

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BERKELEY COUNTY

In the Court of Common Pleas

The Honorable Markley Dennis, Jr., Circuit Court Judge

Case No. 2012-CP-08-2618

Case No. 2012-CP-08-3478

Appellate Case No. 2016-002192

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**SC Court of Appeals**

Bank of North Carolina, .....Respondent

v.

Anthony M. Whitfield and Cindy Whitfield..... Defendants

Of whom Anthony M. Whitfield is the Appellant and Cindy Whitfield is Respondent.

Anthony M. Whitfield.....Appellant

v.

David Swanson .....Respondent

FINAL BRIEF OF RESPONDENT

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September 1, 2017

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**STATEMENT OF ISSUES ON APPEAL**

1. WHETHER THE TRIAL COURT ERRED IN DISMISSING THE CLAIMS ASSERTED BY THE APPELLANT AGAINST RESPONDENT SWANSON?

## STATEMENT OF THE CASE

Respondent Bank of North Carolina (hereinafter "BNC"), formerly known as Harbor National Bank and improperly identified in the relevant pleadings as BNC Bancorp, filed three civil actions against Appellant Whitfield (hereinafter "Whitfield") in Berkeley County (as well as additional civil actions filed in Dorchester County and Charleston County). In these matters, BNC is seeking action on notes and foreclosure on properties as a result of loan defaults by Whitfield. Subsequently, Whitfield made counterclaims against BNC and asserted Third-Party claims against Respondent Swanson (hereinafter "Swanson"). Swanson moved to have the Third-Party claims against him dismissed. On June 28, 2016 the Honorable Markley Dennis, Jr. heard arguments related to Swanson's Motion to Dismiss. His Honor issued an Order dismissing Whitfield's Third-Party claims against Swanson in the Berkeley County matters. Whitfield then served the Notice of Appeal.

By way of background, BNC has nine outstanding loans to Anthony Whitfield secured by nine separate residential mortgages, all of which have been in default and for many years have been the subject of foreclosure actions in, Berkeley, Dorchester, and Charleston Counties.

The nine loans in question were originated in 2007 and 2008, pursuant to a \$1.5 million guidance line to Whitfield. The loans were cross-collateralized and each loan was the subject of its own note, mortgage, and assignment of leases and rents. The loans each had five-year terms, thirty-year amortizations, and fixed interest rates specified in the loan documents. The documents relevant to the loans at issue in this case are attached to the

Complaint. Whitfield made regular monthly payments on all the loans for the five-year loan period of each.

Upon the maturity of the first three loans in 2012, Harbor National Bank (now known as Bank of North Carolina) and Whitfield had difficulty coming to terms for their renewal. By the time Mr. Whitfield was requesting renewal of the loans, he was a poor credit risk; so much so, in fact, that he had asked Harbor National Bank, as well as another bank, to provide him with a letter indicating that it would not be possible or prudent to extend him more credit. He had also failed to provide Harbor National Bank with financial information when requested. When Whitfield provided some financial information in April 2012, it consisted of Whitfield's 2010 tax returns.

Despite these difficulties, Charlie Rivers, the President of Harbor National Bank, agreed to meet with Whitfield on June 21, 2012 in an effort to identify terms on which the loans might be renewed. After their conversation, Rivers instructed Scott Warren, a loan officer at Harbor, to prepare a term sheet based on the general terms agreed to in order to proceed to the next step toward a closing.

On its face, the term sheet was a preliminary document and not a legally binding contract. Whitfield testified that he received the term sheet from Scott Warren at a meeting on June 27, 2012. Before that meeting, Harbor National Bank had become aware of a potential title defect in its collateral for the loan, because Whitfield had conveyed a one-half interest in a Charleston County property to his ex-wife, Cindy Whitfield. Whitfield does not dispute that Warren told him at their meeting that a title endorsement might be

required. Whitfield cannot dispute that the term sheet plainly states, among other things, that it is not a commitment to lend. In attempt to circumvent the statute of frauds in these suits, however, Whitfield seeks to turn the term sheet into something it patently is not.

In any event, on June 28, 2012, Warren and Whitfield attended an attempted closing of the renewal transactions at the office of Mark Weeks, Esq. On the advice of its counsel, David Swanson, Esq., Harbor National Bank required a title endorsement or co-signature from Cindy Whitfield before closing the loan transactions.<sup>1</sup> When contacted during the attempted closing, Cindy Whitfield's counsel advised the parties that she would not sign. Harbor did not close the loans that day as a result. Whitfield rejected other ways to address the problem with the security for the loans, and litigation followed.

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<sup>1</sup> Whitfield has argued repeatedly in this case to date that Mr. Swanson's legal advice to the bank that a title endorsement or co-signature would help protect the bank's lien position is incorrect as a matter of law. While Harbor National bank believes strongly in the advice of Mr. Swanson, an experienced South Carolina real estate lawyer, whether his analysis is correct or not legally is not at issue here. Because Harbor National Bank had no contractual obligation to Whitfield to close the renewals of the loans, it had no obligation to close. The question whether it had a sufficient ground for refusing to close is not relevant.

## ARGUMENTS

- I. RESPONDENT BANK OF NORTH CAROLINA SUBMITS ITS OWN STATEMENT OF THE CASE WHILE JOINING IN THE BRIEF FILED BY RESPONDENT SWANSON BY REFERENCE AND INCORPORATES ALL ARGUMENTS AND SUPPORTING EXHIBITS ASSERTED THEREIN

BNC submits this Respondent's brief to provide its own statement of the case. In doing so, BNC cannot be bound by the matters stated or alleged in Whitfield's Appellant brief. Rule 208(b)(2), SCACR. Additionally, BNC joins in the brief filed by Swanson, adopts the same by reference, and incorporates all arguments and supporting exhibits asserted therein. Rule 208(b)(6).

## CONCLUSION

For the reasons stated, Respondent Bank of North Carolina submits this brief with its own statement of the case and incorporates by reference all arguments and supporting exhibits asserted in the brief of Respondent Swanson.

Respectfully submitted this 1<sup>st</sup> day of September, 2017

By:



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