THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Master-in-Equity Judge

Case No. 2014-CP-40-3950
Appellate Case No. 2016-001895

First Citizens Bank and Trust Company, Inc., successor by Merger to Community Resource Bank, N.A.,.....Respondent,

v.

SOH Properties, LLC, Ivan A. Roldan, and Eugene G. McDonald a/k/a Eugene G. McDonald, III, Defendants,

Of whom Eugene G. McDonald a/k/a Eugene G. McDonald, III, is the Appellant.

FINAL BRIEF OF RESPONDENT

HAYNSWORTH SINKLER BOYD, P.A.

Stanley H. McGuffin, SC Bar No. 3830
Mary M. Caskey, SC Bar No. 76198
Haynsworth Sinkler Boyd, P.A.
1201 Main Street, Suite 2200 (29201)
Post Office Box 11889 (29211)
Columbia, South Carolina

Attorneys for Respondent First Citizens Bank and Trust Company, Inc., successor by merger to Community Resource Bank, N.A.

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STATEMENT OF THE CASE

This appeal arises out of a foreclosure action filed on June 20, 2014 by Respondent First Citizens Bank and Trust Company, Inc., successor by merger to Community Resource Bank, N.A. (the "Bank") against Appellant Eugene G. McDonald a/k/a Eugene G. McDonald III ("McDonald") and his co-defendants SOH Properties, LLC ("SOH Properties") and Ivan A. Roldan ("Roldan") (collectively, the "Defendants"), following their default on two commercial loans.

The Bank brought this action to foreclose upon certain commercial mortgages on real property in Richland County and to recover amounts due pursuant to guaranties signed by McDonald and Roldan in connection with two promissory notes executed by SOH Properties. (R.at 3-10.) In response to the Complaint, McDonald, acting *pro se*, filed an answer on behalf of himself and SOH Properties on August 29, 2014, and a crossclaim against Roldan. (R. at 41.) The Bank filed a motion to strike SOH Properties' answer on the basis that South Carolina courts require a corporation to be represented by an attorney. (R. at 48.) On November 26, 2014, prior to a hearing on the Bank's motion to strike, McDonald filed a motion seeking leave on his behalf individually and on behalf of SOH Properties to amend their answers and assert a counterclaim against Plaintiff. (R. at 46.)

On February 11, 2015, the Court of Common Pleas for Richland County granted the Bank's motion to strike SOH Properties' answer, and denied McDonald's motion to amend his answer individually. (R. at 63-68.) However, the court granted McDonald fifteen (15) days to re-file his motion seeking leave to amend and to include a proposed amended answer with the motion. (R. at 65.)

On February 15, 2015, McDonald filed a second motion to amend his answer and asserted counterclaims against the Bank, alleging unclean hands, misrepresentation, and detrimental reliance based on the Bank's alleged refusal to modify the terms of the subject loan. (R. at 56.)[1] On October 16, 2015, the Circuit Court entered an order denying McDonald's motion to amend, without prejudice, on the grounds that the amendment would have been futile because McDonald's proposed counterclaims did not state facts that would support a claim. (R. at 80.) The court also granted the Bank's motion for an Order of Reference and the case was referred to the Master in Equity for Richland County. (*Id.*)[2]

Following a hearing on the merits on June 29, 2016, the Master entered an Order and Judgment of Foreclosure and Sale on August 2, 2016. (R. at 83.) Following the foreclosure sale, on December 13, 2016, the Master entered an Order of Deficiency Judgment against the Defendants in the amount of $100,090.47. (R. at 93.) This appeal followed.

FACTS

On or about April 20, 2007, SOH Properties executed and delivered to the Bank a South Carolina – Universal Note in the original principal amount of Seventy Four Thousand Five Hundred and No/100 ($74,500.00) Dollars ("Note-1"). (R. at 4.) To secure repayment of Note-1, and the debt evidenced thereby, SOH Properties executed

[1] Prior to the hearing on McDonald's motion to amend his complaint, the Bank filed a Motion for Order of Reference with the Court of Common Pleas requesting a referral of the foreclosure action to the Master in Equity for Richland County. (R. at 69.)

[2] Pursuant to Rule 71, the Bank moved the trial court for an order vacating the Order Granting Plaintiff's Motion for Order of Reference and Denying Defendant McDonald's Motion for Leave to Amend Answer and to Assert Counterclaims because the order had been filed in the incorrect case, which was granted and the Order was ultimately entered in the correct case.

and delivered unto the Bank a certain Real Estate Mortgage, dated April 20, 2007 ("Mortgage-1") whereby SOH Properties mortgaged to the Bank the real property described in Mortgage-1 (the "Mortgaged Property"). (R. at 4.) The Mortgage-1 was recorded on April 26, 2007, in the Office of the Register of Deeds for Richland County in Book 1306 at Page 3670. (*Id.*)

On or about August 31, 2009, SOH Properties executed and delivered to the Bank a renewal Commercial Note whereby the Bank agreed to loan an additional amount with the principal balance of Fourteen Thousand Nine Hundred Thirty Seven and 37/100 ($14,937.37) Dollars ("Note-2") (collectively with Note-1 hereinafter referred to as the "Notes"). (R. at 7.) To secure the repayment of Note-2, and the debt evidenced thereby, SOH executed and delivered unto the Bank a certain Mortgage of Real Estate dated August 31, 2009 ("Mortgage-2") (collectively with Mortgage-1 hereinafter referred to as the "Mortgages"), whereby SOH mortgaged to the Bank the Mortgaged Property. (*Id.*) Mortgage-2 was recorded on September 3, 2009, in the Office of the Register of Deeds for Richland County in Book 1553 at Page 2704. (*Id.*)

Note-1 provides an award of attorneys' fees and costs, stating, "I agree to pay all costs of collection. . . . if you hire an attorney to collect this note, I also agree to pay any fee you incur with such attorney plus court costs . . . .". (R. at 14.) Note-2 provides an award of attorneys' fees and costs, stating, "If you hire a lawyer to help collect this loan, I also agree to pay collection costs to include reasonable fees not to be less than 15% of the amount to be collected . . . ." (R. at 25.)

To further induce the Bank to enter into the Notes, and as additional security for the Notes, Roldan and McDonald made, executed, and delivered unto the Bank those

certain unconditional guaranties dated April 30, 2007, October 30, 2007, June 18, 2008, and Roldan executed an additional guaranty on August 31, 2009 (collectively, the "Guaranties"). (R. at 31-40.) The Guaranties provide, in part, for an award of attorneys' fees and costs in the event of default. (R. at 31, 33, 35, 37, 40.) Pursuant to the terms of the Guaranties, Roldan and McDonald guaranteed to the Bank the prompt payment when due of the entire indebtedness evidenced by the Notes and the Mortgages. (R. at 31, 33, 35, 37, 39.)

SOH Properties is in default under the terms of the Notes and Mortgages by failing to make payments when due. (R. at 5, 8.) In addition, neither Roldan nor McDonald has made payments of the amounts due under the Notes and the Mortgages and, therefore, the Guaranties are in default. (R. at 10, 42.)

David Davies, who was the account officer for the Notes, Mortgages, and Guaranties at all relevant times in this case and was the primary point of contact with McDonald regarding the loan agreements, testified during the hearing under questioning from McDonald that the Bank never agreed to renew or modify the loan nor did they ever settle on terms of such an agreement after the default. (R. at 152:11-21; 153:20-154:8; 156:10-157:3.) He further explained that the Bank could not move forward with negotiations related to renewing or modifying the Notes, Mortgages, or Guaranties because the Bank had not received documents from Roldan, who was also a guarantor of the Notes and Mortgages. (R. at 164:3-17.) Mr. Davies also testified that even though he had accepted documents from McDonald in order to assess whether the Bank would consider a loan modification, the Bank did not promise that it was going to enter into an

agreement with McDonald because terms of such an agreement were never settled upon. (R. at 156:18-157:3.)

ARGUMENT

I. The Circuit Court correctly refused to allow McDonald to amend his Answer and Crossclaim to assert counterclaims against the Bank because the counterclaims would have been futile.

Because McDonald sought to amend his answer and assert counterclaims well beyond the thirty days after it was served on July 1, 2014, he could only amend his pleadings by leave of court. Rule 15(a), SCRCP, states that "leave shall be freely given when justice so requires and does not prejudice any other party."

Despite the lenient standard under Rule 15, South Carolina courts have refused to allow amendment of pleadings when an amendment would be futile. *See, e.g., Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 680-81 (Ct. App. 2010), *rev'd on other grounds*, 401 S.C. 1, 736 S.E.2d 242 (2012) (affirming trial court's denial of plaintiff's motion to amend to add new parties to the action because the amendment was futile in that it would not survive summary judgment); *see also Red Oak Lands, Inc. v. Lane*, 268 S.C. 631, 634-36, 235 S.E.2d 718, 720 (1977) (affirming the trial court's ruling refusing to allow plaintiff to amend its complaint because the statute of limitations had run so that any amendment would be "futile"); *Coral Gables, Inc. v. Palmetto Brick Co.*, 183 S.C. 478, 487, 191 S.E.2d 337, 340 (1937) (holding that "it would be futile and unavailing" to allow amendment of plaintiff's complaint because the action was barred by the statute of limitations). As this Court has noted, in considering whether a party dismissed pursuant to Rule 12(b)(6) should be granted leave to amend, "[i]n the absence of any apparent or declared reason – such as . . . futility of amendment . . . – the leave sought should, as the rules require, be 'freely given.'" *Higgins v. Med. Univ. of S.C.*, 326 S.C. 592, 604, 486

S.E.2d 269, 275 (Ct. App. 1997) (quoting *Foman v. Davis*, 371 U.S. 178 (1962)) (emphasis added).[3]

McDonald proposed counterclaims against the Bank alleged unclean hands, misrepresentation, and detrimental reliance based on the Bank's alleged refusal to modify the terms of the subject loan. (R. at 59-61.) A review of McDonald's proposed counterclaims show that they clearly lack any merit, and adding them to the case would have been futile and a waste of resources because they would never have survived a motion to dismiss or similar dispositive motion. Therefore, the Court of Common Pleas properly denied McDonald's motion for leave to amend his Answer.

A. The Bank was not under any contractual or legal obligation to modify the Notes, the Mortgages, or the Guaranties.

All of McDonald's counterclaims are based on factual allegations that the Bank improperly failed to modify the commercial loan that is the subject of this foreclosure action. (R. at 59-61.) In support of these claims, McDonald alleges that "[t]hroughout the time that it was apparent that there were issues with the notes, Plaintiff had engaged in such conduct that led Defendants to believe a restructuring of the notes was imminent." (R. at 59.) McDonald asserts that these facts support counterclaims for unclean hands, misrepresentation, and detrimental reliance. (R. at 61.)

Regardless of how McDonald classifies or casts his claims, the Bank was under no obligation, legally or contractually, to modify the commercial loan that is the subject of this action. There is simply no provision in the Notes, the Mortgages, or the

[3] Federal courts interpreting Rule 15, FRCP, which mirrors the relevant portions of South Carolina's state rule, have also consistently denied a motion to amend where such amendments would be futile. *See, e.g., Perkins v. United States*, 55 F.3d 910, 917 (4th Cir. 1995) (upholding district court's denial of motion for leave to amend because additional claims were "futile" and "could not withstand a motion to dismiss").

Guaranties that require a modification or other amendment to the terms of the agreements. Further, the Bank has not breached any loan document by denying McDonald's request for a loan modification, or by collecting the debt in the manner prescribed in the Notes, the Mortgages, and/or the Guaranties. A contracting party does not breach his implied duty of good faith and fair dealing by refusing to change the terms of a contract. *Adams v. G.J. Creel and Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995); *see also Dearaujo v. PNC Bank, N.A.*, Case No. 2:12-cv-00981, 2012 WL 5818131 (D. Nev. Nov. 15, 2012) (finding there was no breach of the implied covenant of good faith and fair dealing when a bank failed to modify a loan because "(1) there was no enforceable contract between the parties requiring Defendant to modify the loan, (2) there was no duty to modify under the operative Loan Agreement, and (3) Plaintiff has failed to plead any plausible facts that Defendants breached the intention and spirit of the Loan Agreement.")

The Bank was not under any contractual or legal obligation to modify the Notes, the Mortgages, or the Guaranties. Therefore, McDonald's counterclaims do not state facts that would support a claim, and the Circuit Court correctly denied his motion to amend his answer to assert futile counterclaims against the Bank.

B. Any agreement to modify the Notes, Mortgages, and/or Guaranties had to be in writing.

It is axiomatic that any modification of a written contract must satisfy all requirements of a valid contract. *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) (citations omitted). Under South Carolina's Statute of Frauds, any agreement to answer for the debt of another or any contract dealing with an interest in land must be in writing. S.C. Code Ann. § 32-3-10. Accordingly, a contract required to be in writing

by the South Carolina Statute of Frauds cannot be orally modified. *Player*, 299 S.C. at 105, 382 S.E.2d at 893.

Further, no person may maintain an action for relief or a defense based upon the failure to perform an alleged promise, undertaking, commitment, or agreement "to renew, modify, amend, or cancel a loan of money or any provision with respect to a loan of money, involving any such case a principal amount in excess of [$50,000]" unless the party seeking to enforce said agreement has "received a writing from the party to be charged containing the material terms and conditions" of the agreement and "the party to be charged, or its duly authorized agent, has signed the writing." S.C. Code Ann. § 37-10-107(1)(c).

McDonald has not alleged and cannot show that the Bank entered into a written agreement to modify the Notes, the Mortgages, or the Guaranties. (R. at 145:3-146:3.) Thus, McDonald's counterclaims, that are based upon the premise that the Bank promised to modify the agreements between them, are meritless and the Circuit Court correctly denied his motion to amend.

C. The alleged statements on which McDonald relies cannot be the basis for a misrepresentation counterclaim.

The Circuit Court correctly ruled that both of McDonald's counterclaims for misrepresentation failed as a matter of law because these claims rely on statements concerning future events. To establish a cause of action for fraud based upon misrepresentation, the following elements must be shown by clear, cogent, and convincing evidence:

> (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7)

the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury.

M.B. Kahn Constr. Co. v. South Carolina Nat'l Bank, 274 S.C. 381, 384, 271 S.E.2d 414, 415 (1980). "Failure to prove any one of the foregoing elements is fatal to recovery." *Id.* Additionally, statements concerning a future event – such as the modification of an agreement – cannot form the basis of fraud.

Under South Carolina law, an allegedly fraudulent representation "must relate to a **present or pre-existing fact** and it cannot ordinarily be based upon an unfulfilled promise to perform in the future or statements as to future events." *Bishop Logging Co. v. John Deer Indus. Equip. Co.*, 317 S.C. 520, 527, 455 S.E.2d 183, 187 (1995) (emphasis added). "As a general rule, fraud cannot be predicated on a statement that constitutes an expression of an intention." *Osborn v. Univ. Med. Assocs.*, 278 F. Supp. 2d 720, 732 (D.S.C. 2003).

Even if McDonald could prove that a representative of the Bank promised him that Notes, the Mortgages, or the Guaranties would be modified, such statements concern an unfulfilled promise to perform in the future or a statement as to a future event, and cannot be considered the basis for a fraudulent misrepresentation cause of action. Thus, the alleged misrepresentations cannot be the basis for damages, and allowing McDonald to assert his proposed counterclaims would have been futile.

II. The Master did not err in failing to apply the doctrine of promissory estoppel in this foreclosure action because no promise was ever made to McDonald.

McDonald argues that the Master erred in failing to apply the doctrine of promissory estoppel in this case because the Bank allegedly promised to renew and modify the terms of the Notes and Mortgages. At the outset, McDonald did not raise this argument to the trial court, and therefore is not preserved for review. *Wilder Corp. v.*

Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 734 (1998).

South Carolina courts have consistently refused to apply the plain error rule. Instead, it is the responsibility of the appellant to preserve issues for appellate review. *Jackson v. Speed*, 326 S.C. 289, 306-07, 486 S.E.2d 750, 759 (1997). It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved. *Pye v. Estate of Fox*, 369 S.C. 555, 566, 633 S.E.2d 505, 510 (2006). In order for an issue to be preserved for appellate review, it must have been: (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity. *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007).

McDonald did not raise a claim or affirmative defense of promissory estoppel in his original Answer and Crossclaim, his proposed Answer and Counterclaim that was denied by the Court of Common Pleas, or at the final foreclosure hearing. Additionally, the Master did not address whether promissory estoppel applied in this action and McDonald failed to file a motion to alter or amend pursuant to Rule 59(e), SCRCP. *See Hancock v. Wal-Mart Stores, Inc.*, 355 S.C. 168, 171, 584 S.E.2d 398, 399 (Ct. App. 2003) (holding that an argument raised to the trial judge but not addressed in the final order is not preserved for appellate review when the appellant fails to file a motion to alter or amend). Thus, it is not preserved for this Court's review.

Assuming, *arguendo*, that this issue is preserved, McDonald has presented no evidence that a promise was made to him. In order to recover under the theory of promissory estoppel, McDonald must demonstrate: "(1) the presence of a promise

unambiguous in its terms; (2) reasonable reliance on the promise; (3) the reliance was expected and foreseeable; and (4) injury in reliance of the promise." *Craft v. South Carolina Com'n for Blind*, 385 S.C. 560, 565, 685 S.E.2d 625, 627 (Ct. App. 2009) (citation omitted). Whether the doctrine is applicable "depends upon whether the refusal to apply the doctrine would be virtually to sanction the perpetration of fraud or would result in other injustice." *Citizens Bank v. Gregory's Warehouse, Inc.*, 297 S.C. 151, 154, 375 S.E.2d 316, 318 (Ct. App. 1988).

As discussed at length above, the gravamen of McDonald's claims rest upon his allegation that the Bank had promised him that it was going to renew or modify the Notes, Mortgages, and/or Guaranties. However, there is nothing in the record to support that allegation except for McDonald's unsubstantiated assertions.

As mentioned previously, David Davies, who was the account officer for the Notes, Mortgages, and Guaranties at all relevant times in this case, testified multiple times during the hearing under questioning from McDonald that the Bank never agreed to renew or modify the loan nor did they ever settle on terms of such an agreement. (R. at 152:11-21; 153:20-154:8; 156:10-157:3.)[4] He further explained that the Bank could not move forward with negotiations related to renewing or modifying the Notes, Mortgages, or Guaranties because the Bank had not received documents from Roldan, who was McDonald's co-guarantor of the Notes and Mortgages. (R. at 164:3-17.) Moreover, Mr. Davies testified that even though he had accepted documents from McDonald in order to

[4] As an alternate sustaining ground, pursuant to Rule 220, SCACR, the Court should have sustained the Bank's objection to the introduction of any testimony related to the negotiations between McDonald and the Bank on the grounds that Rule 408 to the South Carolina Rules of Evidence precludes the admission of evidence of conduct or statements made in settlement negotiations. (*See* R. at 104: 6-18; 132:14-134:14.)

assess whether the Bank would consider a loan modification, the Bank did not promise that it was going to enter into an agreement with McDonald because terms of such an agreement were never agreed upon. (R. at 156:18-157:3.)

Even McDonald admitted that he never received or signed a loan modification agreement nor could he provide direct evidence of the Bank's promise to enter into such an agreement. (R. at 147:12-148:1.) Instead, McDonald testified only that he *thought* it was the Bank's "intention" to modify the Notes and Mortgages. (R. at 146:9-17.)

The testimony and evidence presented at the hearing falls considerably short of establishing the presence of an unambiguous promise. As a result, the Master did not err in failing to apply the doctrine of promissory estoppel in this case.

III. The Master did not err in refusing to apply the doctrine of unclean hands.

McDonald next argues that the Master erred in failing to apply the doctrine of unclean hands as a defense to the foreclosure action and the deficiency judgment that was entered. Again, McDonald did not raise this argument to the Master during the hearing nor did he plead this affirmative defense in his original Answer and Crossclaim, and therefore is not preserved for review. *Wilke*, 330 S.C. at 76, 497 S.E.2d at 734. Additionally, the Master did not address whether unclean hands applied in this action and McDonald failed to file a motion to alter or amend pursuant to Rule 59(e), SCRCP. *See Hancock*, 355 S.C. at 171, 584 S.E.2d at 399.

However, assuming that the defense of unclean hands was properly raised, McDonald does not cite to anything in the Record to support his fact-based argument, despite having the burden of proof on this issue. *See U.S. Bank Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 375, 684 S.E.2d 199, 205 (Ct. App. 2009) (holding that once default has been proven, the burden of "establishing a defense to foreclosure" shifts to the borrower).

McDonald does not dispute that he signed the Notes, Mortgages, and Guarantees; nor does he contest their validity. (R. at 142:25-144:3.) Thus, the Court should not have to blindly dig through the Record for evidence support his fact-based arguments when the McDonald has failed to cite anything to support his position.

Moreover, as set forth in Section I(A) above, the Bank was not under any contractual or legal obligation to modify the Notes, the Mortgages, or the Guaranties, and thus did not act unfairly in electing to proceed under the terms of those instruments. Because the Bank's actions were not unfair and were expressly allowed by contract, they cannot support a defense of unclean hands.

Further, MacDonald testified at the foreclosure hearing that he is not in a position financially to pay off or refinance the Notes. (R. at 170:7-16.) This Court has previously rejected allegations that assume banks take measures that are plainly contrary to their self-interests. *See e.g., Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 351, 565 S.E.2d 309, 315 (Ct. App. 2002) ("Additionally, we can think of no logical reason why Bank would make it a practice to intentionally make loans for an amount in excess of the collateral's value and risk substantial losses in the event of default.").

The equitable doctrine of unclean hands prevents a party from recovering if it acted unfairly to the prejudice of the defendant. *Wilson v. Landstrom*, 281 S.C. 260, 266, 315 S.E.2d 130, 134 (Ct. App. 1984). Here, McDonald claims that the Bank acted unfairly to him by not going through with a loan modification. However, the testimony from Mr. Davies makes clear that the Bank was unable to move forward with negotiations as to a loan modification because it did not receive the necessary documents from McDonald's co-guarantor, Roldan. (R. at 164:3-17.)

Further, even if the Court chooses to accept McDonald's claims, there is no possible prejudice to McDonald because he is not in a financial position to pay the amount owed or refinance the debt. Thus, his argument as to "unclean hands" fails on its merits. *See Wilson*, 281 S.C. at 267, 315 S.E.2d at 134 ("Since prejudice to the defendant is a necessary element of the 'unclean hands' defense, the doctrine cannot bar relief on the facts before us.").

IV. The issue of the Bank's attorneys' fees is not preserved for review by this Court.

McDonald argues in Section IV(D) of his brief that the trial court abused its discretion in awarding attorneys' fees to the Bank in the amount of $17,500.00 because the Master "simply rubber-stamped the amount of attorney's fees" and failed to ensure that McDonald, as a pro se litigant, "understood what was being entered and giving him an opportunity to review it prior to summarily accepting it." As with Sections II and III above, McDonald did not raise this issue with the trial court or was it addressed pursuant to Rule 59(e), SCRCP. Furthermore, he did not object to submission of the affidavit nor challenged its sufficiency at trial. (*See* R. at 28:12-24.) Because McDonald asserts this issue for the first time on appeal, it is not preserved for review. *See Allen v. Allen*, 347 S.C. 177, 187, 554 S.E.2d 421, 427 (Ct. App. 2001) (finding issued unpreserved where the husband raised the issue of attorney fees in his post trial motion for reconsideration, but did not mention the sufficiency of the wife's attorney fee affidavit nor did he object to the submission of the affidavit or challenge its sufficiency at trial).

In the alternative, if this Court determines that the issue of the Bank's attorneys' fees is preserved for review, the Master did not abuse his discretion in awarding attorneys' fees in the amount of $17,500, as authorized by the Notes, Mortgages, and

Guaranties.

Under South Carolina law, attorneys' fees are recoverable if authorized by contract. *See Blumberg v. Nealco, Inc.*, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993) (citations omitted). When such a contract exists, the award of attorneys' fees is left to the discretion of the trial judgment and will not be disturbed unless an abuse of discretion is shown. *American Federal Bank, FSB v. Number One Main Joint Venture*, 321 S.C. 169, 175, 467 S.E.2d 439, 442 (1996).

In the present case, attorneys' fees were authorized by contract. (*See* R. at 14, 25, 31, 33, 35, 37.) In awarding attorneys' fees, the South Carolina Supreme Court has noted that the factors to be considered are set forth in Rule 407, SCACR, Rule 1.5. *Condon v. State of South Carolina*, 354 S.C. 634, 583 S.E.2d 403 (2003). Those factors include: the results obtained and awards in similar cases; time and labor involved; difficulty of questions involved; skill required; preclusion of other employment; whether the fee is fixed or contingent; the experience, reputation, and ability of the attorneys. As set forth in the Attorney Fees and Costs Affidavit submitted to the Master, an analysis of these factors in this case shows that the requested award of attorneys' fees and costs was warranted and the Master ruled correctly. (R. at 244-246.)

CONCLUSION

For all of the above reasons, the Circuit Court's and Master's orders should be affirmed in their entirety.

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Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

By: _____

Stanley H. McGuffin, SC Bar No. 3830
Mary M. Caskey, SC Bar No. 76198
1201 Main Street, Suite 2200 (29201)
Post Office Box 11889 (29211)
Columbia, SC
Telephone: (803) 779-3080

Attorneys for Respondent First Citizens Bank and Trust Company, Inc., successor by merger to Community Resource Bank, N.A.

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Of whom Eugene G. McDonald, III is the.....Appellant

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Respondent complies with Rule 211(b).

HAYNSWORTH SINKLER BOYD, P.A.

Stanley H. McGuffin, SC Bar No. 3830
Mary M. Caskey, SC Bar No. 76198
Haynsworth Sinkler Boyd, P.A.
1201 Main Street, Suite 2200 (29201)
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PROOF OF SERVICE

I, the undersigned employee of Haynsworth Sinkler Boyd, P.A., do hereby certify that I have this 16th day of November, 2017, caused the foregoing *Final Brief of Respondent* to be served via U.S. mail, postage prepaid on *pro se* Appellant at the address shown below:

Eugene G. McDonald
4533 Ivy Hall Drive
Columbia, SC 29206
Pro se Appellant

(Signature Page Follows)

HAYNSWORTH SINKLER BOYD, P.A.

Stanley H. McGuffin, SC Bar No. 3830
Mary M. Caskey, SC Bar No. 76198
Haynsworth Sinkler Boyd, P.A.
1201 Main Street, Suite 2200 (29201)
Post Office Box 11889 (29211)
Columbia, South Carolina

Attorneys for Respondent First Citizens Bank and Trust Company, Inc., successor by merger to Community Resource Bank, N.A.

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