

STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

2015-CP-23-03300

Treybern Homeowners Association, Inc.

Plaintiff,

v.

Daniel B. Albert

Defendant(s).

20557.2

RECEIVED

APR 19 2018

SC Court of Appeals

JUDGMENT OF FORECLOSURE AND SALE

A hearing was held September 12, 2017. Plaintiff was represented by Joel M. Deason, Esq. Defendant appeared *pro se*. Plaintiff presented evidence to establish a basis for the debt by introducing the Declaration of Covenants and the deed to Defendant's property. Plaintiff also called its association manager, Shannon Deweese, who offered testimony regarding the individual charges and credits for the subject account. This is a significantly contested action, and the Court has held pre-trial conferences, tried the case for one full day and had multiple post-trial communications from counsel for Plaintiff and Mr. Albert.

Defendant's defense primarily centered upon an alleged agreement between the parties in August of 2013 wherein Defendant was to repay his arrearage in installments and Plaintiff would forbear from taking legal action to collect the outstanding charges. Defendant claims that he accepted the offer and that Plaintiff took unwarranted legal action by filing a lien and assessing additional charges to his account due to the associated legal expenses during the pendency of the agreement. Defendant testified that he asked Plaintiff to waive the legal fees after receiving notice of the lien filed on or about October 15, 2013 (Plaintiff's Ex. 6), but that Plaintiff refused. Defendant admitted that he stopped making payments in protest of Plaintiff's refusal.

In his Defense, Mr. Albert offered a letter from Plaintiff's association management company, William Douglas, to the Defendant dated August 5, 2013 (Defendant's Ex.14). The letter offers terms to Defendant in order to settle the past due balance owed to Plaintiff. It sets forth a schedule of payments beginning in August of 2013 and ending the following February. Defendant's Exhibit 14 bears Defendant's signature and purports to have been signed by Mr. Albert August 30, 2013. Ms. Deweese testified that Plaintiff did offer the August 5, 2013 payment plan to the Defendant, amongst others; however, her company's records indicated that they did not receive a signed copy of the letter memorializing Defendant's acceptance. She authenticated Plaintiff's Exhibit 8 which was the same August 5, 2013 letter from William Douglas to the Defendant that was marked as having been received by William Douglas on September 6, 2013. Plaintiff's Exhibit 8 was not signed or dated by the Defendant.

ELECTRONICALLY FILED - 2018 Feb 08 1:50 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2303300

Ms. Deweese also authenticated Defendant's Exhibit 36 which was explained to be William Douglas' electronic log of events related to Defendant's account that contained entries indicating that Defendant was offered a payment plan August 5, 2013 and that William Douglas later received the payment plan letter unsigned. Ms. Deweese also testified that Defendant had been credited for four separate payments in the amount of twenty five dollars received by William Douglas on the 6<sup>th</sup> and 30<sup>th</sup> of September and the 4<sup>th</sup> and 27<sup>th</sup> of November 2013. Upon cross examination Defendant agreed that he only made the four payments as itemized by Ms. Deweese during the entire course of the subject delinquency. Defendant also acknowledged that he was unsure if he had returned the signed copy of the payment plan acceptance to William Douglas.

Defendant also contended that the Plaintiff corporation lacked authority to conduct business due to irregularities with the adoption of its bylaws. Plaintiff offered rebuttal that its claim was not based on the bylaws, but based on the provisions contained in its Declaration of Covenants. Plaintiff also asserted that collateral attacks on the corporation or its authority was improper since Defendant's claim or defense had not been brought derivatively and was also barred by the doctrines of de facto corporation and de facto officer.

In addition to the above, an issue arose between the parties following submission of a proposed Order by counsel for Plaintiff concerning attorney fees. As a result, the Court directed the trial transcript be prepared. The Court has now reviewed the transcript and relevant exhibits. The attorney fees issues and all other issues are discussed below.

From the evidence presented, I find and conclude as follows:

FINDINGS OF FACT:

1. The Notice of Lien was filed on 10/15/2013 in Book Mo 5235 at Page 526-528.
2. The Lis Pendens was filed on 05/22/2015.
3. The Summons and Complaint were filed on 05/22/2015.
4. Service was made upon all Defendant(s) as shown by the proof(s) of service filed herein.
5. The Defendant filed an Answer August 5, 2015.
6. The Defendant(s) are not in the Military Service of the United States of America, as contemplated under The Servicemembers Civil Relief Act, 50 U.S.C. § 501 et. seq. as shown by affidavit, certificate or order filed herein.
7. Attorney for the Plaintiff has fully complied with the South Carolina Supreme Court Administrative Order 2011-05-02-01 dated May 2, 2011.
8. On March 15, 2006 the Defendant(s) took title to the subject property located at 2 Tennwood Drive. The Defendant(s), by taking title to the subject property agreed to the governing

documents for Plaintiff, which are of record herein.

9. The titleholder(s) of record in and to the subject property as of the filing of the lis pendens in this action is/are Daniel B. Albert.

10. The Declaration of Covenants, Conditions and Restrictions for Treyburn Subdivision were filed March 24, 2005 in Book 2136 at Page 320 in the Office of The Greenville County Register of Deeds.

11. Payment of assessments has not been made as provided for by the Declaration, and the Plaintiff has elected to require immediate payment of the entire amount due thereon. Plaintiff placed it in the hands of the attorney herein for collection by filing a Notice of Lien for unpaid assessments and initiating a foreclosure of that lien.

12. Defendant's defense related to the August 5, 2013 payment plan is not persuasive. I am inclined to believe that Defendant did not return a written acceptance of the offer. Irrespective of whether or not an enforceable contract was created by the parties, Defendant's testimony indicates that he was in breach of any such agreement by not adhering to the payment schedule since his first and third payments were late according to the schedule set forth in the letter; therefore the prior breach of Defendant bars his defense that Plaintiff breached its agreement to forbear from taking legal action.

13. Defendant's argument that the Plaintiff lacked the requisite corporate authority to act is unpersuasive due to his testimony that he had numerous negotiations with representatives of the Plaintiff including his attempts to enter into a contract with the Plaintiff corporation (payment plan) and had consensually entered into a binding settlement of a previous legal dispute with the Plaintiff. It would be inequitable to allow him to apparently condone Plaintiff's authority in some circumstances, but bar Plaintiff's claims when it does not suit Defendant's desired outcome.

14. The sum of \$1,650.00 is the agreed upon Plaintiff's attorney flat-fee and based upon the testimony and evidence presented at trial. 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.

15. After all payments received by the Plaintiff have been credited, the amount due and owing with interest at the rate provided in the Declaration, and other costs and expenses of the within action, including an attorney's fee, secured by the Declaration, is as follows:

<b>Description</b>	<b>Amount</b>
Regular Assessments	\$2,639.46
Administrative Fees/Collection Costs	\$55.00
MTB Legal Fees	\$1,650.00 <sup>1</sup>
Late Fees	\$156.57
MTB Costs	\$505.00
Previous Legal Fees/Court Costs (lien & warning letter attorney David Wilson)	\$215.00
Total	\$5,221.03

Interest for the period from the date shown in (b) above through the date of this judgment at above stated rate to be added to the above stated "Total Debt" to comprise the amount of the judgment debt entered herein and interest after the date of judgment at the rate of 7.75 % per annum (pursuant to the terms of the Declaration) on the judgment debt should be added to such judgment debt to comprise the amount of Plaintiff's debt secured by the Declaration through the date to which such interest is computed.

16. Plaintiff is seeking the usual foreclosure of the property and has expressly waived the right to a personal or deficiency judgment.

**IT IS THEREFORE ORDERED THAT:**

1. There is due the sum of \$5,221.03, as set out in the Findings of Fact *supra*, together with interest at the rate provided herein on the balance of principal from the date aforesaid to the date hereof.
2. The amount due in the preceding paragraph (the "Final Total Debt" as set out in the Findings of Fact *supra*) shall accrue interest at the rate of the respective Declaration rate per annum and together with such interest shall constitute the total judgment debt due the Plaintiff.
3. The amount of the judgment shall be subject to increase to permit the Plaintiff to recover additional costs, commissions and expenses not included in the minimum deposit previously made in compliance with S.C. Code Ann. §14-11-310 (1976). It may also increase to include supplemental compensation for attorney's services not contemplated by the initial fee award. Jurisdiction over the fee award and total debt is reserved to facilitate the assessment and payment of any such costs and/or supplemental compensation. Such additional costs, commissions and expenses may be established by affidavit.

<sup>1</sup> In the proposed Order submitted by counsel for Plaintiff, Plaintiff sought attorney's fees of \$22,710.00. At trial, Defendant objected to attorney fees. Post-trial Defendant objected both to attorney's fees and the amount sought in post-trial materials, stating that the evidence presented sought and supported only a flat fee of \$1,650.00.

The Court has reviewed the transcript. In particular, p. 58, lines 13-16 (Ms. Dewese testifies to a flat fee of \$1,650.00 plus costs), p. 146, p. 154-155 and p. 159. As such, the Court finds the evidence submitted at trial supports an award of only \$1,650.00, together with costs.

4. The Defendant is liable for the aforesaid judgment debt including interest at the rate of 7.75 % per annum shall on or before the date of sale of the property hereinafter described, pay to the Plaintiff, or 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 time herein indicated, the premises described in the Complaint, as hereinafter set forth, shall be sold by the at public auction, at the Greenville County Courthouse, in the City of , County and State aforesaid on some convenient sales day hereafter (and should the regular day of judicial sales fall on a legal holiday, then and in such event, the sales day shall be on the next business day succeeding such holiday), on the following terms, that is to say:

a. For cash: The will require a deposit of 5% on the amount of the bid (in cash or equivalent) same to be applied to purchase price if compliance is made, but in the event compliance is not made, the deposit may be forfeited without further hearing and applied first to costs of the action and then to plaintiff's debt. Should the successful bidder at the regularly conducted sale fail or refuse to either make the required deposit at time of bid or comply with the other terms of the bid within 20 days, then the property may be re-sold on the same terms and conditions on the same or some subsequent Sales Day, but at the risk of the defaulting bidder(s).

b. Interest on the balance of the bid shall be paid through the day of compliance at the rate of 7.75 %.

c. The sale shall be subject to taxes and assessments, existing easements and restrictions and easements and restrictions of record, and any other senior encumbrances. Specifically, this sale is subject to a senior mortgage held by Bank of America recorded in Book 4531 at Page 238.

d. Purchaser to pay for any statutory commission on sale from the proceeds of the final bid amount.

e. Purchaser to pay for deed preparation, costs of recording the deed, and transfer taxes on the deed.

6. The bidding will not remain open after the date of sale and compliance with the bid may be made immediately.

7. Plaintiff may waive any of its rights, including its right to a deficiency judgment in accordance with Rule 71, South Carolina Rules of Civil Procedure, prior to sale.

8. The Master in Equity will, by advertisement according to law, give notice of the time and place of such sale and the terms thereof and will execute to the purchaser, or purchasers, a deed to the premises sold. The 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 20 days after date of sale, then the Master in Equity may advertise the said premises for

sale on the next or some other subsequent sales day at the risk of the highest bidder and so from time to time thereafter until a full compliance shall be secured.

9. If Plaintiff be the successful bidder at the said sale, for a sum not exceeding the amount of costs, expenses and the indebtedness of Plaintiff in full, Plaintiff may pay to the only the amount of the costs and expenses crediting the balance of the bid on Plaintiff's indebtedness.

10. The Master in Equity will apply the proceeds of the sale as follows:

FIRST: To the payment of the amount of the costs and expenses of this action, including any Guardian Ad Litem fee or fees of attorneys appointed under Order of Court.

NEXT: To the payment to the Plaintiff or Plaintiff's attorney of the amount of Plaintiff's debt and interest (including attorney fees) or so much thereof as the purchase money will pay on the same;

NEXT: Any surplus should be held pending further Order of this court.

11. The Defendant named herein, and all persons whosoever claiming under Defendant, are forever barred and foreclosed of all right, title, interest, equity of redemption or lien in the said premises so sold, or any part thereof.

12. In accordance with Rule 77(d), SCRCP, the Clerk of Court shall serve a notice of entry of this Judgment of Foreclosure upon all parties not in default for failure to appear herein.

13. The deed of conveyance made pursuant to said sale shall contain the names of only the first-named Plaintiff and the first-named Defendant(s), and the Defendant(s) who was/were the titleholder(s) of the property at the time of the filing of the notice of pendency of the within action, and the name of the grantee; and the Register of Deeds/Clerk of Court is authorized to omit from the indices pertaining to such conveyance the names of all parties not contained in said deed.

14. The undersigned will retain jurisdiction to do all necessary acts incident to this foreclosure including, but not limited to, the issuance of a Writ of Assistance.

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

All that certain piece parcel or lot of land lying and being in the County of Greenville, State of South Carolina being shown and designated as Lot 184 on plat prepared by Freeland & Associates Inc. dated November 11, 2004 entitled TREYBERN PHASE IB SECTION 2 recorded in the RMC Office for Greenville County SC in Plat Book 49-D at Page 90. Reference is hereby made to said plat for a more complete metes and bounds description thereof.

This being the same property given to Daniel B. Albert by deed of Centex Homes dated 03/15/2006 and recorded in the Greenville County Register of Deeds Office on 03/15/2006 in Book 2194 at Page 1097-1098.

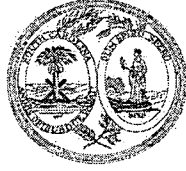
Property Address: 2 Tennwood Drive

TMS: 0445020104200

JUDGE'S ELECTRONIC SIGNATURE PAGE TO FOLLOW

ELECTRONICALLY FILED - 2018 Feb 08 1:50 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2303300





Greenville Common Pleas

**Case Caption:** Treybern Homeowners Association Inc vs. Daniel B Albert

**Case Number:** 2015CP2303300

**Type:** Master/Order/Foreclosure & Sale and Form 4

And It Is So Ordered!

s/ Judge Charles B. Simmons, Jr. (3023)

Electronically signed on 2018-02-08 13:20:44 page 9 of 9

ELECTRONICALLY FILED - 2018 Feb 08 1:50 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2303300