr. McCarrell that he was scheduled for surgery on September 2, 2010 and the doctors said recover would take about two weeks. He told Mr. McCarrell I would contact him after the surgery and would arrange a meeting with him and a representative of the bank to discuss Respondent's discovery requirements and any settlement they may wish to make. Recovery from the surgery took much longer than anticipated and it was not until November 18, 2010 that they were able to meet.

At the meeting Appellant informed Mr. McCarrell of his assets, and explained that because of the Bank's action in foreclosing on the property all funding dried up and that he would not qualify to resume the loan under the terms the bank was asking for. Appellant requested that the bank suspend payments for one year to make up for the damage the bank caused the Appellant by reneging on the agreement. The Bank refused that and all other suggestions and the meeting was adjourned with Appellant suggesting that the Bank's representative discuss the matter with higher ups in the bank because they really did not want this to go to a jury. Appellant also requested that the Bank representative contact him no matter what the decision was in that if a settlement could not be reached then Appellant would have to begin his own discovery.

By the end of January Appellant still had not received a reply from the Bank nor from Mr. McCarrel but Appellant assumed that it was because of the holidays. Appellant was getting ready to contact Mr. McCarrell when he received a letter from Mr. McCarrell

dated February 16, 2011 stating that a Motion for a Compulsory Order of Reference had been signed and that he was now requesting a hearing before Judge Charles B. Simmons, Jr.

It took Appellant, who is not a lawyer, a month to study the issues and understand the difference between the equity courts and the courts of law. At the same time Appellant tried again to obtain the services of a lawyer who would work for an interest in the technology Appellant and his partner were developing. The first attorney's law firm would not take the case because they did legal work for Respondent in the past and either were concerned about a possible conflict of interest or loss of future Bank business. The second attorney, Grant Gibson, who has offices in several states could not meet with Appellant until a week before the scheduled hearing. Appellant contacted Judge Simmons' office to obtain a continuance so that Mr. Gibson would have time to study the case to see if he wanted to represent Appellant. Appellant was told by Judge Simmons' secretary that Mr. Gibson would have to get Mr. McCarrell to agree to the continuance and that if Mr. McCarrell did not agree to the continuance that Mr. Gibson would have to contact Judge Simmons' office. Mr. McCarrell of course refused and Mr. Gibson left town without contacting Judge Simmons' office.

The hearing before Judge Simmons was scheduled for Wednesday March 30, 2011. Appellant having been left in the lurch by Mr. Gibson filed a Motion to have the case returned to the Circuit Court under Rule 38a of the South Carolina Rules of Civil Procedures and on Monday Mr. McCarrell e-mailed Appellant a copy of his response to the motion.

Appellant did prepare his answer to Mr. McCarrell's response but there was no time to serve Mr. McCarrell before the hearing on Wednesday.

At the start of the hearing Judge Simmons asked if Appellant/Defendant knew why we were here and Appellant/Defendant stated because Respondent/Plaintiff moved to have the case tried in Magistrate's Court rather than a trial in the Civil Court. Judge Simmons told Appellant that Master in Equity court is the non jury side of the Civil Court and said, "I just want to make sure you understand that" to which Appellant replied he did not.

At the hearing on the motion Appellant/Defendant stated that he had prepared an answer to Respondent/Plaintiff's response but it was not entered into evidence and instead Judge Simmons asked Appellant/Defendant if he had anything else to add and Appellant/Defendant tried to summarize the issues covered in his answer.

Judge Simmons then immediately denied the motion to return the case to the Circuit Court. After denying the motion Judge Simmons began the trial. At the end of the trial Judge Simmons ruled in favor of Respondent: A Master's Order and Judgement of Foreclosure and Sale was filed on April 8, 2011 which awarded Respondent the sum of \$126,596.81 in principle, interest, collection costs, and attorney's fees and ordered that the property be put up for sale on June 11, 2011.

Due to testimony and evidence presented at trial, Appellant filed both a Motion for

a New Trial and a Motion for Relief of Judgement with Judge Simmons' Court. Both were denied.. Appellant then filed this appeal with the South Carolina Court of Appeals. Appellant also filed a Motion with Judge Simmons' Court requesting a stay of his order selling the property until after the case could be heard by the Appellate Court. Judge Simmons ordered a bond hearing and set bond for the stay at \$25,000 and gave Appellant 30 days to post the bond. Raising that amount of money was of course impossible for Appellant to meet and Appellant had no choice but to file a Motion with the Appellate court asking it to stay Judge Simmons' order until after they had ruled on the appeal That motion is still pending.

ARGUMENTS

1. THE CASE MUST BE TRIED BY A JURY FIRST

In Appellant's answer to Respondent's original complaint, Appellant stated that he had an oral agreement with the Bank's loan officer Ms. Josie Stewart to resume making payments on the equity line of credit on February 24, 2010 after his social security check had cleared. (Answer p. 1, 3c) (R. p. 24) Appellant did exactly as promised and was in her office on the 24th to make the payment and was informed that the Bank had already foreclosed on the property. (Answer p. 2, 3d) (R. p. 25) .

In filing the counterclaim Appellant stated that by reneging on the agreement and the cancellation of a credit card that all work on a proof of concept prototype stopped as Appellant and his partner now had to devote all of their efforts in fund-raising and Appellant seeking employment elsewhere.(Answer p. 3, 3j) (R. p. 26).

When Respondent filed the Motion for a Compulsory Order of Reference he stated that actions to foreclose property were equitable in nature and that Rule 71(a) SCRCPP stated that actions to foreclose liens shall be tried by the court and ordinarily are referred to a master pursuant to Rule 53.(Motion for Compulsory Order of Reference p. 1) (R. p. 16) and then stated that the assertion of a counter claim and Appellant's demand for a jury trial does not have any effect on Respondents right to have the foreclosure action heard by the court. (Motion for Compulsory Order of Reference p. 2) (R. p. 17). He then goes on to cite seven

cases to support his position. (Motion for Compulsory Order of Reference p. 2, p. 3) (R. pp. 17-18).

In Appellant's Motion to Restore to Trial Roster Appellant showed that none of the cases cited by Respondent's attorney are relevant to this case either because the facts of the cases are different or the cases have been superceded by more current rulings. (Motion to Restore to Trial Roster p. 2, p. 3) (R. pp. 41-42). Appellant then goes on to correctly state both the law and actual court procedures. (Motion to Restore to Trial Roster p. 4-6) (R. pp. 43-45) which Respondent's attorney in his Objection to Defendant's Motion to Trial Roster agrees is correct. (Objection to Defendant's Motion to Restore to Trial Roster p. 6) (R. p. 51).

Appellant stated in his Motion to Restore to Trial Roster that the foreclosure was clearly an issue in equity and the counterclaim is clearly an issue in Law. Appellant cited the following treatise which Respondent's attorney agreed stated the issue correctly

In Variations In Law Among the Jurisdictions "Right to Jury Trial On Equitable Claims" by Fred A. Simpson with regard to South Carolina he states, ("The Supreme Court of South Carolina prescribes a specific analysis to determine how to try legal and equitable issues in complaints and counterclaims: (1) If both the complaint and counterclaim are in equity, the entire matter is tried by the court; (2) If both are at law, the issues are triable by jury; (3) If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to jury trial; (4) If the complaint is equitable and the counterclaim legal and compulsory, the plaintiff or the defendant each has rights to jury trial on the counterclaim by these procedures: (a) The trial judge may order separate trials of the legal and equitable claims, or may order the claims tried in a single proceeding; (b) If

separate trials are ordered, the judge must determine the sequence of issues to be tried. If there are common issues, absent the "most imperative circumstances" (Beacon Theatres v. Westover, 359 U.S. 500 (1959)) the "at law" claims are tried first. If there are no common factual issues, the trial judge has discretion as to which claim is tried first; (c) If claims are tried in a single proceeding, the jury tries common factual issues first and the court determines equitable issues but is bound by jury findings on the common issues.") (Motion to Restore to Trial Roster p. 4, p. 5) (R. pp. 43-44).

Appellant then states:

13) In the present action, the complaint is equitable and the counterclaim is legal and compulsory. There are common factual issues, did the bank through their wrongdoing prevent me from fulfilling my obligation to them (equity) and did this wrongdoing result in damages to the defendant (legal). (Motion to Restore to Trial Roster p. 5) (R. p. 44).

Rules 53(b) and 38(a) require a trial by jury of the legal issues first if either party so requests it. Since Defendant did request in writing in Defendant's answer a jury trial the case *must* be returned to the civil court for a jury trial. Consequently Defendant is entitled to a trial by jury of the issues at law first pursuant to Rules 53(b), 38(a), and 38(b) of the South Carolina Rules of Civil procedure which provide that: (Motion to Restore to Trial Roster p. 5) (R. p. 44).

53(b) References. In an action where the parties consent, in a default case, or an action for foreclosure, some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit judge or the clerk of court. In all other actions, the circuit court may, upon application of any party or upon its own motion, direct a reference of some or all of the causes of action in a case. *Any party may request a jury pursuant to Rule 38 on any or all issues triable of right by a jury and, upon the filing of a jury demand, the matter shall be returned to the circuit court.* (emphasis added) A case shall not be referred to a master or special referee for the purpose of making a report to the circuit court. The clerk shall promptly provide the master or special referee with a copy of the order of reference. (SCRCP Rule 53b)

38(a) Right Preserved. The right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate. *Issues of fact in an*

action for the recovery of money only or of specific real or personal property must be tried by a jury, unless a jury trial be waived (emphasis added). (SCRCP Rule 38a)

A jury trial has not been waived.

38(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party. (SCRCP Rule 38b)

The right to a jury trial was demanded in the Defendant's answer.

Therefore, it is appropriate that the case be returned to the Civil Court for a jury trial on the issues of fact and law. (Motion to Restore to Trial Roster p. 6) (R. p. 45).

Respondent/Plaintiff in his Objection to Defendant's Motion to Restore to Trial Roster raised the following arguments.

"INTRODUCTION

Plaintiff filed this foreclosure action on certain real property (the "Mortgaged Property") secured by a Mortgage (the "Mortgage") because of the payment default by Defendant/Counter claimant Walter T. Cardwell, Jr. ("Cardwell"). Cardwell filed an Answer and Counterclaim alleging that he had entered into an oral forbearance agreement with Plaintiff, whereby Plaintiff agreed not to foreclose on the Mortgaged Property, but rather, agreed that Cardwell could gradually catch up on his mortgage payments once Cardwell began receiving his social security payments (the "Alleged Agreement"). Cardwell raises the Alleged Agreement both as a defense to the foreclosure action, and as a claim for damages allegedly resulting from Plaintiff's reporting of his account to consumer credit bureaus." (Objection to Defendant's Motion to Restore to Trial Roster, p. 1) (R. p. 46)

Appellant/Defendant at no time claimed "damages from Respondent/Plaintiff's reporting of

his account to consumer credit bureaus” Appellant/Defendant stated.

“By their actions in reneging on our agreement (foreclosing on the mortgage) *and* (emphasis added) the cancellation of the American Express Card, all work on the prototype ceased as we now had to devote all of our efforts in fund-raising and me seeking employment elsewhere.” (Answer p. 3) (R. p. 26)

In addition, while Appellant did refer to the agreement with Ms. Stewart as a verbal agreement (Answer p. 4) (R. p. 27), when Ms. Stewart told Appellant that she had him down for February 22, 2010 in their computer, that would also make the agreement a written agreement.

Respondent/Plaintiff continues:

“While Plaintiff did initially attempt to work with Cardwell before his account became ninety (90) days delinquent and, therefore, subject to non-accrual status as required by the FDIC, Plaintiff denies that it agreed to the terms alleged by Cardwell.” (Objection to Defendant’s Motion to Restore to Trial Roster, p. 1, p. 2) (R. pp. 46-47)

While not a banker or accountant, Appellant understands that non-accrual status means that the Bank can no longer list the interest on the loan as income as far as bank regulators are concerned. The loan payments were due on or about the 17th of each month. Plaintiff states that the last payment made by Defendant was in October 2009. The next payment was due November 17th so by December 19th it was 30 days past due, by January 17th 60 days past due, and by February 17th 90 days past due. The agreement with the Respondent/Plaintiff was to begin making payments again on February 24th, one week later. If this was a problem, the Respondent/Plaintiff’s representative should not have entered into the agreement.

Respondent/Plaintiff continues:

“More importantly, even if Cardwell's factual allegations are assumed to be true, such allegations fail to establish a legal defense or a legal counter-claim.” (Objection to Defendant's Motion to Restore to Trial Roster, p. 2) (R. p. 47)

If this were true it would mean that Respondent/Plaintiff is free to mislead/lie to anyone to swindle them out of their property and the property owner would have no recourse in the courts..

“Because Cardwell does not have a valid counterclaim, he does not have a right to a jury trial. “(Objection to Defendant's Motion to Restore to Trial Roster, p. 2) (R. p. 47)

Appellant, of course, challenges this assertion.

“Even if Cardwell's allegations were sufficient to allege a counterclaim, such a counterclaim would be permissive, rather than compulsory, and he would not be entitled to a jury trial.”(Objection to Defendant's Motion to Restore to Trial Roster, p. 2) (R. p. 47)

If the counterclaim arises out of the Respondent/Plaintiff's transaction (the foreclosure) which it does, it therefore is compulsory.

Respondent/Plaintiff continues:

“PERTINENT FACTS ALLEGED

On or about April 10, 2008, Cardwell, executed and delivered his Prime Access Interest Only Note to Plaintiff writing, and thereby, for value received, promised to pay to Plaintiff, or order, the sum of \$104,000.00 (the "Note"), to be repaid according to the terms of the Note (Amended Compl. ¶ 2; Cardwell Ans. ¶ 2.). In order to secure the payment of the Note, Cardwell executed and delivered to Plaintiff a Mortgage of Real Estate (the "Mortgage" or collectively with the Note, the "Mortgage Loan") dated April 10, 2008, thereby granting a lien on certain real property as more fully described therein

(the "Mortgaged Property"). (Amended Compl. ¶ 4; Cardwell Ans. ¶ 4). At one time, Cardwell and Nancy Cardwell held the fee simple title with joint rights of survivorship. However, because Nancy Cardwell became deceased prior to the execution of the Mortgage, Cardwell became the sole fee simple owner of the Mortgaged Property subject to Plaintiffs lien. (Amended Compl. ¶¶ 6 & 7.) Cardwell is in default on the Note and Mortgage for failure to make payments when due. (Amended Compl. ¶ 9.) Specifically, Cardwell has failed to make any payments since October 19, 2009. "(Objection to Defendant's Motion to Restore to Trial Roster, p. 2) (R. p. 47)

Appellant/Defendant states that the alleged default on the loan was caused by the Respondent/Plaintiff's misbehavior and that it was this misbehavior that prevented Appellant/Defendant from making the agreed upon payments.

Respondent/Plaintiff continues:

"Cardwell admits failing to make the payments when due on the Mortgage Loan (Cardwell Ans. ¶ 3b.). However, Cardwell claims that, in or around January 2010, he reached an oral agreement with a representative of Plaintiff. Essentially, he claims that Plaintiff agreed to forbear from foreclosing on the Mortgage until Cardwell began receiving Social Security payments, at which point he would gradually catch up the delinquent payments. (Cardwell Ans. ¶¶ 3d & 3e.) According to Cardwell, he attempted to make one monthly payment on or about February 24, 2010. When he began receiving his Social Security funds, but Plaintiff refused his payment, requiring payment of all past due amounts before reinstating his delinquent account. (Cardwell Ans. ¶ 3h.). Cardwell alleges that, as a result of Plaintiff's reporting his account as delinquent, his American Express credit card was cancelled. (Cardwell Ans. ¶ 3h.). Cardwell further alleges that, due to the cancellation of his American Express credit card, his research on a "new transportation system" has been delayed, causing economic damages to him personally. (Cardwell Ans. ¶ 3j.)" (Objection to Defendant's Motion to Restore to Trial Roster, p. 2, p. 3)(R. pp. 47-48)

Appellant/Defendant stated in the original answer to the foreclosure summons, "By their actions in reneging on our agreement and the cancellation of the American Express Card all

work on the prototype ceased as we now had to devote all of our efforts in fund-raising and me seeking employment elsewhere.” (Answer, p. 3) (R. p. 26) While it was the cancellation of the card that was the immediate cause of cessation of work on the prototype, it alone would only have delayed work for a month or two due to the loss of the up to two month’s “float” provided by the card. It was the “reneging” on the agreement, the foreclosure itself, that caused us to shift to fund-raising and Appellant/Defendant looking for employment to try and save the shop and lab located in Appellant/Defendant’s home.

Respondent/Plaintiff continues (reference numbers corrected):

LAW

“1. CARDWELL IS NOT ENTITLED TO A JURY TRIAL ON HIS COUNTERCLAIMS

For the reasons stated below in this section, Cardwell's counterclaims would never be presented to a jury for determination. Cardwell's counterclaims against Plaintiff must fail as a matter of law for at least three reasons: (A) the Alleged Agreement lacks any proximate cause to Cardwell's alleged damages from Plaintiffs reporting Cardwell's delinquency to the credit reporting companies; (B) the Alleged Agreement is unenforceable for lack of consideration; (C) the Alleged Agreement is unenforceable under the Statute of Frauds.” (Objection to Defendant’s Motion to Restore to Trial Roster, p. 3) (R. p. 48)

“A. Lack of Proximate Cause

In an action for breach of contract, “the burden [is] upon the [claimant] to prove the contract, its breach, and the damages caused by such breach. [citation omitted]. The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach.” *Fuller v. Eastern Fire & Cas. Ins. Co.*, 240 S.C. 75 89, 124 S.E.2d 602, 610 (S.C.1962).” (Objection to Defendant’s Motion to Restore to Trial Roster, p. 3, p. 4) (R. pp. 48-49)

“Cardwell cannot prove that any alleged breach of the Alleged Agreement resulted in the alleged damages. Cardwell admits being delinquent in his payments (Cardwell Ans. ¶ 2). Plaintiff has the absolute right to report any account that is delinquent Any alleged agreement not to foreclose on the

Mortgaged Property has no effect on whether the account was delinquent. Therefore, even if we were to assume that Plaintiffs reporting Cardwell's account as delinquent to credit bureaus lead to the cancellation of his American Express, there was nothing improper with Plaintiff so reporting his account. Because Plaintiffs reporting the account as delinquent was not improper, no cause of action can arise for such reporting. Therefore, any failure to honor the Alleged Agreement did not proximately cause the damages alleged by Cardwell, and Cardwell's claims fail as a matter of law."(Objection to Defendant's Motion to Restore to Trial Roster, p. 4) (R. p. 49)

Respondent/Plaintiff continues to misstate that it was *only* (emphasis added) the cancellation of the credit card that was the cause of suspension of work on the project and our having to devote full time to fund raising. The American Express card requires full payment each month so the funds must be available each month to pay the balance. The card can provide up to two months of float but the speed of development is controlled by the anticipated money available to pay the card. After a month or two we could have continued without the "float".

The foreclosure on the other hand had much more serious consequences. It was hard enough to raise money before the foreclosure but after it was impossible. Who will invest in a research project where the lab doing the research is in foreclosure? The answer we have since found out is none. At the foreclosure hearing Appellant told Judge Simmons how important this research was. (Transcript p. 49, lines 20-23) (R. p. 137, lines 20-23) If successful it will eliminate almost all traffic fatalities thus saving 45,000 lives in the United States each year and a million people worldwide. While the Palmetto Bank and Judge Simmons seem willing to let 3 million people die for what was initially less than \$300, Appellant and his partner did understand their responsibility and thus they had no choice but

to try and protect the "lab"(house).

B. Lack of Consideration

It is well-settled that "(t)he necessary elements of a contract are an offer, acceptance, and valuable consideration." *Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (S.C. Ct. App. 1997). Under South Carolina law, "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. *Plantation A D LLC v. Gerald Builders of Conway, Inc.*, 386 S.C. 198, 206, 687 S.E.2d 714, 718 (S.C. Ct. App. 2009) (quoting *Prestwick Golf Club Inc. v. Prestwick Ltd. P'ship*, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998)). (Objection to Defendant's Motion to Restore to Trial Roster, p. 4) (R. p. 49)

Moreover, a promise to do something that a party is already legally bound to do is not sufficient consideration. *Rabon v State Finance Corporation* 203 S.C. 183, 26 S.E.2d 501 (Objection to Defendant's Motion to Restore to Trial Roster, p. 4, p. 5) (R. pp. 49-50)

(1943). In *Rabon* the maker of a promissory note sued the payor for breach of an alleged contract to extend the time for payment of the note. *Id.* at 183, 26 S.E.2d at 501. After the payor filed an assignment of wages to secure payment of the promissory note, the maker filed suit, alleging that, although he was delinquent on his payments, the payor had told him he could "catch up the two payments" at a later time. *Id.* at 183, 26 S.E.2d at 502. The court held that, because the maker was already legally obligated to pay the note, a promise to pay the debt owed was not sufficient consideration to form a new contract. *Id.* (Objection to Defendant's Motion to Restore to Trial Roster, p. 5) (R. p. 50)

The Alleged Agreement contains no hint of consideration given by Cardwell. Rather, Cardwell merely requested that Plaintiff forbear from foreclosing on the Mortgage until Cardwell's financial situation brightened. (Cardwell Ans. 'ft 3c: "I asked if it would be okay for me to resume payments after [my first social security] check arrived.") Under *Rabon* Cardwell's promise to "catch up" the missed payments, which he was already legally obligated to pay, is not sufficient consideration to form a new contract. Therefore, the Alleged Agreement is unenforceable due to lack of consideration. (Objection to Defendant's Motion to Restore to Trial Roster, p. 5) (R. p. 50)

Of course there was consideration given by Appellant/Defendant (Cardwell) to the

Respondent/Plaintiff. As stated above by the Respondent/Plaintiff, "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." In dealing with another matter with Respondent/Plaintiff's representative, Plaintiff was made aware of the new transportation system. Appellant/Defendant on many occasions made Plaintiff's representative aware of the great benefit that Respondent/Plaintiff would receive from a continuing banking relationship that of course would be lost if the bank foreclosed and Appellant/Defendant left the state..

While it is only the potential for great profit that is conveyed to Respondent/Plaintiff, is the potential of millions of dollars in profits for the Respondent/Plaintiff not sufficient consideration to delay a payment of under \$300 for one week? Appellant/Defendant clearly is not obligated to do other business with the bank.

Furthermore, surely no one believes that any Bank would do something out of the goodness of their heart. Why not foreclose the day after the first payment is late? Why wait three months? Because they do receive a benefit if the loan is made current in that they will continue to receive interest and avoid a possible loss if their investment is not recovered from the sale of the property. That is why all banks do this. Moreover, if these agreements are not legally enforceable then the Bank is engaging in deception with intent to defraud by implying they are.

C. Statute of Frauds

South Carolina law has long required that certain agreements be in writing in order to be enforceable, and has explicitly set forth those types of agreement by statute. S.C. Code § 32-3-10. Specifically, South Carolina law provides as follows:

No action shall be brought whereby

...

(4) To charge any person upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them...

Unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized..(Objection to Defendant's Motion to Restore to Trial Roster, p. 5) (R. p. 50)

Id. Furthermore, it is well-settled that "a contract required to be in writing by the South Carolina Statute of Frauds cannot be orally modified." *Player v. Chandler* 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989)(citing *Windham I/ Honeycutt*, 279 C.S. 109, 302 S.E.2d 856 (1983)). It is axiomatic that a mortgage is a contract concerning an interest in real estate which is subject to the Statute of Frauds. Therefore, any modification of a mortgage would further be subject to the Statute of Frauds. .(Objection to Defendant's Motion to Restore to Trial Roster, p. 6) (R. p.51)

Cardwell alleges that he entered an oral agreement with Plaintiff to modify the terms of the Mortgage so that Plaintiff would forbear from foreclosing on the Mortgage until Cardwell received his social security payments. (Cardwell 3c.) Even if the alleged facts are true, the oral forbearance agreement to modify the Mortgage is unenforceable under the Statute of Frauds. See e.g., *Secrest v. Security National*, 167 Ca. App. 4th 544 (Cal. Ct. App. 4th Dist. 2008)(following several courts that have explicitly held mortgage forbearance agreements must be in writing to be enforceable under the respective state's Statute of Frauds). .(Objection to Defendant's Motion to Restore to Trial Roster, p. 7) (R. p. 52)

Appellant/Defendant erroneously did say that he has never charged Respondent/Plaintiff nor Respondent/Plaintiff's representative with fraud. Appellant/Defendant's stated that the only

mention of fraud was,

Whether this action was due to negligence or fraud is immaterial as the action cannot be undone and the Defendant's only remedy is to seek money damages as was done in the Counterclaim. (Defendant's Motion to Restore to Trial Roster, p. 4) (R. p. 43)

g) That should it turn out that the Plaintiff took this action not due to a mistake but deliberately for some other reason constituting fraud on their part, that punitive damages also be awarded. (Answer, p. 5) (R. p. 28)

and that clearly in these statements defendant had not categorized Respondent/Plaintiff's misbehavior as fraud. Appellant/Defendant did overlook the statement in his answer to the summons and wishes to set the record straight,

10. Plaintiff, by not honoring the agreement made with their duly authorized agent Ms. Stewart has engaged in fraud and deceptive practices and is therefore not entitled to have its mortgage foreclosed. (Answer p. 4) (R. p. 27)

However, since it has now been determined that a written record does or did exist not only does the everyday usage of the term fraud apply, so does the legal definition under the state's Statute of Frauds. Respondent/Plaintiff's representative did call and get approval for the agreement and Respondent/Plaintiff's representative did confirm to Appellant/Defendant that the information was entered into Appellant/Defendant's loan information in their computer.

While the *South Carolina Code of Laws* does not seem to define the term in writing Rule 407 of the SCACR titled Rules of Professional Conduct under Rule 1.0(p) titled Terminology states:

(p) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and e-mail.

The entry in Respondent's computer would therefore constitute "in writing." Furthermore, most financial software would require that a record of the person who modified the account would also be kept as part of the entry. Since the person entering the information could only be an authorized agent of the bank, this would constitute an authorized signature on the agreement. Again citing Rule 407 SCACR Rule 1.0(p)

A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

At trial, Respondent introduced a document titled Debtor's Comments (Exhibit A , p. 1) (R. p. 143) which is purportedly a printout of comments made by Appellant when talking to representatives of the Bank and in each line item there is a notation of the form "Date Comment <BY xxx1234x AT 10.03.29> which appears to the date the comment was entered, the comment itself, the individual who entered the data, and at what time the data was entered.

What is even more important about the Debtor's Comments document is that it does not contain an entry for the meeting where Appellant testified under oath that Respondent's representative Ms. Stewart agreed to the late payment. There can only be three explanations for this missing entry. First that the Debtor's Comment document is incomplete whether by accident or design. Second that Appellant lied under oath and Ms. Stewart never said to Appellant the information was in the computer. Third that at the time of the meeting Ms. Stewart lied to Appellant about the information being entered in the computer and only

pretended to call the loan office and have it entered. Therefore if the information was not entered into the computer and thus no written record of the agreement exists Ms. Stewart under S.C. Code § 16-13-240 is guilty of attempting to obtain property by false pretenses,

A person who by false pretense or representation obtains the signature of a person to a written instrument or obtains from another person any chattel, money, valuable security, or other property, real or personal, with intent to cheat and defraud a person of that property is guilty of a:

(1) felony and, upon conviction, must be fined not more than five hundred dollars and imprisoned not more than ten years if the value of the property is ten thousand dollars or more;

(2) felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than five years if the value of the property is more than two thousand dollars but less than ten thousand dollars;

(3) misdemeanor triable in magistrates court or municipal court, notwithstanding the provisions of Sections 22-3-540, 22-3-545, 22-3-550, and 14-25-65, if the value of the property is two thousand dollars or less. Upon conviction, the person must be fined not more than one thousand dollars, or imprisoned not more than thirty days.

and if Judge Simmons' order is allowed to stand and the Respondent does sell Appellant's property Ms. Stewart WILL either be guilty of a Felony punishable by up to ten years in prison if convicted if the information was not entered in the computer as she told Appellant or she and the Bank are guilty of Fraud in not honoring the agreement and then lying about it.

Respondent further states in his Objection to Defendant's Motion to Restore to Trial Roster,

EVEN IF CARDWELL'S COUNTERCLAIMS COULD SURVIVE DISMISSAL AS A MATTER OF LAW THOSE COUNTERCLAIMS WOULD BE PERMISSIVE AND THEREFORE CARDWELL WOULD NOT BE ENTITLED TO A JURY TRIAL...(Objection to Defendant's Motion to Restore to Trial Roster, p. 6) (R. p. 51)

Cardwell cites a treatise which properly outlines the analysis for determining whether a defendant is entitled to a jury trial on a counterclaim in a foreclosure action as set forth in *C&S Real Estate Services, Inc. v. Messenaale*, 290 S.C. 299, 350 S.E.2d 191 (1986). Because Plaintiffs claims for foreclosure and reformation are equitable and Cardwell's claims for breach of contract are legal, the question becomes whether Cardwell's counterclaims are compulsory or permissive: if compulsory, then Cardwell would be entitled to assert his right to a jury trial; if permissive, then Cardwell would be deemed to have waived his right to a jury trial. *Id.* at 301, 350 S.E.2d at 192...(Objection to Defendant's Motion to Restore to Trial Roster, p. 6) (R. p. 51)

Rule 13(a) states that a counterclaim is compulsory "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Otherwise, a counterclaim is permissive...(Objection to Defendant's Motion to Restore to Trial Roster, p. 7) (R. p. 52)

Cardwell's counterclaims do not arise out of the Note and Mortgage which are the subject of the foreclosure action, but rather they arise out of Plaintiffs reporting of Cardwell's account to the credit bureaus. Therefore, Cardwell's counterclaims are permissive, and therefore, Cardwell has waived his right to a jury trial. (Objection to Defendant's Motion to Restore to Trial Roster, p. 7) (R. p. 52)

As Respondent/Plaintiff states Rule 13(a) states that a counterclaim is compulsory "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Otherwise, a counterclaim is permissive. As stated above, Appellant/Defendant's counterclaim does not "arise out of Respondent/Plaintiff's reporting of Cardwell's accounts to the credit bureaus" as Respondent/Plaintiff's attorney continuously keeps misstating but does arise out of the foreclosure action itself and these claims are

therefore compulsory.

In the final analysis all of Respondent's arguments in his Objection to Defendant's Motion to Restore to Trial Roster are like all of his arguments, totally irrelevant. Reiterating Rule 38(a) of the SCRPC:

38(a) Right Preserved. The right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate. *Issues of fact in an action for the recovery of money only or of specific real or personal property must be tried by a jury, unless a jury trial be waived* (emphasis added).

This rule is quite emphatic. **Issues of fact in an action for the recovery of money only or of specific real or personal property MUST** (emphasis added) **be tried by a jury, unless a jury trial be waived** Appellant's counterclaim is based on an accusation of wrong doing by the bank and Appellant is asking for money damages. It is neither Respondent, nor Respondent's attorney, nor Judge Simmons who is to determine any issue of fact in this case. All facts relating to the counterclaim **MUST** be determined by a jury. Judge Simmons has neither the right nor the authority to determine the facts in this case.

In dismissing the Motion to Restore to Trial Roster Judge Simmons stated.

All right, and I know you're not going to agree with this, but I am going to deny the motion because historically in South Carolina, mortgage foreclosure cases are tried non-jury as well as any counterclaims that directly relate to or flow from them, so we're going to go ahead and proceed with the case here this morning (Transcript p. 9 line 22 - p. 10 line 2) (R. p. 97 line 22 - p. 98 line 2).

Really? Respondent says if it is in writing it is a legal contract and the statute of fraud applies. It either was in writing or Respondent's representative was engaging in a felony trying to obtain Appellants property by false pretenses. Both are issues of law not equity. Respondent says if it is an issue of law and it arises directly out of the foreclosure itself then it is compulsory that the case be tried by a jury. Now Judge Simmons says,

"historically in South Carolina, mortgage foreclosure cases are tried non-jury as well as any counterclaims that directly relate to or flow from them"
(Transcript p. 9 line 22 - p. 10 line 2) (R. p. 97 line 22 - p. 98 line 2).

This statement certainly seems at odds with Rule 38a of the SCRPC , the State Supreme Court, and the US Supreme Court rulings.

2. LACK OF DISCOVERY

In the Statement of the case above starting on page 1 Appellant describes the events leading up to the "Hearing" on March 30, 2011. The events described prevented Appellant from conducting discovery. Whether Respondent and Respondent's attorney acted properly in not honoring Appellant's verbal request for discovery is up to the Appellate court to decide. At the time Appellant believed that he was dealing with honorable men and did not know that discovery requests had to be in writing. Had Respondent or his attorney refused discovery clearly the court would have been contacted. Ignoring the request and "gaming the system" to prevent discovery is another matter. While the request for discovery was an oral request, the meeting was tape recorded should that make a difference.

In the Preamble of Rule 407 SCACR Rules of Professional Conduct titled A Lawyer's Responsibilities it states

[1] A lawyer, being a member of the legal profession, is a representative of clients, an officer of the legal system and *a public citizen having special responsibility for the quality of justice.*(emphasis added)

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but *consistent with requirements of honest dealings with others* (emphasis added). As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

In their communication with Attorney Grant Gibson, Respondent said to him,

2. If you have entered an appearance, how long a continuance are you requesting? This case has already been referred to the Master, and we don't think the issues are that complicated. If it's just a matter of your needing a few days to review the file, we are not going to have a problem with a short continuance. If you plan to undertake discovery and delay the case for a long period, we will have a different reaction. (Response to Defendant Walter T. Cardwell, Jr.'s Motion for Relief from Judgement or Order and Motion for a New Trial, Exhibit B, p.5) (R. p. 78)

Preventing Appellant from discovery seems to be their goal, not truth and justice.

3. SURPRISE EVIDENCE

Before trial, Appellant/Defendant received no notification as to witnesses to be called by the Respondent/Plaintiff and no opportunity to interrogate them before trial. Also, at the start of the Trial Appellant/Defendant was presented with a stack of papers many of which Appellant/Defendant had never seen before and was given no time to even read these documents much less evaluate them. Of even greater consequence, Appellant/Defendant did

not even know for sure that this was a trial until it began as it was characterized by Respondent/Plaintiff's attorney's notification to the Appellant/Defendant as a hearing not a trial. (Transcript p.6 lines 22-25) (R. p. 94 lines 22-25)

4. MISCONDUCT OF RESPONDENT'S AGENTS INCLUDING POTENTIALLY PROVABLE PERJURY

When this all began, Appellant believed that there was a good chance that this was just a mistake that could easily have been straightened out. With what came out at trial in the Debtor's Comment document, that view is no longer possible. Appellant could be lying and committing perjury but assume for the moment he is not.

A record of the meeting where Appellant says Ms. Stewart said she had him down for the 22nd should be in the Debtor's Comment document. Moreover it would be in the middle of the records shown not at either end where it is conceivable although unlikely that the record could have simply not been printed out. That it is missing from the middle makes it likely that it was either never entered or more likely that it was deleted or the record introduced in court was doctored.

If Appellant is telling the truth then either Ms. Stewart with or without the Bank's knowledge could have been engaging in this swindle on her own and thus the data was never entered or the Bank is engaging in a conspiracy to cover up the existence of what is now known to be a written agreement since it is now known that Ms. Stewart could not modify Appellant's account information.

Appellant asked Judge Simmons in his Motion for a New Trial to see that whatever evidence remains is protected,

Also, that steps be taken to protect any evidence remaining in the banks computer system and any internal bank communication that is pertinent. (Defendant's Motion for a New Trial, p. 4) (R. p. 56).

This of course was not taken seriously and to the best of Appellant's knowledge no action has been taken to protect any evidence. For this reason, to outline in more detail where and what evidence may still exist to corroborate Appellant's charges would only serve as a heads up to the Bank as to what further evidence it must destroy.

It is, however, very likely that sufficient evidence does exist to determine who is telling the truth and who is not which is another reason why this case must be returned a jury for trial and that the appropriate authorities begin an investigation to uncover the facts that felonies have been committed here by the Bank and their personnel which of course Appellant will cooperate fully with and will outline where further evidence may be found.

5 MISCONDUCT OF RESPONDENT'S ATTORNEY

While "gaming the system" to hinder Appellant's discovery may be considered by the Appellate Court to be within the bounds of acceptable behavior for an attorney, lying on papers submitted to the court can't be.

In Appellant's motion for a new trial and his motion for Relief of Judgement

Appellant argued the issue of lack of disclosure (Defendant's Motion Requesting a new Trial, p. 13) (R. p. 64) and surprise evidence (Defendant's Motion Requesting Relief of Judgement, p. 1) (R. p. 66) as stated above. In Respondent's combined response to Appellant's motions, Mr. McCarrell stated,

As to Cardwell's Motion for Relief from Judgment or Order Cardwell asserts that there was surprise and newly discovered evidence due to documentation he received for the first time at the foreclosure hearing. However, Cardwell chose not to participate in the discovery process. This action was filed on June 2, 2010 and served upon Cardwell on June 7 2010. Plaintiff served Interrogatories (sic) and Requests for Production on Cardwell on July 29, 2010. *Cardwell did not respond to Plaintiff's discovery requests* (emphasis added). Also, Cardwell did not serve any discovery requests on Plaintiff. By choosing not to participate in discovery, Cardwell cannot now assert that he was "surprised" or has "newly discovered evidence." (Response to Defendant Walter T. Carwell, Jr.'s Motion for Relief from Judgment or Order And Motion for a New Trial, p. 2) (R. p. 69)

In Appellant's answer to Mr. McCarrell's response Appellant said,

There is nothing else to say here but that it is a bald face lie. Defendant did receive Plaintiff's Interrogatories and Requests for Production. As stated above, before Defendant could reply to this request Defendant received a request from Plaintiff's for a settlement meeting. Defendant did respond to both requests in a letter marked Exhibit A. Once Defendant was sufficiently recovered from his surgical procedures he sent the letter marked Exhibit B to Mr. McCarrell. (Defendant's Answer to Plaintiff's Response to Defendant's Request for a New Trial, p. 4) (R. p. 86)

A meeting was arranged and we met in Mr. McCarrell's Offices sometime in November. Mr. Thomason was also at that meeting. The initial part of the meeting was Mr. McCarrell asking for documents which did not exist and for information about my financial situation. I complied fully with Mr. McCarrell and when he had no further requests for information from me we moved on to try and settle the case. For Mr. McCarrell to state that Defendant "did not respond to Plaintiff's discovery requests" is a bald faced lie. There is a witness Mr. Thomason who may or may not tell the truth but at the start of the meeting Mr. McCarrell was kind enough to give me free legal advice when I asked to record the meeting and said that he had no problem with me

recording the meeting but it was not admissible in court. I of course did not ask if it was admissible in his disbarment hearing. (Defendant's Answer to Plaintiff's Response to Defendant's Request for a New Trial, p. 4) (R. p. 86)

With regard to my not serving them with any discovery request it was because at the end of the meeting I asked Mr. Thomason to get back to me on the Bank's response to my settlement offer one way or another because if they did not want to settle I would have to begin Discovery. I waited for their answer and assumed the long delay was due to the holidays. They never did responds and it was not until Mr. McCarrell filed the Motion of Referral that it was clear that they were not going to respond. The foreclosure hearing was scheduled four to six weeks after the Motion was granted. That time was spent trying to find an attorney and learning enough to file the motion to return the case to the trial docket. It should be quite clear that Plaintiff and his attorney are playing the system to deprive Defendant who, not having an attorney, is inexperienced in these matters. (Defendant's Answer to Plaintiff's Response to Defendant's Request for a New Trial, p. 5) (R. p. 87)

In any case, this statement by Mr. McCarrell is a provable lie. In my first response letter to Mr McCarrell to his request to settle the case I specifically mentioned his request for "disclosure"

With regard to your request for information relating to the disclosure you have requested in the pending lawsuit, I ask also that it be delayed until after my recovery. I would also like to discuss with you just exactly what information you require to better comply with your request. (Defendant's Answer to Plaintiff's Response to Defendant's Request for a New Trial, Exhibit A, p. 6) (R. p. 86)

In my second response letter to Mr. McCarrell setting up the settlement meeting after my surgery I said,

I will be happy to meet with you at any time at your convenience to discuss any possible settlement and if that cannot be arranged, the specifics of your discovery request. (Defendant's Answer to Plaintiff's Response to Defendant's Request for a New Trial, Exhibit B, p. 7) (R. p. 87)

How then can he say "Cardwell did not respond to Plaintiffs discovery requests"

As to his statement,

Also, Cardwell did not serve any discovery requests on Plaintiff. By choosing not to participate in discovery, Cardwell cannot now assert that he was "surprised" or has "newly discovered evidence." (Response to Defendant Walter T. Carwell, Jr.'s Motion for Relief from Judgement or Order And Motion for a New Trial, p. 2) . (R. p. 69)

As stated above,

"I asked Mr. Thomason to get back to me on the Bank's response to my settlement offer one way or another because if they did not want to settle I would have to begin Discovery."

At the time I believed I was dealing with honorable people. I now know that Mr. McCarrell is not an honorable man interested in justice for his client but a dishonest lawyer who if something is not written down will say it did not happen even if he knows it did. If it makes any difference a recording of the entire settlement meeting was made should it be admissible in some context.

The fact that Respondent's attorney is going to such lengths to prevent discovery is a further indication that criminal acts by the Bank have occurred and this is an attempt to cover them up.

6 FAILURE OF MASTER IN EQUITY COURT TO PROVIDE CLEAR INSTRUCTIONS AS TO PROCEDURES TO BE FOLLOWED AND EVEN THE PURPOSE OF THE "HEARING" ITSELF.

Since the "hearing" Appellant has become more aware of the problem courts face when dealing with unrepresented litigants and while many other jurisdictions seem to realize

that impartiality does not mean giving no information to the unrepresented side; fairness and more importantly justice requires that the court at a minimum make it clear to the unrepresented litigant before trial the nature of the trial, the proceedings involved, and the legal avenues open to all litigants. It is not enough for the Clerk of Court or the Judge or his secretary to say the court rules are online and they can't say anything else.

As just one example, when first confronted with the case being moved to "The Master in Equity" court Appellant went to the South Carolina Judicial website for the rules governing the Master in Equity Court and found that there were none. After some study Appellant was still not sure which rules applied and so Appellant asked the Clerk of Court's office. They said the rules were on the website and they could not give out any more information. When told of the confusion as to whether the Civil Court rules or Magistrate Court rules apply they merely repeated their response and said go to the website. When asked by Appellant who to ask they said see a lawyer. When told that Appellant could not afford one they simply said look online for help.

When the issue of trying to obtain a continuance, Appellant was told he had to get the opposing party to agree, Magistrate Court Rules, whereas in Civil Court each side is allowed a single continuance whether the opposing side agrees or not. When Appellant was told by Judge Simmons' staff that his attorney needed to get the opposing side to agree, which rules are we dealing with?

While Appellant now knows which rules apply he did not at the time of trial. After

some confusion Judge Simmons asked Appellant/Defendant if he knew why he was there. Appellant/Defendant stated that he was there “because the Plaintiff has moved that the trial be conducted here in Magistrate’s Court rather than trial in the civil court.” (Transcript p. 2 line 24 - p.3 line 1) (R. p. 90 line 24 - p 91 line 1) Judge Simmons corrected Appellant saying “All right, and also just to make sure you understand, this really is part of the Circuit Court. We are not part of the Magistrate’s Court. The Master in Equity is the non-jury side of the Circuit Court, so I just want to make sure you understand that. (Transcript, p. 3 lines 10-14) (R. p. 91 lines 10 - 14). Appellant replied, “No, I did not.” (Transcript, p. 3 line 15) (R. p. 91 line 14).

Actually at that point it was irrelevant if Appellant knew one way or the other since it made absolutely no difference as to proceeding with the foreclosure “hearing”

Judge Simmons later goes on to say, “Okay, and part of the reason I’m asking this question is I have to make a determination that you understand what this is and that you are competent to proceed here and represent yourself, and I have also reviewed your Motion, which sets out the reasons for your request and it’s I believe a six page document and it cites different legal authorities. So do you feel competent and do you feel like you understand what the issues are so as to represent yourself here this morning?” (Transcript, p. 3 line 21 - p. 4 line 4) (R. p. 91 line 21 - p 92 line 4).

I really believe that Judge Simmons tries to be a fair and Honest Judge. But if the

purpose of these questions was to somehow make sure it was a fair trial, he misses the point. Is Appellant competent enough to represent himself, of course not. If he represented anyone else he would be put in jail. Appellant is doing it because he has to not because he wants to. Short of providing free legal representation for those who need it as is being done in New York State, if Judge Simmons and the Court really want fairness, then be fair. If the unrepresented person says he tried to do something legal and permissible but was prevented in doing so because of their opponent's greater experience, resources, or knowledge, or the Court failed to supply information that the unrepresented person is entitled to, see that it is carried out before trial begins.

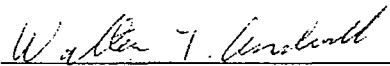
Ultimately the courts are here for only one reason, to see that Justice is done. Laws and Rules are necessary to secure Justice but they are not sufficient. That is why we have juries. If in the end, even if all laws were obeyed and all rules followed to the letter Justice still could be denied and if it has been it is the Court and legal system that will have failed. In the end it is not the Court who determines if Justice was done but the parties involved and when people are deprived of Justice they move to where Justice does prevail and they lose whatever contributions that person could have made to their society. :

CONCLUSION

There can be absolutely no doubt that this case should never have been tried by Judge Simmons in the Master in Equity Court as the first argument above clearly shows. Almost every time Judge Simmions rendered a decision he would say "in fairness" or "to be fair" or

some other comment about fairness. The Master in Equity Court is concerned with fairness but this is a case about justice. The Palmetto Bank tried to swindle Appellant out of his house and it is a matter of justice not only that they be prevented from doing so but that they be punished for the harm they have already caused. That I say they have been engaged in criminal acts does not make it so. BUT it is not up to me nor Respondent nor Respondent's attorney nor Judge Simmons nor the Appellate Court for that matter to determine the truth. It is up to a Jury to decide what is the truth and that is why it must be returned to the jury.

January 19, 2012



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ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM GREENVILLE COUNTY
In The Court Of Common Pleas

Charles B. Simmons, Jr., Master in Equity

Case No. 2010-CP-23-4560
(Case Tracking Number 2011192887)

The Palmetto Bank..... Respondent,

v.

Walter T. Cardwell, Jr., Coach Hills
Homeowner's Association, Inc., United
States of America,..... Defendants.

Of whom, Walter T. Cardwell, Jr. is the, ...Appellant.

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE MASTER IN EQUITY PROPERLY DENIED APPELLANT'S MOTION TO RESTORE TO TRIAL ROSTER.
- II. WHETHER APPELLANT WAS PREVENTED FROM CONDUCTING DISCOVERY.
- III. WHETHER APPELLANT WAS IMPROPERLY SURPRISED BY EVIDENCE AT THE HEARING.
- IV. WHETHER APPELLANT'S ALLEGATIONS OF PERJURY PROVIDE GROUNDS TO REVERSE THE MASTER IN EQUITY.
- V. WHETHER RESPONDENT'S ATTORNEY IS GUILTY OF MISCONDUCT.
- VI. WHETHER RESPONDENT WAS ENTITLED TO LEGAL ADVICE FROM THE CLERK OF COURT'S OFFICE AND THE MASTER IN EQUITY'S OFFICE.

STATEMENT OF THE CASE

On June 2, 2010, Respondent The Palmetto Bank ("Respondent") filed its Summons, Complaint, and Lis Pendens against Appellant Walter T. Cardwell, Jr. ("Appellant") seeking to foreclose on its mortgage of real property titled in Appellant's name (the "Mortgaged Property") after Appellant defaulted on his loan from Respondent. Appellant filed an Answer and Counterclaim alleging that he had entered into an oral forbearance agreement with Respondent, whereby Respondent allegedly agreed not to foreclose on the Mortgaged Property, but rather, agreed to allow Appellant to bring his mortgage payments current gradually once Appellant began receiving his social security payments (the "Alleged Agreement"). Appellant raised the Alleged Agreement both as a defense to the foreclosure action and as a claim for damages, alleging that cancellation of Appellant's credit card by another lender and his alleged inability to obtain financing was because of the foreclosure.¹

In or around November 2010, a representative of Respondent and its attorney met with Appellant for consideration of foreclosure intervention (i.e. loss mitigation). Respondent requested financial information from Appellant but, as admitted by Appellant, Appellant failed to provide any financial information, thereby preventing Respondent from pursuing any foreclosure intervention efforts.²

¹ As set forth in Section I.A. below, Appellant failed to establish how the filing of the foreclosure led to cancellation of the credit card or his inability to obtain financing.

² Respondent asserts that statements made during this meeting would be subject to Rule 408 of the Rules of Evidence, and not admissible as an offer to compromise. Therefore, there is nothing in evidence reflecting the substance of this meeting. However, to the extent Appellant accuses Respondent's attorney of misconduct due to statements at this meeting, Respondent must respond to the merits of Appellant's allegations.

The matter was referred to the Master in Equity for Greenville County, the Honorable Charles B. Simmons, Jr., by Order of Reference dated February 9, 2011 for further proceedings with any appeal therefrom to be directed to this Court. Following the entry of the Order of Reference and Respondent's providing Appellant with notice of the hearing, Appellant filed a Motion to Restore to Trial Roster. Prior to the foreclosure hearing on March 30, 2011, the Master in Equity heard Appellant's Motion to Restore to Trial Roster. The Master in Equity orally denied Appellant's Motion and proceeded with the foreclosure hearing.

The foreclosure hearing resulted in the Master in Equity's Order and Judgment of Foreclosure and Sale filed April 8, 2011 (the "Foreclosure Order")(R. pp 3 - 15). In the body of the Foreclosure Order, the Master in Equity specifically addressed the denial of Appellant's Motion to Restore to Trial Roster. The Master in Equity held that, because Appellant's claims failed as a matter of law, Appellant was not entitled to a jury trial.

Due to varying circumstances, including (i) insuring compliance with Chief Justice Toal's Administrative Order of May 2, 2011 in the matter identified as *Re: Mortgage Foreclosure Actions*, (ii) disposition of Appellant's Motion for New Trial and Motion for Relief from Judgment or Order, and (iii) this Appeal, including disposition of Appellant's Petition for Writ of Supersedeas, the Mortgaged Property has not yet been sold at public auction pursuant to the Foreclosure Order.

ARGUMENT

I. THE MASTER IN EQUITY PROPERLY DENIED APPELLANT'S MOTION TO RESTORE TO TRIAL ROSTER.

Appellant first contends that the Master in Equity improperly denied his Motion to Restore to Trial Roster.³ Appellant argues that he was entitled to a jury trial under an analysis of C&S Real Estate Services, Inc. v. Messengale, 290 S.C. 299, 350 S.E.2d 191 (1986) (Appellant also cites to a treatise Variations in Law Among the Jurisdictions "Right to Jury Trial on Equitable Claims," by Fred A. Simpson that outlines the Messengale analysis). The Foreclosure Order shows, however, that the Master in Equity did not reach a Messengale analysis because he found that Appellant's counterclaims failed as a matter of law:

That analysis [under Messengale] is based on whether the counterclaims are determined to be permissive or compulsory. As to the counterclaims filed in this action, however, after careful consideration, I conclude that Cardwell would not be entitled to a jury trial on any of the issues he has raised, regardless of whether the counterclaims were determined to be permissive or compulsory.

Foreclosure Order, p. 2, ¶ 2. (R. p. 4, lines 9 – 13). The Master in Equity held that Appellant was not entitled to a jury trial on counterclaims that fail as a matter of law. Id.

The Master in Equity had three bases for holding that Appellant's claims fail as a matter of law: (i) the Alleged Agreement lacked proximate cause to Appellant's alleged damages; (ii) the Alleged Agreement lacked consideration; and (iii) the Alleged Agreement was not enforceable pursuant to the Statute of

³ It is important to note that Appellant did not appeal the Order of Reference referring the case to the Master in Equity. The matter was properly before the Master in Equity, as an arm of the circuit court, to rule on Appellant's Motion to Restore to Trial Roster.

Frauds. Id.

A. Lack of Proximate Cause

Appellant argues that the Master in Equity erred in finding that any alleged breach of the Alleged Agreement lacked proximate cause for Appellant's alleged damages. Appellant's Brief, p. 12 – 15.

In an action for breach of contract, "the burden [is] upon the [claimant] to prove the contract, its breach, and the damages caused by such breach. [citation omitted]. The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." Fuller v. Eastern Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (S.C.1962). Any alleged damages must be a *foreseeable* result of a breach of contract. See e.g., Benford v. Berkeley Heating Co., 258 S.C. 357, 363, 188 S.E.2d 841, 843 (S.C. 1972)("In awarding damages, compensation is given for only those injuries that the defendant had reason to foresee as a probable result of his breach when the contract was made.").

Appellant has failed to establish any causal link between Respondent's actions and Appellant's alleged damages. Appellant contended during oral argument on his Motion to Restore to Trial Roster that there were two issues giving rise to his damages: (i) the cancellation of his credit card by another lender due to credit reporting and (ii) the filing of the foreclosure itself. Transcript of Hearing, p. 8. (R. p. 96, lines 13 – 24).

The Master in Equity held that because Appellant had admitted being delinquent on payments (Answer paragraph 3(b))(R. p. 24), Respondent clearly had the right to report Appellant's account as delinquent. Foreclosure Order, p. 2

- 3. (R. pp. 4 – 5). Furthermore, the Master held that the Alleged Agreement, in essence an alleged forbearance agreement, did not address the issue of credit reporting. Id. Therefore, the Master in Equity concluded that, even if there had been a breach of the Alleged Agreement, the alleged breach was not the proximate cause of Appellant's alleged damages. Id.

Moreover, Appellant's Answer and Counterclaim actually belie his allegation that the filing of the foreclosure action had any effect on his alleged damages. According to Appellant's Answer and Counterclaim, his American Express card by another lender was cancelled in or around March 2010.⁴ Likewise, Appellant's Answer and Counterclaim asserts that his damages related to his allegations that he was forced into fund-raising began accruing on March 1, 2010. Answer, p. 5, subsection (f). (R. p. 28). However, the Complaint and Lis Pendens were not filed until June 2, 2010. See filing stamp on Complaint and Lis Pendens. (R. pp. 19 – Lis Pendens not in record). Therefore, the filing of the foreclosure action could not have caused his other lender to cancel his credit card, nor could it have precipitated his inability to raise funds that began on March 1.

Furthermore, the damages alleged by Cardwell could not have been foreseeable by Respondent. See Benford cited above. The contract between Respondent and Appellant was a mortgage loan on Appellant's home. Even assuming Appellant's damages were incurred, it is hardly foreseeable that

⁴ The letter attached as an exhibit to the Answer and Counterclaim states that "right after you filed the foreclosure, American Express first suspended and then cancelled my credit card" (Appellant did not include exhibits in pleadings in the Record on Appeal). The letter is undated, but states that it was sent the month following Appellant's conversation with Respondent's representative Carter Ballentine. Paragraph 3(e) of the Answer and Counterclaim states that Appellant spoke with Mr. Ballentine on February 24, 2010 (R. p. 25), therefore, the letter must have been sent in late March. Appellant's confusion may arise in the distinction between Respondent sending Appellant's file to its attorneys to commence foreclosure and the actual filing of the Complaint.

Respondent's filing a foreclosure action on a home would result in shutting down a commercial lab that was working to build a flying car that would save one million lives every year.

Finally, although Appellant stated in oral argument on his Motion to Restore to Jury Trial that the cancellation of his American Express credit card by another lender and his inability to find funding were the result of the filing of the foreclosure action (Transcript, p. 8)(R. p. 96), he did not present sworn testimony to that effect. Furthermore, Appellant did not present testimony to that effect during the course of the foreclosure hearing that followed. See Transcript pp. 40-49. (R. pp. 128 – 137). Therefore, Appellant has not preserved these issues for review.

B. Lack of Consideration

Appellant also argues that the Master in Equity erred in finding that the Alleged Agreement was not an enforceable contract because it lacked consideration. Appellant's Brief, p. 15 -17.

It is well-settled that "[t]he necessary elements of a contract are an offer, acceptance, and valuable consideration." Roberts v. Gaskins, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (S.C. Ct. App. 1997). Under South Carolina law, "[v]aluable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 206, 687 S.E.2d 714, 718 (S.C. Ct. App. 2009)(quoting Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998)).

The Master in Equity cited Rabon v. State Finance Corporation, 203 S.C. 183, 26 S.E.2d 501 (1943) in his holding that a promise to do something that the promisor is already legally obligated to do is not sufficient consideration to support a contract. (R. p. 3). In Rabon, the maker on a note alleged that the lender had promised that the maker could "catch up" payments at a later time. Id. at 183, 26 S.E.2d at 502. However, the Rabon court held that the maker was already obligated to pay the missed payments, and therefore, a promise to "catch up" payments was not sufficient consideration to form a contract. Id.

The instant case presents facts remarkably similar to those in Rabon. Appellant alleged in his Answer and Counterclaim that he, the maker on the note, promised Respondent, the lender, that he would "gradually get caught up" on his mortgage payments. (Answer paragraph 3(b)). (R. p. 24). As in Rabon, Appellant was already contractually required to make the delinquent payments. Therefore, a promise to "gradually get caught up" is not sufficient consideration to form a contract.

Appellant asserts that valuable consideration was given because Respondent was made "aware of the great benefit that Respondent/Plaintiff would receive from a continuing banking relationship that of course would be lost if the bank foreclosed and Appellant/Defendant left the state." Appellant's Brief p. 17. First, Appellant failed to make this argument to the Master in Equity at the hearing on his Motion to Restore to Trial Roster, and therefore, Appellant failed to preserve this argument for review. Secondly, Appellant's allegation is merely that he informed Respondent that it would receive benefits should a banking relationship continue. Appellant has not alleged that he promised to continue a

banking relationship with Respondent if Respondent agreed not to foreclose. In fact, none of Appellant's testimony or court filings regarding the Alleged Agreement made with Ms. Stewart mention that there was any discussion of a continued banking relationship which was agreed to by Respondent. Under the terms of the Alleged Agreement set forth by Appellant, assuming Respondent had not foreclosed, Appellant could have moved his banking relationship at any time, and Respondent would have been left with no recourse against Appellant because Appellant had made no promise to retain a banking relationship with Respondent. Mere hope that Appellant's flying car will be successful and that Appellant will retain his relationship with Respondent, is not sufficient consideration to form a contract.

Moreover, Appellant suggests that discussions regarding an ongoing banking relationship were had "in dealing with another matter." Appellant's Brief, p. 16. The sole "other matter" in the record is set forth in Ms. Stewart's testimony regarding "Dr. Cardwell coming in, asking for a business loan. At that point he knew this promissory note was past due, delinquent. And for the business loan, he was going to use some of those funds to bring the promissory note current. But we were not interested in pursuing a business loan with him at that time." Transcript, p. 23 - 24. (R. pp. 111 - 112). The record reflects that Respondent declined Appellant's request for a business loan and was not interested in a business relationship with Appellant.

Appellant's brief further asserts that Respondent receives a benefit from delaying foreclosure. Respondent's delay in enforcing its legal rights, and attempting to work with Appellant, does not act as a waiver of its right to

foreclose. See Plaintiff's Exhibit 1, the Note. (R. pp. 146). More importantly, Respondent's choice to delay enforcing its rights cannot be asserted as consideration on the part of Appellant.

C. Statute of Frauds

Appellant asserts that the Master in Equity erred in holding that the Alleged Agreement is unenforceable under the Statute of Frauds. Appellant's Brief, p. 17 - 21.

South Carolina Code Ann. § 32-3-10 (1976) requires that certain agreements be in writing in order to be enforceable. The portion of this statute relevant to this case provides as follows:

No action shall be brought whereby

....
(4) To charge any person upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them . . .

Unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

Id. Furthermore, it is well-settled that "a contract required to be in writing by the South Carolina Statute of Frauds cannot be orally modified." Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989)(citing Windham v. Honeycutt, 279 S.C. 109, 302 S.E.2d 856 (1983)).

A mortgage, being a contract concerning an interest in real estate, is subject to the Statute of Frauds. Therefore, any modification of a mortgage would further be subject to the Statute of Frauds.

The Master in Equity held that the Alleged Agreement was an alleged oral

forbearance agreement, and therefore, unenforceable pursuant to the Statute of Frauds. Foreclosure Order, p. 4 -5. (R. pp. 92 - 93).

Appellant's brief inaccurately states that "it has now been determined that a written record does or did exist" of the Alleged Agreement. Appellant's Brief, p. 19. In fact, the Foreclosure Order shows that the Master in Equity determined exactly the opposite: that there was no written agreement. Foreclosure Order, p. 4-5. (R. pp. 6 - 7).

Appellant asserts that a fictitious entry in Respondent's computer system, allegedly made by Ms. Stewart, constitutes a writing to satisfy the Statute of Frauds. Appellant's Brief, p. 20. Without addressing whether such an entry would constitute a "signed writing" sufficient to satisfy the Statute of Frauds, Appellant has failed to present any such computer entry. Appellant merely alleges that the entry is "missing" from the "Debtor's Comments" document presented at trial. Id.

Ms. Stewart testified at trial that she did not tell Appellant that she was making an entry in the computer system, and, in fact, that she does not even have the authorization or ability to make such an entry. Transcript, p. 31. (R. p. 119). Appellant testified that Ms. Stewart did tell him that she was making such an entry. Transcript, p. 43 - 44. (R. pp. 131 - 132). The Master in Equity heard both accounts and concluded that Ms. Stewart's testimony was the more credible, and that Respondent was entitled to foreclose. Appellant's continued accusations of criminal conduct on the part of Ms. Stewart are groundless and disturbing.

Therefore, the Master in Equity properly held that the Alleged Agreement was unenforceable pursuant to the Statute of Frauds.

II. APPELLANT WAS NOT PREVENTED FROM CONDUCTING DISCOVERY.

Appellant's second contention is that he was not allowed to participate in discovery. However, Appellant had every opportunity to conduct discovery and failed to do so, and certainly Respondent took no action to prevent Appellant from conducting discovery.

On July 29, 2010, Respondent served written Interrogatories pursuant to Rule 33 and Requests for Production pursuant to Rule 34 (the "Discovery Requests"). See Interrogatories and Requests for Production.⁵ (R. pp. 149 – 152). The Discovery Requests did not request financial information as stated in Appellant's brief (page 2, paragraph 3), but rather consisted of several interrogatories, including some of the Standard Interrogatories set forth in Rule 33(b), and requests for documents related to the merits of Appellant's counterclaims. Id. Appellant never responded to the Interrogatories or the Requests for Production, and Appellant does not claim in his brief to have done so.

More importantly, almost ten months lapsed from the time of service of the Complaint on June 7, 2010 to the hearing on March 30, 2011. Appellant did not serve any written discovery requests, nor did Appellant notice any deposition or serve any subpoena. Furthermore, Appellant did not file any motion seeking to

⁵ Neither Respondent's Interrogatories nor the Requests for Production were introduced as evidence in either of the hearings before the Master in Equity because Appellant did not make the present argument until his Motion for New Trial that was decided without a hearing. Respondent recognizes that the Discovery Requests would generally not be included on the Record on Appeal under Appellate Court Rule 210(c). However, in this appeal, Appellant has accused Respondent's attorney of misconduct in discovery and lying about Appellant's lack of participation in discovery. Therefore, Respondent believes that the Discovery Requests should be included in the Record on Appeal.

delay the foreclosure hearing in order to conduct discovery.⁶ In short, Appellant failed to utilize any discovery methods available to him under the Rules of Civil Procedure and cannot now be heard to complain about a lack of discovery.

Appellant alleges that he did not conduct discovery because Respondent's attorney did not reply to his settlement offer. Even if Appellant were delayed in conducting discovery while awaiting a response to his settlement offer, he became aware that his settlement offer was rejected when he was served with Respondent's Motion for Order of Reference on February 7, 2011,⁷ (R. pp. 35 – 39), and he still failed to conduct discovery. Appellant had almost two months before the March 30, 2011 hearing either to conduct discovery or to file a motion to allow additional time to conduct discovery, but Appellant did neither.

III. APPELLANT CANNOT COMPLAIN OF SURPRISE EVIDENCE WHEN APPELLANT FAILED TO CONDUCT DISCOVERY.

Appellant further asserts that he was "surprised" by the evidence presented at trial. As set forth above, Appellant failed to conduct any discovery, and cannot now be heard to complain of "surprise evidence." Appellant had almost ten months to conduct discovery and chose not to do so.

Moreover, Plaintiff submitted only six exhibits at the hearing, including: (i) the Note, (ii) the Mortgage, (iii) the Notice of Hearing, (iv) a payment history, (v) the Debtor's Comments document, and (vi) the Death Certificate of Nancy Cardwell. See Transcript, pp. 16-17, 40. (R. pp. 104 – 105, 128). The only

⁶ As indicated Appellant's Brief (p. 12), once the hearing was scheduled, Respondent would not have consented to any delay of the hearing just so Appellant could conduct discovery because Appellant had more than sufficient time to conduct discovery. However, if Appellant believed he was entitled to additional time, he could have filed a motion seeking additional time.

⁷ Appellant asserts that he "was informed of the Bank's rejection by the filing of the Motion for Reference in February transferring the case to the Master in Equity Court." Motion for New Trial, p. 15, paragraph 3. (R. p. 54).

documents which Appellant may argue he had never seen before, due to his failure to conduct discovery, are the payment history and the Debtor's Comments document. The payment history was used to establish the last date of payment, as well as the current amount owed. Appellant has not contested the amount owed under the Note and Mortgage or the last date of payment. The Debtor's Comments document was a one page document (R. p. 143), which Appellant referred to extensively during his cross-examination of both Mr. Thomason and Ms. Stewart. Transcript, pp. 18 - 19, 32 - 34. (R. pp. 106 - 107; 120 - 122). Therefore, Appellant cannot argue that he was surprised by the evidence presented at the hearing.

Furthermore, Appellant did not object to the admission of any evidence at the hearing and did not preserve those issues for review by this Court. See Transcript, pp. 16 - 17. (R. pp. 104 - 105).

As to Appellant's allegations regarding the difference between a "hearing" and a "trial," Respondent properly noticed the foreclosure proceeding as a "hearing." Historically, courts in South Carolina have referred to a proceeding in a foreclosure action as a "hearing." For example, Rule 71 of the South Carolina Rules of Civil Procedure provides that:

Actions to foreclose liens or obtain partition of real property shall be tried by the court, and shall ordinarily be referred to a master pursuant to Rule 53. In foreclosure actions the judge or master shall compute the amounts due the plaintiff and any other claimants, which amounts when determined shall be the total debt due to each. The total debt shall as a minimum set forth clearly the principal due upon default, the rate of interest and interest from date of default to *hearing* date, and any other relevant interest charged, any amounts due or to be credited

on escrow items, the taxable costs of collection prior to *hearing*, and the amount of allowable attorneys fees due and anticipated through conclusion of the action.

Rule 71, SCRCP (emphasis added); see also, In Re Mortgage Foreclosure Actions, Order No. 2011-05-02-01 (S.C.Sup.Ct. Order dated May 2, 2011) ("In all mortgage foreclosure actions pending on May 9, 2011, before any *merits hearing* in the case . . . ")(emphasis added).

IV. APPELLANT'S ALLEGATIONS OF PERJURY ARE GROUNDLESS.

Appellant asserts that, because he spoke with a bank representative who he alleges typed on her computer, there would necessarily be a record of his meeting or the substance of such meeting. Appellant's Brief, p. 26. Appellant specifically alleges that the bank representative's entry should have appeared in the "Debtor's Comment" document. Id. Because no such entry appears in the Debtor's Comments, Appellant concludes that Ms. Stewart committed perjury. Id.

In almost every contested matter, the parties present different versions of the facts. Appellant's sole "evidence" of perjury is that he and Ms. Stewart have different recollections of events. At the foreclosure merits hearing, Respondent's representative, Ms. Stewart, testified (i) that she did not enter into an agreement with Dr. Cardwell not to foreclose if he made a payment in January, and (ii) that she did not make notes on Dr. Cardwell's account, Transcript, pp. 23 and 31 (R. pp. 111 and 119). Appellant testified that Ms. Stewart did enter into an agreement and did tell him that she was making such an entry. Transcript, pp. 43 - 44. (R. pp. 131 - 132). The Master in Equity heard testimony from both sides and concluded that Ms. Stewart's version of events was more credible, and that

Respondent was entitled to foreclose. Clearly, the Master in Equity did not view any testimony to be perjurious.

V. RESPONDENT'S ATTORNEY IS NOT GUILTY OF ANY MISCONDUCT.

Appellant accuses Respondent's attorney of lying about Appellant's failure to conduct discovery. Appellant's Brief, p. 27. As set forth above in Section II, Appellant confuses Respondent's properly served Interrogatories and Requests for Production on July 29, 2010 with Respondent's request in November 2010 for a personal financial statement and other financial information to assist with attempted foreclosure intervention.

More specifically:

1. Respondent's attorney stated in court documents that Appellant did not respond to his discovery requests. In fact, Appellant did not provide Answers to Respondent's Interrogatories or Responses to Respondent's Requests for Production, and has not contended that he has done so.
2. Respondent's attorney stated in court documents that Appellant did not conduct any discovery of his own. In fact, Appellant did not produce any written discovery propounded on Respondent or any notices of depositions, and has not contended that he has done so. Appellant failed to conduct discovery despite having almost ten months from the foreclosure filing to do so, including almost two months after Appellant admits that he was aware that Respondent had rejected his settlement offer.

Therefore, statements of Respondent's attorney in court documents were

absolutely truthful.

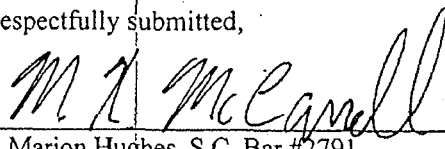
VI. APPELLANT CHOSE TO PROCEED PRO SE AND CANNOT PREVAIL ON APPEAL BECAUSE HE WAS NOT KNOWLEDGEABLE ABOUT THE LAW.

Finally, Appellant contends that, because he represented himself *pro se*, the Clerk of Court's Office and the Master in Equity's Office should have given him legal advice. Appellant's Brief, pp. 30 -33. Appellant has a statutory right to represent himself *pro se*. S.C. Code Ann. § 40-5-80 (1976). Appellant chose to exercise that right, but non-attorneys working in the court's administrative offices have no obligation to give him legal advice. In fact, if they did so, the staff members could be engaging in the unauthorized practice of law. S.C. Code Ann. § 40-5-310 (1976). Therefore, the court administration staff properly declined to provide Appellant legal advice.

CONCLUSION

For the reasons set forth above, the Master's Order and Judgment of Foreclosure and Sale entered by the Honorable Charles B. Simmons, Jr. should be affirmed.

Respectfully submitted,



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ATTORNEYS FOR RESPONDENT

January 12 2012

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM GREENVILLE COUNTY
In The Court Of Common Pleas

Charles B. Simmons, Jr., Master in Equity

Case No. 2010-CP-23-4560
(Case Tracking Number 2011192887)

The Palmetto Bank..... Respondent,

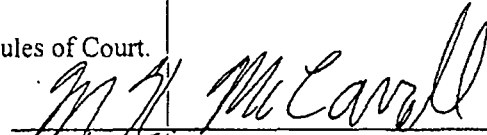
v.

Walter T. Cardwell, Jr., Coach Hills
Homeowner's Association, Inc., United
States of America,..... Defendants.

Of whom, Walter T. Cardwell, Jr. is the, ...Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Respondent complies with
Rule 211(b) of the South Carolina Rules of Court.



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January 12, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
In The Court of Common Pleas

Charles B. Simmons, Jr., Master in Equity

Case No. 2010-CP-23-4560
(Case Tracking Number 2011192887)

The Palmetto Bank..... Respondent,

v.

Walter T. Cardwell, Jr., Coach Hills
Homeowner's Association, Inc., United
States of America,..... Defendants.

Of whom, Walter T. Cardwell, Jr. is the, ...Appellant.

PROOF OF SERVICE

IT IS HEREBY CERTIFIED that a copy of the foregoing **Final Brief of Respondents** was served this 34th day of January, 2012, upon the following persons by placing a copy of the same in the United States Mail, with sufficient postage affixed thereto, addressed as follows:

Dr. Walter T. Cardwell, Jr.
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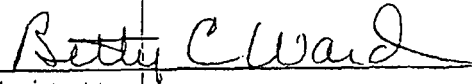
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SC Court of Appeals

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Attorneys for Respondent, The Palmetto Bank

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The Palmetto Bank, Respondent,

v.

Walter T. Cardwell, Jr., Coach Hills Homeowner's
Association, Inc., United States of America, Defendants,

Of whom Walter T. Cardwell, Jr. is the Appellant.

Appellate Case No. 2011-192887

Appeal From Greenville County
Charles B. Simmons, Jr., Master in Equity

Unpublished Opinion No. 2012-UP-504
Submitted September 4, 2012 – Filed September 5, 2012

AFFIRMED

Dr. Walter T. Cardwell, Jr., of Greenville, pro se.

F. Marion Hughes and M. Kevin McCarrell, of Smith
Moore, Leatherwood, LLP, of Greenville, for
Respondent.

PER CURIAM: We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the Master erred in denying Cardwell's motion to restore the case to the trial roster: S.C. Code Ann. § 32-3-10(4) (2007) (requiring contracts related to an interest in land to be in writing to be enforceable); *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989) ("[A] contract required to be in writing by the South Carolina Statute of Frauds cannot be orally modified.").

2. As to whether Cardwell was improperly surprised by evidence, whether Palmetto Bank committed perjury, whether Palmetto Bank's attorney engaged in misconduct, and whether the Master erred in failing to provide clear instructions regarding legal procedures: *Webb v. CSX Transp., Inc.*, 364 S.C. 639, 655, 615 S.E.2d 440, 449 (2005) (finding there must be a contemporaneous objection to evidence to preserve an issue for appellate review); *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) ("It is well settled that an issue may not be raised for the first time in a post-trial motion."); *id.* ("[I]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." (internal quotation marks omitted)).¹

AFFIRMED.²

FEW, C.J., and WILLIAMS and PIEPER, JJ., concur.

¹ There is no evidence to support Cardwell's contention he was prevented from conducting discovery; accordingly, it is without merit.

² We decide this case without oral argument pursuant to Rule 215, SCACR.

PETITION FOR A REHEARING OF AN APPEAL TO THE
COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Master in Equity Court

Charles B. Simmons Master in Equity Court Judge

Case No. 2010-CP-23-4560

Palmetto Bank,

Respondent,

v.

Dr. Walter T. Cardwell Jr.,

Appellant.

PETITION FOR A REHEARING OF AN APPEAL

Pursuant to Rule 221(a) of the South Carolina Rules of Appellate procedures, Appellant respectfully request a rehearing of Appellants appeal based on information contained in the record on appeal that seems to have been overlooked in deciding the appeal.

The Court affirmed that:

1. As to whether the Master erred in denying Cardwell's motion to restore the case to the trial roster: S.C. Code Ann §. 32-3-10(4) (2007) (requiring contracts related to an interest in land to be in writing to be enforceable); *Player v. Chandler*, 29 S.C. 101, 105, 382 S.E. 2d 891, 894 (1989) ("[A] contract required to be in writing by the South Carolina Statute of Frauds cannot be orally modified.").

While Appellant did initially characterize the agreement as an oral agreement, this was due to Appellant's lack of understanding of what constitutes "in writing". Like most people Appellant

erroneously believed that in writing meant paper and pen. However, in his original answer beginning on page on page 24 of the Record on Appeal, Appellant stated,

c. I applied for social security at the earliest opportunity and was informed that I would receive my first check on February 22, 2010. I immediately informed Ms. Stewart that the check would arrive on February 22, and I asked if it would be okay for me to resume payments after the check arrived. She made a call to some department within the bank who at first asked if I could make a payment before the date and when I said it would be a problem Ms. Stewart received authorization for the payment to be made on the 22nd and she said she noted it in my account.

Thus even in my first filing in this case, that when the information was entered into my account in the Bank's computer the agreement was in writing. In Appellant's Motion for a New Trial beginning on page 53 of the Record on Appeal, Appellant discusses at length the issue of whether or not the agreement was actually in writing.

While I do realize that the Appellate Court must rely on the facts as determined by the original trial and cannot ascertain the facts for itself it can only use facts determined from the original trial if they were obtained both legally and properly. The fact of whether the agreement was in writing or not as stated by the original trial judge was supposedly determined by a court specifically barred from obtaining this information.

It is clear that rule 38 of the SCRCF gives no discretion to the judge as to returning the case to a jury to determine the facts precisely to prevent what is now occurring, denying either party their inviolable right to a jury as specified in Article one Section 14 of the South Carolina Constitution based on facts that must be decided by a jury.

But in the end, that is only one of the issues that is in dispute the resolution of which depends on the

facts which, being an issue of law triable by right of jury, rule 38 of the South Carolina Rules of Civil Procedure prohibits Judge Simmons from determining and requires that the facts be determined by a jury. The Appellate Court in its decision is stating as fact that which has yet to be legally determined. The Court also is stating that fraud is the only issue on which to base the counter claim which it is not and which Appellant listed as only one of several possible reasons for the action taken by the Respondent all of which are triable by right of jury and would depend on the facts that also would have to be determined by a jury.

If the court holds that Appellant is not entitled to a jury trial, Appellant respectfully disagrees and believes that this view not only violates rule 38 of the South Carolina Rules of Civil Procedure, Article 1 Section 14 of the South Carolina Constitution, and Section One of the Fourteenth Amendment to the United States Constitution and will therefore ask the United States Court of Appeals to decide who is correct.

The Court also affirmed that:

2. As to whether Cardwell was improperly surprised by evidence, whether Palmetto Bank committed perjury, whether Palmetto Bank's attorney engaged in misconduct, and whether Master erred in failing to provide clear instructions regarding legal procedures: *Webb v. CSX Transp., Inc.*, 364 S.C. 639, 655, 615 S.E.2d 440, 449 (2005) (finding there must be a contemporaneous objection to evidence to preserve an issue for appellate review); *S.C. Dep't of Transp. V. First Carolina Corp. Of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) ("It is well settled that an issue may not be raised for the first time in a post-trial motion."); *id.* ("[I]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." {internal quotation marks omitted})).

All of the issues cited above, improperly surprised by evidence, Palmetto Bank committing perjury,

Palmetto Bank's attorney engaged in misconduct, and the Master erring in failing to provide clear instructions regarding legal procedures were all raised and ruled upon by the original trial judge either in Appellant's Motion for a New Trial included in the Record on Appeal beginning on page 53 or in Appellant's *Defendant's Answer to Plaintiff's Response to Defendant's Request for a New Trial* paragraph four on page 83 of the Record on Appeal. This was of course the first opportunity to address the issue of misconduct by the Bank's attorney which occurred in his response to Appellant's motion.

With regard to the other issues, the South Carolina Rules of Civil Procedure provide in rule 59 a means for the original trial judge to address issues that originated in the original trial. Rule 59 (a) states:

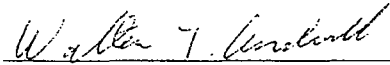
(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues ... (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in the courts of the State. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

Appellant did file a Motion for a New Trial included in the Record on Appeal beginning on page 53 based on the issues cited above giving the original trial judge an opportunity to address the issue of the "Bank's Perjury" among other issues. Judge Simmons denied the motion and thus did rule on the above issues. But this failure of Judge Simmons to address accusations of felonies committed in his courtroom when the Greenville County Solicitor and the Greenville County Sheriff's Department stated that only Judge Simmons could order an investigation of what went on in his courtroom denied Appellant the equal protection of South Carolina laws. While Appellant was not aware at the time of filing his motion with Judge Simmons that because the Palmetto Bank was

insured by the FDIC, in committing what is now known to Appellant as bank fraud, is not only a state crime but a federal one as well, does not absolve the South Carolina Courts of their failure address this issue.

If the court holds that Appellant is not entitled to a full investigation of the alleged wrongdoing, Appellant respectfully disagrees and believes that this view violates, Article 1 Sections 3 and 9 of the South Carolina Constitution , and the equal protection clause of the Fourteenth Amendment to the United States Constitution and will in addition to filing a formal fraud complaint with the FDIC should the Palmetto Bank decline to enter into serious settlement negotiations, Appellant will also ask the United States Court of Appeals to decide whether Appellant's equal protection rights have not also been violated.

September 18, 2012



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The South Carolina Court of Appeals

The Palmetto Bank, Respondent,

v.

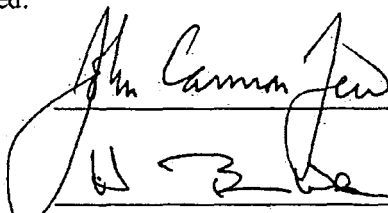
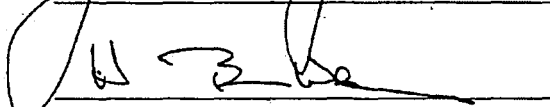
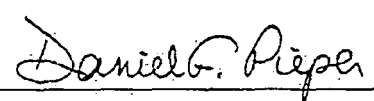
Walter T. Cardwell, Jr., Coach Hills Homeowner's
Association, Inc., United States of America, Defendants,

Of whom, Walter T. Cardwell, Jr. is the Appellant.

Appellate Case No. 2011-192887

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 CJ.
 J.
 J.

Columbia, South Carolina

cc:
Walter T. Cardwell, Jr.
Michael Kevin McCarrell

F. Marion Hughes
Charles B. Simmons, Jr.

FILED

October 18, 2012