

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master-in-Equity

Appellate (Court of Appeals) Case No. 2016-000099

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S.C. SUPREME COURT

U.S. Bank, NA, as trustee relating to the Chevy Chase Funding, LLC Mortgage Backed
Certificates, Series 2004-B, ...Plaintiff,

v.

Alyce F. Otto, Individually; Alyce F. Otto Trustee Under Declaration of Trust of Alyce
F. Otto dated the 17th of November 2009; TD Bank, NA; The United States of America,
acting by and through its agency, the Internal Revenue Service; Laura Kerhulas Giese,
as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated
May 25, 2004; Mark Warner Kerhulas, as Co-Trustee of the Theodore Ernest Kerhulas
Trust Under Declaration of Trust dated May 25, 2004; Jackson L. Munsey, Jr.;
Citibank, NA, ...Defendants,

Of whom Jackson L. Munsey, Jr. is the.....Petitioner,

and

U.S. Bank, NA and Alyce F. Otto are the.....Respondents.

Alyce F. Otto, Trustee.....Plaintiff,

v.

Jackson L. Munsey, Jr.....Defendant.

APPENDIX – VOLUME I

Andrew S. Radeker
S.C. Bar No. 73743
Harrison, Radeker & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Petitioner

Sarah P. Spruill
S.C. Bar No. 68337
Haynsworth Sinkler Boyd, P.A.
Post Office Box 2048
Greenville, South Carolina 29602
(864) 240-3200
Attorney for Respondent Alyce F. Otto

Erica G. Lybrand
S.C. Bar No. 79052
Rogers Townsend & Thomas, PC
Post Office Box 100200
Columbia, South Carolina 29210
(803) 771-7900
Attorney for Respondent U.S. Bank, N.A.

Kenneth C. Anthony, Jr.
S.C. Bar No. 404
The Anthony Law Firm, PA
Post Office Box 3565
Spartanburg, South Carolina 29304
(864) 582-2355
Attorney for Respondent Alyce F. Otto

Richard C. Keller
S.C. Bar No. 74094
Burr & Forman LLP
420 North 20th Street, Suite 3400
Birmingham, AL 35203
(205) 251-3000
Attorney for Respondent U.S. Bank, N.A.

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**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**

U.S. Bank, NA, as Trustee relating to the Chevy Chase
Funding, LLC Mortgage Backed Certificates, Series
2004-B, Plaintiff,

v.

Alyce F. Otto, Individually; Alyce F. Otto Trustee Under
Declaration of Trust of Alyce F. Otto dated the 17th of
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America, acting by and through its agency, the Internal
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of the Theodore Ernest Kerhulas Trust Under Declaration
of Trust dated May 25, 2004; Mark Warner Kerhulas, as
Co-Trustee of the Theodore Ernest Kerhulas Trust Under
Declaration of Trust dated May 25, 2004; Jackson L.
Munsey, Jr.; Citibank, N.A., Defendants,

Of whom Jackson L. Munsey, Jr. is the Appellant,

and

U.S. Bank, NA and Alyce F. Otto are the Respondents.

Alyce F. Otto, Trustee, Plaintiff,

v.

Jackson L. Munsey, Jr., Defendant.

Appellate Case No. 2016-000099

Appeal From Spartanburg County
Gordon G. Cooper, Master-in-Equity

Unpublished Opinion No. 2018-UP-075
Submitted January 1, 2018 – Filed February 7, 2018

AFFIRMED

David Richard Price, Jr. and Samuel Barton Tooker, both
of David R. Price, Jr., P.A., of Greenville, for Appellant.

Kenneth C. Anthony, Jr., of The Anthony Law Firm,
P.A., of Spartanburg, and Sarah Patrick Spruill, of
Haynsworth Sinkler Boyd, P.A., of Greenville, both for
Respondent Alyce F. Otto.

Richard Carlton Keller, of Burr & Forman, LLP, of
Birmingham, AL, and Erica Greer Lybrand, of Rogers
Townsend & Thomas, PC, of Columbia, both for
Respondent U.S. Bank, NA.

PER CURIAM: Jackson Munsey appeals the Master-in-Equity's orders denying his motion to set aside default, denying his motion for relief from default, and judgment of foreclosure and sale, arguing the Master-in-Equity erred by (1) refusing to relieve him from entry of default and (2) finding that he had no equitable interest in the property and no equitable right of redemption. We affirm¹ pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to Munsey's first argument: *Williams v. Vanvolkenburg*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994) ("Whether good cause is established is within the sound discretion of the [Master-in-Equity]."); *Stark Truss Co., Inc. v. Superior Const. Corp.*, 360 S.C. 503, 510, 602 S.E.2d 99, 102 (Ct. App. 2004) ("Rule 55(c), SCRCR, allows the circuit court to set aside an entry of default 'for good cause

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

shown." (quoting Rule 55(c), SCRCPP); *Sundown Operating Co., Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 607-08, 681 S.E.2d 885, 888 (2009) ("This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice. Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted.").

2. As to Munsey's second argument: *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989) ("Our scope of review for a case heard by a Master-in-Equity who enters a final judgment is the same as that for review of a case heard by a circuit court without a jury."); *Fox v. Moultrie*, 379 S.C. 609, 613, 666 S.E.2d 915, 917 (2008) ("In an action in equity, tried with reference to a [M]aster[-in-Equity], this [c]ourt reviews the evidence and determines the facts according to its own view of the preponderance of the evidence, though it is not required to disregard the findings of the master."); *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 173-174, 568 S.E.2d 361, 364 (2002) ("[C]ourts of equity can relieve a defaulting purchaser from the strict forfeiture provision in an installment land contract and provide the opportunity for redemption when equity so demands."); *Lewis* at 171, 568 S.E.2d at 363 ("Basic contract law provides that when a contract is clear and unambiguous, the language alone determines the contract's force and effect. It is not the function of the court to rewrite contracts for parties." (citation omitted)); *Lewis* at 174, 568 S.E.2d at 364 n.5 (2002) (noting "[a] variety of case-specific factors should be considered to determine if redemption is equitable under the circumstances[,] including the amount of the purchaser's equity, the length of the default period, the number of defaults, the value of improvements to the property, the adequacy of the property's maintenance, amount of forfeiture, reason for delay in payment, the speed in which equity is sought, the amount of money the purchaser would forfeit compared to the purchase price, and the relationship of the monthly payments to the fair rental value of the property)."

AFFIRMED.

WILLIAMS, THOMAS, and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master-in-Equity Judge

RECEIVED

Case No.: 2012-CP-42-3549
2012-CP-42-2874

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SC Court of Appeals
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Appellate Case No. 2016-000099

U.S. Bank, NA, as trustee
relating to the Chevy Chase
Funding, LLC Mortgage
Backed Certificates, Series
2004-B,

Plaintiff,

v.

Alyce F. Otto, Individually;
Alyce F. Otto Trustee Under
Declaration of Trust of Alyce
F. Otto dated the 17th of
November 2009; TD Bank,
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through its agency, the
Internal Revenue Service;
Laura Kerhulas Giese, as Co-
Trustee of the Theodore
Ernest Kerhulas Trust Under
Declaration of Trust dated
May 25, 2004; Mark Warner
Kerhulas, as Co-Trustee of the
Theodore Ernest Kerhulas
Trust Under Declaration of
Trust dated May 25, 2004;

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Jackson L. Munsey, Jr.;
Citibank, NA,

Defendants,

Of whom Jackson L. Munsey,
Jr., is the

Appellant.

and

U.S. Bank, NA and Alyce F.
Otto are the

Respondents.

Alyce F. Otto, Trustee,

Plaintiff,

v.

Jackson L. Munsey, Jr.,

Defendant,

APPELLANT'S PETITION FOR REHEARING

Appellant hereby petitions for rehearing in accordance with Rule 221 and 240 of the South Carolina Appellate Court Rules. Appellant makes this Motion on the grounds that:

- I. THE COURT'S OPINION DOES NOT SATISFY THE REQUIREMENTS OF RULE 220, *SCACR*.

The court's opinion in this case is a memorandum opinion without explanation of the reasons for affirming the lower court, just a string of citations and parentheticals. The authority for doing that given in the opinion (as is given in many unpublished opinions issued by this court), is Rule 220(b), *SCACR*. That Rule states as follows:

(b) Decision by the Court. In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be

preserved in the record of the case. This rule does not apply to the following:

(1) *The Supreme Court* may file a memorandum opinion dismissing an appeal, affirming or reversing the judgment appealed from, or granting other appropriate relief when, in unanimous decision, *the Supreme Court* determines that a published opinion would have no precedential value and any one or more of the following circumstances exists and is dispositive of issues submitted to the Court for decision: (A) that a judgment of the trial court is based on findings of fact which are or are not clearly erroneous; (B) that the evidence to support a jury verdict is or is not insufficient; (C) that the order of an administrative agency is or is not supported by such quantum of evidence as prescribed by the statute or law under which judicial review is permitted; or (D) that no error of law appears.

(2) The Court of Appeals need not address a point which is manifestly without merit.

Rule 220(b), *SCACR* (emphasis added).

Per Rule 220(b)(1), *SCACR*, it is only the Supreme Court that may issue a memorandum opinion that does not provide the reason for the appellate court's decision as to every point distinctly stated in the case. The Appellant respectfully submits that the reason it is important for the Court of Appeals to provide the reason for its decision as to every point stated in the case is that, upon the invocation of the certiorari process, our Supreme Court may well have a need to know why this court decided an issue the way it did, so that the Supreme Court can fully evaluate whether certiorari is warranted.

The memorandum opinion in this case merely recites much of the same case law cited by Plaintiff, without addressing the merits of Appellant's arguments. The Appellant therefore cannot know the precise points where the appellate court has rejected his view of the application of the same law, which prejudices him by depriving Appellant of a sufficient reference on which to base his petition for writ of certiorari. It also prevents

the Appellant from adequately targeting this Petition for Rehearing without rehashing each of the arguments set forth in his Appellate Brief(s).

II. THE TRIAL COURT'S DECISION NOT TO SET ASIDE THE ENTRY OF DEFAULT WAS CONTROLLED BY AN ERROR OF LAW AS TO WHETHER A SATISFACTORY EXPLANATION EXISTED AS TO THE REASONS FOR DEFAULT.

Certainly, it is well-settled that “[w]hether good cause is established [to set aside entry of default] is within the sound discretion of the [Master-in-Equity].” Stark Truss Co., Inc. v. Superior Const. Corp., 360 S.C. 503, 510, 602 S.E.2d 99, 102, (Ct. App. 2004). The circuit court’s decision is therefore subject to an abuse of discretion standard on appeal. Regions Bank v. Owens, 402 S.C. 642, 647, 741 S.E.2d 51, 54 (Ct. App. 2013). However, “[a]n abuse of discretion occurs when the judgment is controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support.” *Id.* In the present case, the Master-in-Equity’s refusal to set aside entry of default was based on an error of law.

Rule 55(c) of the *South Carolina Rules of Civil Procedure* provides that “[f]or good cause shown the court may set aside an entry of default . . .” Rule 55(c), *SCRPC*. As noted in this court’s memorandum opinion, “[t]his standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice.” Sundown Operating Co., Inc. v. Intedge Industries, Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). Then, once the party seeking relief from default has put forth a satisfactory explanation for default, the trial court must consider whether good cause exists to set aside the default, which can include an analysis of the factors outlined in

Wham v. Shearson Lehman Bros., Inc. *Id.*, at 607-608, 681 S.E.2d at 888.

The threshold question for the trial court should have been whether the Appellant could “provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice.” See Sundown Operating Co., Inc. v. Intedge Industries, Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009)). Had the trial court properly made this initial inquiry, it would have found that there is ample evidence in the record that the Appellant provided an explanation for the default. Appellant filed two motions requesting relief from default and attached affidavits and supporting documentation to each. (See R. pp. 297-303, and R. pp. 306-401). Appellant explained exactly why the default occurred: there were numerous sincere attempts by Appellant to quickly resolve both actions amicably. The trial court also would have necessarily found that it served the interests of justice to grant Appellant’s requested relief as his Answer, Counterclaims, and Cross-Claims enumerated factual allegations that, if true, would indicate that Appellant did not default on his obligations pursuant to the Contract for Deed. (See R. pp. 47-81). In addition, Appellant’s Answer, Counterclaims, and Cross-Claims alleged that Respondent Otto’s conduct warranted a judicial accounting and an award of damages. (*Id.*).

Unfortunately, the trial court did not properly make this initial inquiry. It conflated two separate issues that affect a litigant’s ability to be relieved from default: (1) the initial explanation for the default; and (2) whether good cause exists to set aside default. As a result, the trial court incorrectly applied the fact-specific reasoning of Regions Bank v. Owens to the Appellant’s case, and the trial court determined that

Appellant had failed to “put forth a satisfactory explanation for the default” and so it determined that it need not even consider the Wham factors to determine whether good cause existed to set aside default. (See R. p. 103, lines 1-10. See also R. pp. 411-415). Since the trial court did not apply the correct analysis, its ruling was controlled by an error of law.

The trial court made its error of law when it adopted Respondent U.S. Bank’s argument that Appellant’s circumstances were similar to the party seeking relief from default in Regions Bank and so the trial court did not need to consider the Wham factors to determine whether good cause was shown to set aside entry of default, based the Court of Appeals’ ruling in Regions Bank. (See R. p. 86, lines 4-25). In so doing, the trial court incorrectly applied the law in Regions Bank to the Appellant’s case by relying on facts specific to a finding that good cause did not exist to set aside default in Regions Bank, to determine that Appellant had failed to satisfactorily explain his default. (See R. pp. 85-88).

Simply put, the trial court inappropriately applied fact-specific case law addressing the good cause standard to whether there existed a satisfactory explanation for default. As a result, the trial court failed to properly apply the Wham factors to consider whether the facts specific to the present case would yield a different finding than they did in Regions Bank as to whether good cause existed to support Appellant’s request for relief from entry of default. As the court’s order refusing to grant Appellant relief from an entry of default is controlled by an error of law, it must be vacated. See Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989).

As “Rule 55(c) should be liberally construed to promote justice and dispose of cases on the merits,” the trial court erred by failing to rule that Appellant’s actions constituted a satisfactory explanation for default and that it would have served the interests of justice to see the multitude of disputes in the Appellant’s cases resolved by an impartial factfinder and on the merits. *See Melton v. Olenik*, 379 S.C. 45, 54, 664 S.E.2d 487, 492 (Ct. App. 2008). The trial court should have determined that there existed a satisfactory explanation for Appellant’s default in the combined action. It then should have ruled on whether good cause existed to let Appellant out of default. This failure to correctly apply the facts to the appropriate inquiry constitutes an error of law and should be reversed. The appellate court’s memorandum opinion also fails to set forth reasons why a proper analysis does not call for relief from entry of default.

III. IF A PROPER ANALYSIS WERE MADE, THE APPELLANT SHOWED GOOD CAUSE TO SET ASIDE DEFAULT.

The rule governing relief from default “is liberally construed to promote justice and dispose of cases on the merits.” *Dixon v. Besco Engineering, Inc.*, 320 S.C. 174, 178, 436 S.E.2d 636, 638 (Ct. App. 1995). Had the trial court correctly found that Appellant had provided a satisfactory explanation for the default, it should have applied the Wham factors to the specific facts of the case. If it had done so, it would have found that Appellant showed good cause to set aside entry of default.

In contesting Appellant’s right to entry of default, Respondent U.S. Bank argued to the trial court that Appellant’s default in this case was sufficiently analogous to the defendant’s default in Regions Bank v. Owens for the trial court to refuse to set aside the default. (See R. pp. 411-415). The trial court appeared to rely on Respondent U.S.

Bank's arguments in denying Appellant's requested relief. (See R. p. 86, line 5-p.88 line 16). However, the facts in Regions Bank are readily distinguishable from the facts in the instant matter.

In Regions Bank, the defendant Owens and his co-defendant Paddy were served with a mortgage foreclosure action, and Owens failed to file an answer. Regions Bank v. Owens, 402 S.C. 642, 645, 741 S.E.2d 51, 53 (Ct. App. 2013). Owens subsequently moved to be let out of default just prior to the foreclosure hearing. Id. Owens claimed that he failed to file responsive pleadings because he believed Paddy was going to file an answer on his behalf. Id., at 646, 53. The Court of Appeals concluded that Owens did not meet the "good cause" standard set forth in Rule 55(c) because he failed to monitor the progress of his case by merely relying on an alleged agreement he had with Paddy that Paddy would file an answer on his behalf. Id., at 648, 54. The Court of Appeals in Regions Bank noted that Owens "presented no evidence he took any steps to protect himself by contacting either Paddy or Paddy's attorney to confirm an answer would be filed on his behalf." Id.

In the instant matter, Appellant maintained constant contact with Respondent Otto's counsel in relation to both actions. Appellant's systematic and sustained attempts to amicably resolve the pending actions, by negotiating with Respondent Otto's counsel and by obtaining a reinstatement amount from Respondent U.S. Bank, are clear evidence that Appellant was diligent in his attempt to protect himself and resolve the pending actions. (See R. pp. 311-318 and R. pp. 349-401). Furthermore, unlike Owens who was a borrower on the subject mortgage loan, Appellant was reliant on Respondent Otto to

work towards a solution to the mortgage foreclosure, because Respondent U.S. Bank would not communicate with Appellant. (See R. pp. 315-316, ¶ 17). Moreover, unlike Owens, who did not move to be let out of default until just prior to the dispositive hearing, the Appellant filed his Answer in December 2012, and moved to be let out of default in January 2013, shortly after defaulting on his obligation to file an Answer to Complaints served on July 27 and August 31, 2012. The Appellant's delay in filing an Answer was insignificant considering the matter did not come to trial until November 2015.

"An abuse of discretion [not only] occurs when the judgment is controlled by some error of law [it also occurs] when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." *Id.*, at 647, 54. For the reasons set forth in Appellant's brief, his motion for relief from default satisfies the three Wham factors, and so there was no factual basis to support a finding that good cause did not exist to warrant setting aside default. Therefore, the trial court erred in refusing to grant Appellant's Motion to Set Aside Default and Appellant's Motion for Relief from Default in the consolidated action. The appellate court's memorandum opinion does not identify which facts, if any, provide a basis for the court's finding that good cause did not exist.

IV. THE APPELLATE COURT DOES NOT APPEAR TO HAVE CONSIDERED THE CLEAR EVIDENCE OF APPELLANT'S EQUITABLE INTEREST IN THE PROPERTY.

As noted in the memorandum opinion, "[i]n an action in equity, tried with reference to a [M]aster[-in-Equity], this [c]ourt reviews the evidence and determines the facts according to its own view of the preponderance of the evidence, though it is not

required to disregard the findings of the master.” Fox v. Moultrie, 379 S.C. 609, 613, 666 S.E.2d 915, 917 (2008). As argued by Appellant and conceded by this court in the memorandum opinion, “courts of equity can relieve a defaulting purchaser from the strict forfeiture provision in an installment land contract and provide the opportunity for redemption when equity so demands.” Lewis v. Premium Inv. Corp., 351 S.C. 167, 173, 568 S.E.2d 361, 364 (2002). The memorandum order further sets forth a number “of case-specific factors that should be considered to determine if redemption is equitable under the circumstances.”

Despite having a standard of review that requires it to review the evidence and determine the facts according to its own view of the evidence, the memorandum opinion in this case does not make any findings of fact. It also does not address the application of its findings of fact to any of the case-specific factors enumerated in the order. Instead, the memorandum order disposes of Appellant’s claim to an equitable right of redemption, without mention of the vast sums of money that the record reflects that Appellant paid to Respondent Otto or paid on her behalf.

Appellant respectfully submits that a fair view of the evidence in the record demonstrates beyond a preponderance that Appellant had substantial financial equity in the property. In aggregate, Appellant paid a deposit of \$10,000.00 and \$43,076.84 to Respondent Otto (See R. pp. 273-277); \$14,601.71 to the IRS on Respondent Otto’s behalf (See R. pp. 273-277. See also R. p. 144, line 21-p. 145 line 3); \$5,978.87 in real property taxes for calendar year 2010 on Respondent Otto’s behalf (See R. pp. 273-277 and R. pp. 249-268); \$5,590.47 for other assessments on Respondent Otto’s behalf (See

R. pp. 273-277 and R. pp. 249-268); \$50,839.96 for reinstatement of the arrears, penalties and fees due the first mortgagee (See R. pp. 273-277 and R. pp. 249-268); at least \$15,723.00 on the first mortgage, which was subsequently returned to Respondent Otto, held by her counsel and not returned to Appellant (See R. pp. 278-280); \$6,044.10 to Respondent Otto's counsel to be held in trust during the negotiation process (See R. p. 20); and approximately \$16,101.68 in principal on the second mortgage (See R. pp. 249-268 and R. p. 20). Appellant may have even paid a greater amount to the first mortgagee, but Otto was never required by the trial court to account for the funds. Nevertheless, the trial record is clear that Appellant would forfeit at least \$167,956.63 if the foreclosure of the first mortgagee and bond for title were to proceed.

The record is also clear that the trial court refused from the outset to consider the other case-specific Lewis factors set out by the appellate court in its memorandum opinion. The trial court repeatedly sustained objections to questions by Appellant's attorney designed to address the factors, on the basis that they were outside the scope of inquiry as to damages that is ordinarily available at a default hearing on damages. The trial court would not permit Appellant to examine the first mortgagee regarding bank statements sent to the borrower (See R. pp. 117, l. 21-118, l. 22), which was relevant to the length of default period, the number of defaults, and the reason for delay for payment. The trial court would not even permit the Appellant to examine the first mortgagee as to specific line items of the debt claimed by the first mortgagee, such as force-placed insurance (See R. pp. 119, l. 2-120, l. 5). The trial court also would not permit the Appellant to examine Otto as to terms of the Contract for Deed that were clearly relevant

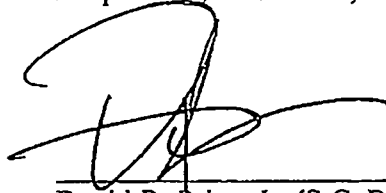
to whether Appellant was entitled to stop making payments under the terms of the Contract for Deed (See pp. 152, l. 16-53, l. 6).

The trial court appears to have refused to consider evidence relating to the Lewis factors based on an erroneous belief that a party that is procedurally in default (as opposed to default under a loan) has waived its equitable right of redemption (See p. 120, l. 4-121, l. 11; pp. 130, l. 16- 132, l. 21). The trial court simply ruled that “there was no equity of redemption” without considering or even allowing Appellant to present evidence addressing any of the case-specific factors set forth in the memorandum opinion (See R p. 131, ll. 15-16). The Appellant would therefore respectfully submit that the trial court did not find that Appellant lacked an equitable right of redemption after a careful application of the Lewis factors to the facts of this case, but because the trial court mistakenly believed that the equity of redemption is dictated solely by comparing the amount of payments made by Appellant against the value of the property instead of against the purchase price (See R. pp. 154, l. 16-155, l. 5).

To terminate Appellant’s rights to the property without first allowing him an opportunity to redeem the Contract for Deed by paying the entire amount due would be inequitable and would amount to an unlawful deprivation of a substantial right. It was therefore error for the trial court to deny Appellant his equitable right to redemption, without permitting Appellant an opportunity to present evidence addressing the Lewis factors set out in the memorandum opinion. It further appears that the appellate court also failed or refused to apply the case-specific Lewis factors to this case, since the memorandum order does not provide any reasons why Appellant’s payments totaling at

least \$167,956.63 were not sufficient to create an equitable right of redemption in the property.

Respectfully Submitted,



David R. Price, Jr. (S.C. Bar # 75140)
Samuel B. Tooker (S.C. Bar # 78999)
DAVID R. PRICE, JR., P.A.
318 West Stone Avenue (29609)
Post Office Box 2446
Greenville, South Carolina 29602-2446
(864) 271-2636 office
(864) 271-2637 fax
David@GreenvilleLegal.com
Sam@GreenvilleLegal.com
Attorneys for Appellant

Greenville, South Carolina

Date: 2/21/2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master-in-Equity Judge

Case No.: 2012-CP-42-3549
2012-CP-42-2874

Appellate Case No. 2016-000099

U.S. Bank, NA, as trustee
relating to the Chevy Chase
Funding, LLC Mortgage
Backed Certificates, Series
2004-B,

Plaintiff,

v.

Alyce F. Otto, Individually;
Alyce F. Otto Trustee Under
Declaration of Trust of Alyce
F. Otto dated the 17th of
November 2009; TD Bank,
NA; The United States of
America, acting by and
through its agency, the Internal
Revenue Service; Laura
Kerhulas Giese, as Co-Trustee
of the Theodore Ernest
Kerhulas Trust Under
Declaration of Trust dated May
25, 2004; Mark Warner
Kerhulas, as Co-Trustee of the
Theodore Ernest Kerhulas
Trust Under Declaration of
Trust dated May 25, 2004;
Jackson L. Munsey, Jr.;
Citibank, NA,

Defendants,

Of whom Jackson L. Munsey,
Jr., is the

Appellant.

and

U.S. Bank, NA and Alyce F.
Otto are the

Respondents.

Alyce F. Otto, Trustee,

Plaintiff,

v.

Jackson L. Munsey, Jr.,

Defendant,

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SC Court of Appeals

PROOF OF SERVICE

IT IS HEREBY CERTIFIED that a copy of the foregoing PETITION FOR REHEARING in this action was served upon: Erica Greer Lybrand, Esq., and Richard C. Keller, Esq., counsel for Respondent U.S. Bank, NA as Trustee relating to the Chevy Chase Funding, LLC Mortgage Backed Certificates, Series 2004-B; Kenneth C. Anthony, Jr., Esq., and Sarah Patrick Spruill, Esq., counsel for Respondent Alyce F. Otto; Erin Culbertson, Esq., counsel for Appellant Jackson L. Munsey, Jr., by placing copies of same in the United States Mail this date, with sufficient postage affixed thereto, addressed as follows:

Erica Greer Lybrand, Esq.
PO Box 100200
Columbia, SC 29210
Attorneys for Respondent U.S. Bank, NA

Kenneth C. Anthony, Jr., Esq.
PO Box 3565
Spartanburg, SC 29304
Attorney for Respondent Alyce F. Otto

Richard Carlton Keller, Esq.
420 North 20th Street
Suite 3400
Birmingham, AL 35203
Attorney for Respondent U.S. Bank, NA

Sarah Patrick Spruill, Esq.
PO Box 2048
Greenville, SC 29602
Attorney for Respondent Alyce F. Otto

Erin Culbertson, Esq.
114 Manly St.
Greenville, SC 29601
Attorney for Appellant



David R. Price, Jr. (S.C. Bar # 75140)
Samuel B. Tooker (S.C. Bar # 78999)
DAVID R. PRICE, JR., P.A.
318 West Stone Avenue (29609)
Post Office Box 2446
Greenville, South Carolina 29602-2446
(864) 271-2636 office
(864) 271-2637 fax
David@GreenvilleLegal.com
Sam@GreenvilleLegal.com
Attorneys for the Appellant Jackson L.
Munsey, Jr.

Greenville, SC

Date:

2/21/2008

The South Carolina Court of Appeals

U.S. Bank, NA, as Trustee relating to the Chevy Chase
Funding, LLC Mortgage Backed Certificates, Series
2004-B, Plaintiff,

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of Trust dated May 25, 2004; Mark Warner Kerhulas, as
Co-Trustee of the Theodore Ernest Kerhulas Trust Under
Declaration of Trust dated May 25, 2004; Jackson L.
Munsey, Jr.; Citibank, N.A., Defendants,

Of whom Jackson L. Munsey, Jr. is the Appellant,

and

U.S. Bank, NA and Alyce F. Otto are the Respondents.

Alyce F. Otto, Trustee, Plaintiff,

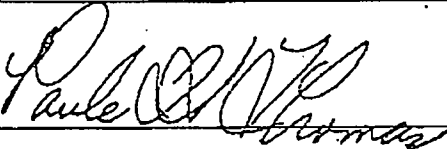
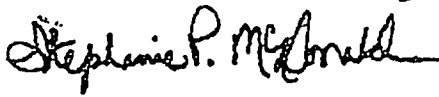
v.

Jackson L. Munsey, Jr., Defendant.

Appellate Case No. 2016-000099

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.

	J.
	J.
	J.

Columbia, South Carolina

FILED

April 4, 2018

cc:

David Richard Price, Jr.
Samuel Barton Tooker
Kenneth C. Anthony, Jr.
Erica Greer Lybrand
Sarah Patrick Spruill
Richard Carlton Keller
The Honorable Gordon G. Cooper

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master-in-Equity Judge

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DEC 21 2016
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Otto are the

Respondents.

Alyce F. Otto, Trustee,

Plaintiff,

v.

Jackson L. Munsey, Jr.,

Defendant,

FINAL BRIEF OF APPELLANT

David R. Price, Jr. (S.C. Bar # 75140)
Samuel B. Tooker (S.C. Bar # 78999)
DAVID R. PRICE, JR., P.A.
318 West Stone Avenue (29609)
Post Office Box 2446
Greenville, South Carolina 29602-2446
(864) 271-2636 office
(864) 271-2637 fax
David@GreenvilleLegal.com
Sam@GreenvilleLegal.com
Attorneys for the Appellant

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err by ruling that Appellant failed to put forth a satisfactory explanation for default and therefore err in failing to analyze whether good cause existed to set aside default?
2. Did the trial court err by failing to determine that Appellant showed good cause to set aside default?
3. Did the trial court err by finding that Appellant did not have an equitable interest in the property?
4. Did the trial court err by finding that Appellant did not have an equitable right to redeem the property?

STATEMENT OF CASE

Appellant Jackson Munsey, Jr. (hereinafter "Appellant") and Respondent Alyce F. Otto, individually and as trustee under declaration of trust of Alyce F. Otto, dated November 17, 2009 (hereinafter "Respondent Otto") entered into an installment land contract (hereinafter "Contract for Deed") for the purchase of a piece of property in Campobello, South Carolina (hereinafter "subject property") in March of 2011. (See R. pp. 249-268). Respondent Otto was the seller of the subject property, and Appellant was the purchaser of the subject property. (R. pp. 249-268.).

The terms of the Contract for Deed required that Appellant pay Respondent Otto a deposit payment of \$10,000.00; pay the monthly installments due to the subject property's first mortgagee, which totaled \$1,061,968.32; pay the monthly installments due to the subject property's second mortgagee, which totaled \$193,665.68; pay an IRS lien in the amount of \$14,601.71; pay real property taxes for calendar year 2010 in the amount of \$5,978.87; pay other assessments totaling \$5,090.47; pay for reinstatement of the arrears, penalties and fees due to the first mortgagee totaling \$50,839.96; pay Respondent Otto \$43,076.84 with adjustments for Respondent's pro rata portion of the 2011 taxes and assessments and deposit credit; and pay additional payments to Respondent Otto on a principal sum in the amount of \$13,000.00. (R. pp. 249-268. See also R. pp. 273-277).

Pursuant to the terms of the Contract for Deed, Appellant made monthly installment payments to the first mortgagee, Respondent U.S. Bank, NA, as trustee relating to the Chevy Chase Funding, LLC, Mortgage Backed Certificates, Series 2004-B (hereinafter "Respondent U.S. Bank") as well as to the second mortgagee. (R. pp. 47-81). As the mortgagor subject to Respondent U.S. Bank's mortgage, Respondent Otto had access to information and monthly statements related to the first mortgage, but Respondent Otto refused to give Appellant access to

this information. (Id.). Respondent U.S. Bank inexplicably began returning Appellant's payments on the first mortgage to Respondent Otto. (Id.). Respondent Otto failed to notify Appellant that his mortgage payments to Respondent U.S. Bank had been returned, or attempt to resolve the returned funds with U.S. Bank. (Id.).

Respondent Otto and Appellant met on April 15, 2012 to discuss the Appellant's repeated requests for tax information that Appellant needed regarding the first, second and third mortgages, and how Appellant could gain access to or monthly account statements regarding the first and second mortgage accounts. (See R. pp. 312-313, ¶¶ 5-6). At that point, Appellant learned that the first mortgage was in default. (R. pp. 311-317.). Respondent Otto and Appellant called the first mortgagee together and were told that Appellant's payments had been received by the first mortgagee, misallocated to principal, and certain payments had been returned by check to Respondent Otto. (Id.). The first mortgagee, Respondent U.S. Bank, agreed to reallocate the principal reduction payments to regular monthly payments and to properly apply the refunded payments once the payments were returned to the first mortgagee by Respondent Otto. (Id.).

Respondent Otto again failed to provide Appellant the requested tax and account information for any of the mortgages, which concerned Appellant and prompted him to search the Spartanburg County public index where he discovered several new liens filed against Respondent Otto. (See R. p. 313 ¶ 7). Pursuant to the Contract for Deed, Respondent Otto agreed that the subject property was not and would not become encumbered by any liens or judgments other than those acknowledged in the contract. (See R. pp. 47-81). Despite the terms of her contract with Appellant, Respondent Otto had permitted three IRS tax liens, totaling approximately \$58,000.00; a judgment against Respondent Otto in the amount of \$571,329.90;

and another judgment against Respondent Otto in the amount of \$12,396.66 to encumber the subject property, which directly contravened the Contract for Deed. (R. pp. 52-53.).

Appellant, now aware of Respondent Ottos' breach of the Contract for Deed, withheld the third mortgage payments due from Appellant directly to Respondent Otto until the encumbrances were cleared as allowed under the Contract for Deed. (See R. p. 313, ¶ 8. See also R. pp. 249-268). Appellant continued making payments on the first and second mortgage. (See R. p. 313, ¶ 9).

Respondent Otto served a Summons and Complaint on Appellant Munsey on July 27, 2012 (R. p. 314, ¶ 10). Respondent U.S. Bank served a Summons and Complaint on Appellant Munsey on August 31, 2012. (See R. p. 302 ¶ 4). Respondent U.S. Bank named Respondent Otto as a party to its action, as well. At that point, Appellant had been named a defendant in two separate actions related to the same piece of real property: Respondent Otto's action, 2012-CP-42-2874, and Respondent U.S. Bank's action, 2012-CP-42-3549.

Appellant began communicating with counsel for Respondent Otto with regards to a resolution of Otto's action on August 3, 2012. (See R. p. 314 ¶ 11). Regarding Respondent Otto's Complaint, Appellant's wife, who is a licensed attorney, asked Otto's counsel for an extension to file an Answer to Otto's Complaint on August 20, 2012. (See R. p. 315. ¶ 14, and R. pp. 349-401). Otto's counsel agreed to the extension on August 24, 2012 and said "I am not going to call time on you." (See R. pp. 371-372).

After being served by Respondent U.S. Bank, Appellant began communicating with Respondent Otto's counsel about amicably resolving U.S. Bank's case, as well. (See R. pp. 314-316, ¶¶ 12-20). Appellant and Respondent Otto, both Defendants in Respondent U.S. Bank's action, cooperated in an attempt to settle U.S. Bank's foreclosure action, as U.S. Bank would

not deal directly with Appellant regarding the mortgage loan without authorization from Otto, which Otto would not give. (See R. p. 312, ¶ 5, R. pp. 315-316, ¶ 17). Working through Respondent Otto's counsel, Appellant obtained a reinstatement amount from the original mortgagee to avoid litigation with Respondent U.S. Bank that was good through October 31, 2012. (See R. pp. 314-316, ¶¶ 12-20.). However, when it became apparent that Respondent Otto could not account for all payments made to first mortgagee by Appellant and subsequently refunded to Respondent Otto, Otto's counsel ceased communicating with Appellant in November 2012. (See Id.).

Appellant, realizing that the matter could not be resolved prior to litigation, contacted an attorney in November of 2012. (See R. p. 316 ¶ 20). Appellant was able to meet with and retain an attorney in December 2012, and filed responsive pleadings to both actions on December 21, 2012. (See R. pp. 316-317, ¶¶ 20-21).

On October 9, 2012, while Appellant was working to obtain a reinstatement amount, Respondent U.S. Bank filed a Certificate of Default and Non-Military Service affirming that Appellant Munsey was served with the Summons and Complaint in 2012-CP-42-3549. (See R. p. 406). Appellant filed his Answer, Counterclaims, and Cross-Claims on December 21, 2012 and served copies of the same on Respondent U.S. Bank, as Plaintiff, and Respondent Otto as cross-claim Defendant. (See R. pp. 297-303 and R. pp. 47-81). Appellant then moved to set aside default on January 29, 2013. (See R. pp. 297-303). In his Motion to Set Aside Default, the Appellant provided the court with background as to the circumstances surrounding the case and his default. (Id.)

Appellant's Motion to Set Aside Default was held simultaneously with his Motion to Consolidate the two pending cases. (See R. pp. 82-92). At that hearing, the Honorable Gordon

G. Cooper, Master-in-Equity for Spartanburg County, South Carolina, consolidated Respondent Otto's action with Respondent U.S. Bank's action. However, the trial court denied Appellant's Motion to Set Aside Default in the U.S. Bank action. (See R. pp. 7-8). The next day, Otto's counsel filed an Affidavit of Default in the Otto action, despite Otto's counsel's previous representation to Appellant that he was "not going to call time." (See R. p. 407. See also R. p. 371).

For two and a half years, the case remained pending before there was an adjudication on the merits. During this period of time, Respondent U.S. Bank deposed Appellant and Respondent Otto, and Appellant participated in the discovery process. The matter was set for final hearing on November 24, 2015, and so Appellant filed a renewed Motion for Relief from Entry of Default on November 23, 2015. (See R. pp. 306-317). In his motion, Appellant further explained the circumstances surrounding his default and provided a myriad of documentary evidence to the court evidencing the lengths to which Appellant went in an attempt to amicably resolve both cases. (R. pp. 306-317, Motion and Affidavit and R. pp. 319-401, Exhibits A-D). The trial court denied this motion as well and again refused to let Appellant out of default, issuing an Order on December 22, 2015 finding that the motion should "be denied on the grounds of *res judicata*." (See R. pp. 15-16).

During the foreclosure hearing, Appellant argued that he had an equitable right to redeem the property. (See R. pp. 120-121 and R. pp. 130-132). Pursuant to the terms of the Contract for Deed, Appellant had paid in aggregate a deposit of \$10,000.00 and \$43,076.84 to Respondent Otto (See R. pp. 273-277); \$14,601.71 to the IRS on Respondent Otto's behalf (See R. pp. 273-277. See also R. p. 145 line 18-p. 146 line 3); \$5,978.87 in real property taxes for calendar year 2010 on Respondent Otto's behalf (See R. pp. 273-277 and R. pp. 249-268); \$5,590.47 for

other assessments on Respondent Otto's behalf (See R. pp. 273-277 and R. pp. 249-268); \$50,839.96 for reinstatement of the arrears, penalties and fees due the first mortgagee (See R. pp. 273-277 and R. pp. 249-268); at least \$15,723.00 on the first mortgage, which was subsequently returned to Respondent Otto, held by her counsel and not returned to Appellant (See **Three Checks**); \$6,044.10 to Respondent Otto's counsel to be held in trust during the negotiation process (See R. p. 20); and approximately \$16,101.68 in principal on the second mortgage (see R. pp. 249-268 and R. p. 20). Appellant may have even paid a greater amount to the first mortgagee, but Otto was never required to account for the funds.

Despite the considerable sums paid by Appellant to acquire the property pursuant to the Contract for Deed, the trial court concluded that Appellant had no equitable right of redemption over objection by Appellant. (See R. pp. 120-121, 130-132, and 172). The trial court issued its Judgment of Foreclosure and Sale on December 22, 2015, which provided that Appellant may claim a subordinate lien or legal interest in the subject property and present a claim to any surplus in the event there is a surplus after the sale of the subject property. (See R. pp. 25-26). However, the court ruled that Appellant had "no equitable right of redemption in the mortgaged property ... based upon the fact that he is not a junior lienholder." (See R. p. 8).

Appellant subsequently filed a motion to alter or amend the court's ruling, requesting that the court clarify whether Appellant had an equitable interest in the subject property and if so, whether Appellant had an equitable right to redeem the defaulted mortgage. (See R. pp. 402-404, and R. pp. 208-219). In its order dated April 19, 2016, the Court again held that the Appellant had no equitable interest in the subject property, ruling that "[Appellant] has no equitable interest in the property, and consequently, no equitable right of redemption, because he is not a junior lienholder." (See R. pp. 17-20). While the trial court acknowledged that

Appellant was to receive notice of surplus funds, it refused to recognize the Appellant's equitable interest in the property or his equitable right to redeem the property. (See R. pp. 17-20).

Appellant respectfully appeals the trial court's Order dated May 6, 2013, denying Appellant's Motion to Set aside Default, the trial court's Order dated December 22, 2015 denying Appellant's Motion for Relief from Default, the trial court's Judgment of Foreclosure and Sale dated December 22, 2015, and the trial court's Order dated April 19, 2016 on Appellant's Motion to Alter or Amend.

ARGUMENTS

I. THE TRIAL COURT ERRED BY REFUSING TO RELIEVE APPELLANT FROM ENTRY OF DEFAULT

STANDARD OF REVIEW

The rule governing relief from default “is liberally construed to promote justice and dispose of cases on the merits.” Dixon v. Besco Engineering, Inc., 320 S.C. 174, 178, 436 S.E.2d 636, 638 (Ct. App. 1995). “The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the circuit court.” Regions Bank v. Owens, 402 S.C. 642, 647, 741 S.E.2d 51, 54 (Ct. App. 2013). The circuit court’s decision is subject to an abuse of discretion standard on appeal. *Id.* “An abuse of discretion occurs when the judgment is controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support.” *Id.*

A. The Trial Court Erred by Ruling that Appellant Failed to Put Forth a Satisfactory Explanation for Default and Therefore Erred in Failing to Analyze Whether Good Cause Existed to Set Aside Default.

In denying Appellant’s motion to set aside default, the trial court concluded that because Appellant “failed to put forth a satisfactory explanation for his default,” the court did not need to “consider the factors as set forth in Wham v. Shearson Lehman Brothers.” (See R. pp. 7-8).

Rule 55(a) of the South Carolina Rules of Civil Procedure requires that the clerk of court for the county where a complaint is filed to record an entry of default when the party served with that complaint fails to respond to it. However, Rule 55(c) provides that “[f]or good cause shown the court may set aside an entry of default and, if a judgment by default has been entered may likewise set it aside in accordance with Rule 60(b).” Rule 55(c), SCRP.

“This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would

serve the interests of justice.” Sundown Operating Co., Inc. v. Intedg Industries, Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). Once the party seeking relief from default has explained the reason for default, the trial court must consider whether good cause exists to set aside the default, which can include an analysis of the factors outlined in Wham v. Shearson Lehman Bros., Inc. *Id.*, at 607-608, 681 S.E.2d at 888.

In finding that Appellant was not entitled to relief from default, the trial court conflated two separate issues that affect a litigant’s ability to be relieved from default: (1) the initial explanation for the default; and (2) whether good cause exists to set aside default. As a result, the trial court incorrectly applied the facts specific to Regions Bank v. Owens to the Appellant’s case in determining that Appellant had failed to “put forth a satisfactory explanation for the default” and determining that the court need not consider the Wham factors to determine whether good cause existed to set aside default. *Id.* (citing Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501-502 (Ct. App. 1989)). (See R. p. 103, lines 1-10. See also R. pp. 411-415). The court adopted Respondent U.S. Bank’s argument that Appellant’s circumstances were similar to the party seeking relief from default in Regions Bank and that the trial court did not need to consider the Wham factors based the Court of Appeals’ ruling in Regions Bank. (See R. p. 86, lines 4-25). In so doing, the trial court incorrectly applied the law in Regions Bank to the Appellant’s case by relying on facts specific to a finding that good cause did not exist to set aside default in Regions Bank, to determine that Appellant had failed to satisfactorily explain his default. (See R. pp. 85-88). Simply put, the trial court inappropriately applied case law addressing the good cause standard to whether there existed a satisfactory explanation for default.

The trial court did not rule that Appellant had failed to show good cause to warrant setting aside default. (See R. pp. 7-8). Instead, it ruled that Appellant failed to meet the initial burden of providing a satisfactory explanation for the default. (Id.). By virtue of this determination, the trial court concluded that it did not need to consider the Wham factors to determine whether good cause existed to let Appellant out of default (Id.).

As the threshold question for the trial court should have been whether the Appellant could “provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice,” the trial court erred by relying on the Regions Bank case in making that threshold determination. See Sundown Operating Co., Inc. v. Intedger Industries, Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009)). As the court’s order refusing to grant Appellant relief from an entry of default is controlled by an error of law, it must be vacated. See Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989).

There is ample evidence in the record that the Appellant provided an explanation for the default. Appellant filed two motions requesting relief from default and attached affidavits and supporting documentation to each. (See R. pp. 297-303, and R. pp. 306-401). After being served process in each case, Appellant was diligent in his attempts to resolve each pending matter. (See R. p. 302, ¶ 5).

In Respondent Otto’s action, Appellant communicated with Respondent Otto’s attorney immediately after being served process and delivered to Respondent Otto’s counsel evidence of the Appellant’s payment history to Respondent Otto. (See R. p. 314, ¶ 11). Appellant maintained regular contact with Respondent Otto’s counsel and ascertained that the first mortgagee had returned mortgage payments made by Appellant to Respondent Otto. (See R. p.

314, ¶ 12). Respondent Otto's counsel told Appellant, in response to concerns about default, "I am not going to call time on you." (See R. p. 315, ¶ 14 and R. pp. 349-401).

In Respondent U.S. Bank's action, Appellant was in contact with Respondent Otto's attorney, who was in the process of negotiating a settlement with Respondent U.S. Bank. (See R. p. 302, ¶ 5). Appellant, learning that the first mortgage was in default, sought to reinstate it, which he could only do through Respondent Otto because U.S. Bank refused to deal with Appellant directly. (See R. p. 314, ¶ 12). Appellant was so convinced that a settlement between all parties was imminent that he deposited settlement funds with Respondent Otto's counsel, which continues to be held by Otto's counsel. (See R. pp. 314-315, ¶ 13). Appellant and Respondent Otto even successfully obtained a reinstatement amount from the first mortgagee, and Appellant was prepared to pay the reinstatement once Respondent Otto accounted for the amount and disposition of funds returned from the first mortgagee to Respondent Otto. (See R. pp. 315-316, ¶¶ 15-19).

When Respondent Otto would not account for all of the funds, her counsel ceased communicating with Appellant, and so Appellant hired an attorney and filed responsive pleadings. (See R. pp. 314-316, ¶¶ 10-15, 20). These were promptly provided to Respondents' counsel, and Appellant thereafter filed a Motion to Set Aside Default and Leave to File Answer Outside of Time. (See R. pp. 297-303).

The initial question for the trial court was whether the Appellant provided a satisfactory explanation for the default. Appellant explained exactly why the default occurred: there were numerous sincere attempts by Appellant to quickly resolve both actions amicably. It would have served the interests of justice to grant Appellant's requested relief as his Answer, Counterclaims, and Cross-Claims enumerated factual allegations that, if true, would indicate that Appellant did

not default on his obligations pursuant to the Contract for Deed. (See R. pp. 47-81). In addition, Appellant's Answer, Counterclaims, and Cross-Claims alleged that Respondent Otto's conduct warranted a judicial accounting and an award of damages. (Id.).

As "Rule 55(c) should be liberally construed to promote justice and dispose of cases on the merits," the trial court erred by failing to rule that Appellant's actions constituted a satisfactory explanation for default and that it would have served the interests of justice to see the multitude of disputes in the Appellant's cases resolved by an impartial factfinder and on the merits. See Melton v. Olenik, 379 S.C. 45, 54, 664 S.E.2d 487, 492 (Ct. App. 2008). The trial court should have determined that there existed a satisfactory explanation for Appellant's default in the combined action. It then should have ruled on whether good cause existed to let Appellant out of default. This failure to correctly apply the facts to the appropriate inquiry constitutes an error of law and should be reversed.

B. The Trial Court Erred by Failing to Determine that Appellant Showed Good Cause to Set Aside Default.

The trial court also erred in concluding the Appellant failed to show good cause sufficient to warrant setting aside default.

Respondent U.S. Bank argued to the trial court that Appellant's default was sufficiently analogous to the defendant's default in Regions Bank v. Owens for the trial court to refuse to set aside the default. (See R. pp. 411-415). The trial court appeared to rely on Respondent U.S. Bank's arguments in denying Appellant's requested relief. (See R. p. 86, line 5-p.88 line 16). However, the facts in Regions Bank are readily distinguishable from the facts in the instant matter.

In Regions Bank, the defendant Owens and his co-defendant Paddy were served with a mortgage foreclosure action, and Owens failed to file an answer. Regions Bank v. Owens, 402

S.C. 642, 645, 741 S.E.2d 51, 53 (Ct. App. 2013). Owens subsequently moved to be let out of default just prior to the foreclosure hearing. *Id.* Owens claimed that he failed to file responsive pleadings because he believed Paddy was going to file an answer on his behalf. *Id.*, at 646, 53. The Court of Appeals concluded that Owens did not meet the “good cause” standard set forth in Rule 55(c) because he failed to monitor the progress of his case by merely relying on an alleged agreement he had with Paddy that Paddy would file an answer on his behalf. *Id.*, at 648, 54. The Court of Appeals in Regions Bank noted that Owens “presented no evidence he took any steps to protect himself by contacting either Paddy or Paddy’s attorney to confirm an answer would be filed on his behalf.” *Id.*

In the instant matter, Appellant maintained constant contact with Respondent Otto’s counsel in relation to both actions: Appellant’s systematic and sustained attempts to amicably resolve the pending actions, by negotiating with Respondent Otto’s counsel and by obtaining a reinstatement amount from Respondent U.S. Bank, are clear evidence that Appellant was diligent in his attempt to protect himself and resolve the pending actions. (See R. pp. 311-318 and R. pp. 349-401). Furthermore, unlike Owens who was a borrower on the subject mortgage loan, Appellant was reliant on Respondent Otto to work towards a solution to the mortgage foreclosure, because Respondent U.S. Bank would not communicate with Appellant. (See R. pp. 315-316, ¶ 17).

While the trial court is not required to “make specific findings of fact on the record for each factor,” the three Wham factors, if established, demonstrate good cause exists to set aside default. Dixon v. Besco Engineering, Inc., 320 S.C. 174, 179, 463 S.E.2d 636, 639 (Ct. App. 1995). The aforementioned Wham factors include “(1) the timing of [the defaulting party]’s motion for relief; (2) whether [the defaulting party] has a meritorious defense; and (3) the degree

of prejudice to [the other party] if relief is granted.” Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989).

The Appellant’s Motion to Set Aside Default and Leave to File Answer Outside of Time in these combined actions was filed within a reasonable amount of time after pleadings were initially served on Appellant, which satisfies the first prong of Wham. Respondent Otto served a Summons and Complaint on Appellant Munsey on July 27, 2012. (See R. p. 407). Respondent U.S. Bank served a Summons and Complaint on Appellant Munsey on August 31, 2012. (See R. p. 302, ¶ 4). Appellant filed his responsive pleadings in December of 2012 and his Motion to Set Aside Default in January of 2013, but the Respondents’ consolidated actions were not heard by the court until November, 2015. (See R. p. 95, 100). The timing of the Appellant’s original motion was sufficiently contemporaneous with when his responsive pleadings were due, particularly in light of the gross delay between the dates the matters were originally filed and consolidated, and the date the cases were finally heard, for the Appellant’s motion for relief to satisfy the first prong of Wham.

The Appellant had numerous meritorious defenses as well as multiple meritorious compulsory counterclaims related to the consolidated actions in the instant case. Pursuant to the Contract for Deed that created Appellant’s rights to the subject property and his obligation to the Respondents, Appellant was to make payments on Respondent Otto’s mortgages encumbering the subject property. (See R. pp. 49-59). Appellant made the payments required of him, but some of those payments were returned from the mortgagee, Respondent U.S. Bank, to Respondent Otto. (Id.). Respondent Otto failed to advise Appellant of this fact or return those payments to Appellant or U.S. Bank. (Id.). Respondent Otto failed to provide Appellant the access necessary to communicate directly U.S. Bank and would not even provide monthly

statements from the mortgagee, both of which were requested numerous times by Appellant. (Id.). Respondent Otto failed to advise Appellant that there were additional liens on the subject property that were not acknowledged in the original Contract for Deed, and Otto allowed additional liens to attach to the property after the closing of the Contract for Deed. (Id.). The first mortgagee, Respondent U.S. Bank, inappropriately applied Appellant's mortgage payments to principal and refused to provide information directly to Appellant, requiring Appellant to go through Respondent Otto to attempt to resolve the case with Respondent U.S. Bank. (Id.). In addition, the Contract for Deed contained an indemnification provision requiring Respondent Otto to indemnify and hold harmless the Appellant for any and all costs, expenses, fees, and/or damages related to the mortgages encumbering the property. (Id.). On top of general denials, Appellant asserted defenses of waiver and estoppel, unclean hands, and prior breach; as well as counterclaims of negligent and intentional misrepresentation, accounting, and negligence and gross negligence; and cross-claims of breach of contract, fraud, breach of contract accompanied by a fraudulent act, breach of fiduciary duty, and conversion. (Id.). Because Appellant had meritorious defenses available to him in each cause of action, his request for relief satisfies the second prong of Wham.

Neither Respondent would have been prejudiced had the trial court set aside Appellant's default. Appellant's Motion to Set Aside Default was heard in May of 2013. (See R. pp. 82-85). The trial court denied Appellant's requested relief, but the case was not heard until November of 2015. (See R. pp. 306-310 and R. pp. 95-103). For two and a half years, the case remained pending before there was an adjudication on the merits. During this period of time, Respondent U.S. Bank deposed Appellant and Respondent Otto, and Appellant participated in the discovery process. (See R. pp. 306-310). Respondent U.S. Bank argued to the court that it

would prejudice U.S. Bank to set aside default because the value of the subject property might decline if the process were prolonged. (See R. p. 87, lines 14-23). However, delay associated with a decision to set aside Appellant's default would not have extended the delay between the dates of filing in the combined action and the date the case was finally called to trial. Any decline in the subject property's value between September 2012 and December 2012 is moot in light of the failure of the case to be called for trial until November 2015. Therefore, neither Respondent would have suffered any prejudice if the trial court had decided to set aside Appellant's default.

As Appellant's motion for relief from default satisfies the three Wham factors, there was no factual basis to support a finding that good cause did not exist to warrant setting aside default. Therefore, the trial court erred in refusing to grant Appellant's Motion to Set Aside Default and Appellant's Motion for Relief from Default in the consolidated action.

II. THE TRIAL COURT ERRED BY FINDING THAT APPELLANT HAD NO EQUITABLE INTEREST IN THE PROPERTY AND, THEREFORE, NO EQUITABLE RIGHT OF REDEMPTION

STANDARD OF REVIEW

"If the essential character of the petitioner's cause of action is grounded on equitable rights and equitable relief is sought, the case is regarded as equitable and the appellate court has jurisdiction to make findings in accordance with its own view of the preponderance of the evidence." Dean v. Kilgore, 313 S.C. 257, 259, 437 S.E.2d 154, 155 (Ct. App. 1993). "In an action in equity, the appellate court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence." Green Tree Servicing, LLC v. Adams, 375 S.C. 583, 586, 654 S.E.2d 100, 102 (Ct. App. 2007).

A. The Trial Court Erred by Finding that Appellant Did Not Have an Equitable Interest in the Property.

Appellant acquired his rights the property at issue in this case from Respondent Otto by means of an installment land contract. (See R. pp. 249-268). As the evidence before the court established the nature of Appellant's interest in the subject property and the amount of money he paid pursuant to the Contract for Deed, it was error to conclude that Appellant did not have an equitable interest in the subject property.

The terms of the Contract for Deed required that Appellant pay Respondent Otto a deposit payment of \$10,000.00; pay the monthly installments due to the subject property's first mortgagee, which totaled \$1,061,968.32; pay the monthly installments due to the subject property's second mortgagee, which totaled \$193,665.68; pay an IRS lien in the amount of \$14,601.71; pay real property taxes for calendar year 2010 in the amount of \$5,978.87; pay other assessments totaling \$5,090.47; pay for reinstatement of the arrears, penalties and fees due to the first mortgagee totaling \$50,839.96; pay Respondent Otto \$43,076.84 with adjustments for Respondent's pro rata portion of the 2011 taxes and assessments and deposit credit; and pay additional payments to Respondent Otto on a principal sum in the amount of \$13,000.00. (Id. See also R. pp. 273-277).

Pursuant to the terms and conditions of the Contract for Deed, in addition to the monies paid at the time of the agreement, Appellant made all payments to the first mortgage holder and second mortgage holder in a timely fashion, from April 2011 through August 2012. (See R. pp. 52-53). An undetermined amount of sums paid to the first mortgagee, Respondent U.S. Bank, were subsequently returned to Respondent Otto. (See Id.). The undisputed amount of funds paid by Appellant on the first mortgage, and, subsequently, returned by Respondent U.S. Bank to Respondent Otto by means of three (3) checks held by Respondent Otto's counsel are noted in the eighth line item in Exhibit A to the Court's Order dated April 19, 2016 and total \$15,723.00.

(See R. pp. 278-280. See also R. pp. 17-20). According to Respondent Otto, Appellant also made six payments to her which she paid on the second mortgage totaling \$11,052.00, but this amount was never verified as Otto was not required to account for all of the funds returned by U.S. Bank. (See R. p. 149 line 10-p.151 line 7). It actually appears from comparing the sum to be paid on the second mortgage pursuant to the Contract for Deed and the sum found by the trial court to be owed on the second mortgage in 2016 amounts to approximately \$16,101.68. (See R. pp. 249-268 and R. p. 20). In aggregate, Appellant paid a deposit of \$10,000.00 and \$43,076.84 to Respondent Otto (See R. pp. 273-277); \$14,601.71 to the IRS on Respondent Otto's behalf (See R. pp. 273-277. See also R. p. 144, line 21-p. 145 line 3); \$5,978.87 in real property taxes for calendar year 2010 on Respondent Otto's behalf (See R. pp. 273-277 and R. pp. 249-268); \$5,590.47 for other assessments on Respondent Otto's behalf (See R. pp. 273-277 and R. pp. 249-268); \$50,839.96 for reinstatement of the arrears, penalties and fees due the first mortgagee (See R. pp. 273-277 and R. pp. 249-268); at least \$15,723.00 on the first mortgage, which was subsequently returned to Respondent Otto, held by her counsel and not returned to Appellant (See R. pp. 278-280); \$6,044.10 to Respondent Otto's counsel to be held in trust during the negotiation process (See R. p. 20); and approximately \$16,101.68 in principal on the second mortgage (see R. pp. 249-268 and R. p. 20). Appellant may have even paid a greater amount to the first mortgagee, but Otto was never required to account for the funds.

In the court's Judgment of Foreclosure and Sale dated December 22, 2015, the Court concluded that Appellant Munsey, "by virtue of that memorandum of Contract for Deed dated March 4, 2011 and recorded March 9, 2011 in Book 97-Z at Page 748" may claim "a subordinate lien upon or subordinate legal interest in the subject property and in the event there is a surplus from the sale of the subject property ... may present through any such lien or legal interest a

claim to the surplus at a hearing subsequent to the sale.” (See R. pp. 25-26). However, in its Order dated April 19, 2016, the Court concluded that Appellant Munsey “has no equitable interest in the property.” (See R. p. 18). The court did acknowledge that “as a party to the action, of course, [Appellant] will receive notice of any surplus funds to make a claim,” (R. p. 214 line 25-p. 215 line 4.) but the trial court erroneously refused to recognize the Appellant’s equitable interest in the property.

Installment land contracts are typically structured so that the vendor or seller retains legal title to the property until the entirety of the purchase price is paid, and the vendee or purchaser is entitled to immediate possession of the property. Lewis v. Premium Inv. Corp., 351 S.C. 167, 170, 568 S.E.2d 361, 363 (Ct. App. 2002). A vendee in possession of the land under a contract for sale is the owner of an equitable interest in the property. Southern Pole Bldgs., Inc. v. Williams, 289 S.C. 521, 524, 347 S.E.2d 121, 122 (Ct. App. 1986). Appellant Munsey took possession of the property when the Contract for Deed was executed and at that point of time, he acquired an equitable interest in the property. Therefore, Appellant has an equitable interest in the property and an equitable lien on any surplus from the sale.

Based on the foregoing, Appellant respectfully requests that this Court overrule the trial court’s Judgment of Foreclosure and Sale and Order on Jackson L. Munsey, Jr.’s Motion to Alter or Amend as the trial court erroneously determined that Appellant did not have an equitable interest in the subject property. The order of foreclosure should be remanded to the trial court for the trial court to make a specific finding that Appellant has an equitable interest in the property.

B. The Trial Court Erred by Finding that Appellant Did Not Have an Equitable Right to Redeem the Property.

During the foreclosure hearing, the trial court heard arguments from counsel for Respondent U.S. Bank, Respondent Otto, and Appellant Munsey regarding Appellant's equitable right of redemption, and the trial court ruled that Appellant did not have an equitable right to redeem the mortgages in default. (See R. pp. 120-121 and R. pp. 130-132). Counsel for the Appellant again raised the issue of Appellant's equitable right of redemption during the trial, and the court reaffirmed its decision that the Appellant had no equitable right of redemption in the property. (See R. p. 172). In the Judgment of Foreclosure and Sale, the court concluded that Appellant had "no equitable right of redemption in the mortgaged property described hereinafter, based upon the fact that he is not a junior lienholder." (See R. p. 28, ¶ 7). The trial court further explained its reasoning in a subsequent hearing on Appellant's Motion to Reconsider, ruling that the Appellant had no equitable interest in the property and, therefore, no equitable right to redeem. (See R. p. 215). The Court's ruling was formalized in an order dated April 19, 2016, in which the court found that "[Appellant] Munsey has no equitable interest in the property, and consequently, no equitable right of redemption, because he is not a junior lienholder." (See R. p. 18).

Historically, the equity of redemption was created to afford mortgagors a reasonable time to cure default and facilitate reconveyance of property from the mortgagee to the mortgagor. Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 578-579 (1935). The mortgagee, however, "would be compensated for the default by a later payment, with interest, of the debt for which the security was given; and the protection afforded the mortgagor was, in effect, the granting of a stay." *Id.*, at 579. Once the mortgagor pays the mortgagee the sums the mortgagee is rightfully owed, the mortgagor is "entitled to possession of the mortgaged premises, freed and

discharged of the liens created by said mortgages.” Ham v. Flowers, 214 S.C. 212, 221, 51 S.E.2d 753, 757 (1949).

“An omitted junior lienholder retains his right of redemption, giving him the right to tender to the buyer at the senior foreclosure sale the balance which was owed on the senior lien at the time of the foreclosure.” Green Tree Servicing, LLC v. Adams, 375 S.C. 583, 587, 654 S.E.2d 100, 102 (Ct. App. 2007) (citing 27 S.C. Jurisprudence § 109, at 248). To redeem, the junior lienholder must pay the entire debt accrued upon the senior mortgage. Id. See also Peoples v. Snyder, 141 SC 152, 139 S.E. 405 (1927).. The mortgagor’s right to redeem was an equitable interest in the land, which afforded the mortgagor the “right to redeem the property in defiance of the mortgage.” Bartles v. Livingston, 282 S.C. 448, 454, 319 S.E.2d 707, 711 (Ct. App. 1984). “A junior mortgagee had the right to bring a suit for the redemption of the premises from a senior mortgagee, and by so doing could tack his junior mortgage to a senior mortgage and cut out an intervening mortgage.” Union Nat. Bank of Columbia v. Cook, 110 S.C. 99, 96 S.E. 484, 487 (1918).

As “the common law recognized an equitable right of redemption in the context of mortgages well before any statutory right was granted,” “[t]here is no equitable reason why the right of redemption should not likewise be afforded to vendees in an installment land contract in appropriate circumstances.” Lewis v. Premiuni Inv. Corp., 351 S.C. 167, 173, 568 S.E.2d 361, 364 (2002). See also Dempsey v. Huskey, 224 S.C. 536, 80 S.E.2d 119 (1954). “The Court of Appeals has specifically held that in an installment land contract, the vendee in possession of the land is considered the owner of an equitable interest in the property.” Id., fn 4, citing Southern Pole Bldgs., Inc. v. Williams, 289 S.C. 521, 347 S.E.2d 121 (Ct. App. 1986). And, “[f]or years,

in an executory contract for the sale of land our Court has equated the vendor with the mortgagee and the vendee with the mortgagor.” *Id.* at 173, 568 S.E.2d at 364.

Appellant entered into an installment land contract, otherwise known as a Contract for Deed, with Respondent Otto, which made Appellant a junior lienholder to the first mortgage and second mortgage on the property. (See R. pp. 319-338). Appellant paid tens of thousands of dollars to Respondent Otto directly and to others on behalf of Respondent Otto, including the first mortgagee and the second mortgagee in accordance with the terms of the Contract for Deed. South Carolina law recognizes an equitable right of redemption of defaulted installment land sales contracts when equity so requires. See Lewis v. Premium Inv. Corp., at 173, 568 S.E.2d at 364. Even counsel for Defendants Laura Kerhulas Giese and Mark Warner Kerhulas noted his agreement with Appellant’s position at trial, acknowledging that “a right of redemption is merely an equitable right that allows a junior lien holder or owner ... to cough up the money,” and “I don’t think that a foreclosure [proceeding] would wipe out [Appellant Munsey’s] ability to cough up the money.” (See R. p. 131 line 23–p.132 line 4). To terminate Appellant’s rights to the property without first allowing him an opportunity to redeem the Contract for Deed by paying the entire amount due would be inequitable and would amount to an unlawful deprivation of a substantial right. It was therefore error for the trial court to deny Appellant his equitable right to redeem.

CONCLUSION

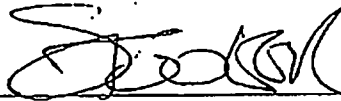
The rule governing relief from default should be liberally construed to promote justice and dispose of cases on the merits. The trial court therefore abused its discretion in inappropriately applying Regions Bank v. Owens in finding that Appellant failed to provide a satisfactory explanation for his default. Had the court considered whether good cause existed to

warrant setting aside default pursuant to Rule 55(c), the court would have found ample evidence in the record justifying Appellant's requested relief, as Appellant's case satisfies each of the three Wham factors.

Furthermore, the evidence in this case demonstrates that the trial court erred in determining that Appellant did not have an equitable interest in the subject property or an equitable right to redemption by virtue of his Contract for Deed.

For all of these reasons, Appellant respectfully requests that this Court overrule the trial court's Judgment of Foreclosure and Sale and Order on Jackson L. Munsey, Jr.'s Motion to Alter or Amend as the trial court inequitably denied Appellant his redemption rights.

Respectfully Submitted,



David R. Price, Jr. (S.C. Bar # 75140)
Samuel B. Tooker (S.C. Bar # 78999)
DAVID R. PRICE, JR., P.A.
318 West Stone Avenue (29609)
Post Office Box 2446
Greenville, South Carolina 29602-2446
(864) 271-2636 office
(864) 271-2637 fax
David@GreenvilleLegal.com
Sam@GreenvilleLegal.com
Attorneys for Appellant

Greenville, South Carolina
Date: December 16, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master-in-Equity Judge

Case No.: 2012-CP-42-3549
2012-CP-42-2874

U.S. Bank, NA, as Trustee relating to the Chevy Chase
Funding, LLC Mortgage Backed Certificates, Series 2004-B, ... Plaintiff,

v.

Alyce F. Otto, Individually; Alyce F. Otto Trustee Under Declaration
of Trust of Alyce F. Otto dated the 17th of November 2009;
TD Bank, NA; The United States of America, acting by and through
its agency, the Internal Revenue service; Laura Kerhulas Giese, as
Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration
of Trust dated May 25, 2004; Mark Warner Kerhulas, as Co-Trustee of the
Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004;
Jackson L. Munsey, Jr.; Citibank, NA. Defendants,

Of whom Jackson L. Munsey, Jr., is the Appellant.

and

U.S. Bank, NA and Alyce F. Otto are the Respondents.

Alyce F. Otto, Trustee Plaintiff,

v.

Jackson L. Munsey, Jr., ... Defendant.

FINAL BRIEF OF RESPONDENTS

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Of whom Jackson L. Munsey, Jr., is the Appellant.

and

U.S. Bank, NA and Alyce F. Otto are the Respondents.

Alyce F. Otto, Trustee Plaintiff,

v.

Jackson L. Munsey, Jr., ... Defendant.

FINAL BRIEF OF RESPONDENTS

Sarah P. Spruill, SC Bar No. 68337
Haynsworth Sinkler Boyd, P.A.
ONE North Main, 2nd Floor
Greenville, SC 29601-2772
Telephone: 864.240.3200
Email: sspruill@hsblawfirm.com

Kenneth C. Anthony, Jr.
The Anthony Law Firm, PA
P.O. Box 3565
Spartanburg, SC 29304
Telephone: 864.582.2355
Email: kanthony@anthonylaw.com

Attorneys for Respondent Alyce F. Otto

Erica G. Lybrand, SC Bar No. 79052
Rogers Townsend & Thomas, PC
14th Floor, 1221 Main Street
Columbia, SC 29201
Telephone: 803.771.7900
Email: erica.lybrand@rtt-law.com

Richard C. Keller
Burr & Forman LLP
Suite 3400, 420 North 20th Street
Birmingham, AL 35203
Telephone: 205.251.3000
Email: rkeller@burr.com

*Attorneys for Respondent U.S. Bank,
NA as Trustee relating to the Chevy
Chase Funding, LLC Mortgage
Backed Certificates, Series 2004-B*

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STATEMENT OF ISSUES ON APPEAL

1. Is Munsey's appeal barred because he cannot directly appeal from a default judgment and he never sought relief pursuant to Rule 60, SCRCP?
2. Did Munsey fail to preserve any argument regarding the standard used by the Master in denying the Motions for Relief from Entry of Default by failing to raise them to the Master?
3. Did the Master properly deny Munsey's motions for relief from the entry of default due to Munsey's failure to provide a satisfactory explanation for the default?
4. Did the Master properly decline to consider the factors set forth in *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 381 S.E. 2d 499 (Ct. App. 1989) because Munsey failed to provide a satisfactory explanation for his default?
5. Did the Master correctly determine that Munsey did not have an equitable right of redemption in the property?

STATEMENT OF THE CASE

This appeal results from two consolidated cases relating to real property located at 1825 Fairview Farms Road, Campobello, South Carolina ("Property"): a mortgage foreclosure action filed by U.S. Bank, NA as trustee relating to the Chevy Chase Funding, LLC Mortgage Backed Certificates, Series 2004-B ("US Bank") on August 21, 2012 ("mortgage foreclosure" or "foreclosure action") (R. pp. 37-46), and an action to cancel or foreclose a contract for deed filed by Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated the 17th of November 2009 (hereinafter referred collectively with Alyce F. Otto, individually, as "Otto") on July 6, 2012 ("Otto action") (R. pp. 31-36). Jackson L. Munsey, Jr. ("Munsey") was named as a Defendant in both actions. (*See generally* R. pp. 31-36; R. pp. 37-46).

Munsey was served with the Otto action on July 27, 2012. (R. p. 407). He did not file an answer nor has he sought leave to do so. (*Id.*). Munsey was served with the mortgage foreclosure on August 31, 2012. (R. p. 405). Munsey also failed to answer the mortgage foreclosure Complaint. (R. p. 406). On October 15, 2012, a Certificate of Default and Non-Military Service was filed in the mortgage foreclosure, holding Munsey in default. (*Id.*). The Otto action was referred to the Master in Equity ("Master") on July 6, 2012, (R. p. 1), and the mortgage foreclosure was referred October 15, 2012, (R. p. 2).

Thereafter, Munsey attempted to file an Answer, Counterclaims, and Crossclaims as to the mortgage foreclosure on December 27, 2015. (*See* R. pp. 47-79). US Bank's counsel submitted a letter to the court on January 14, 2013, wherein it objected to the filing of the late Answer due to Munsey's default. (R. p. 410). Munsey filed a Motion to Set Aside Default and Leave to File Answer (R. pp. 297-303) and a Motion to Consolidate the Otto action and the mortgage foreclosure on February 4, 2013 (R. pp. 304-305).

These motions were heard on May 6, 2013. (R. pp. 7-8; R. pp. 9-10). In orders filed on May 6, 2013, the Master granted the Motion to Consolidate (R. pp. 9-10), but denied the Motion to Set Aside Default and Leave to File Answer Outside of Time (R. pp. 7-8). The Motion to Set Aside Default and Leave to File Answer was accompanied by an affidavit indicating that Munsey claimed he failed to answer the mortgage foreclosure because he was attempting to negotiate a resolution with counsel for Otto (R. p. 302). The Master found this to be an unsatisfactory reason for default and ruled that Munsey had therefore failed to meet the initial burden of the "good cause" standard pursuant to Rule 55(c), SCRCF. (R. p. 88, lines 10-14; R. pp. 7-8). On May 8, 2013, Otto filed an Affidavit of Default as to Munsey's default in the Otto action. (R. p. 407).

The actions were tried by the Master on November 24, 2015. (R. p. 22). The day prior to the trial, Munsey's counsel filed a second Motion for Relief from Entry of Default (R. pp. 306-310) this time accompanied by an affidavit of Munsey's wife (R. pp. 311-401). Mrs. Munsey's affidavit detailed her efforts to resolve the default of the mortgage loan with counsel for Otto, but did not present any new evidence or basis for setting aside the default. (*See Id.*). The Master addressed the renewed Motion for Relief from Entry of Default prior to the non-jury trial. (R. pp. 101-103). At that time, Munsey did not raise any argument objecting to the reasoning of the previous Order Denying Motion to be Relieved from Default but simply restated his earlier argument that an answer was not filed because the Munseys were negotiating a resolution with counsel for Otto. (*Id.*). The Master denied the renewed Motion orally (R. p. 103, lines 1-10) and by written order filed on December 22, 2015 (R. pp. 15-16).

After hearing the evidence, the Master directed that judgment be entered in favor of US Bank and Otto in the respective cases. (R. pp. 21-30; R. pp. 11-14). The Order as to the Otto

action was filed on December 15, 2015. (R. pp. 11-14). The Judgment of Foreclosure and Sale in the US Bank matter was filed on December 22, 2015. (R. pp. 21-30).

Munsey filed a Motion to Alter or Amend Order on January 7, 2016, seeking clarification as to certain portions of the order in the Otto action. (R. pp. 402-404). A hearing on the Motion to Alter or Amend Order was held on February 15, 2016, and certain portions of the Order in the Otto action were amended, but the ultimate result of both cases remained the same. (R. pp. 17-20). The Order as to the Motion to Alter or Amend was filed on April 19, 2016. (*Id.*). Munsey has not sought relief pursuant to Rule 60, SCRCP from any default judgment entered against him.

FACTS

The Property was conveyed to Otto and her husband in July 2004. (R. pp. 281-283). In August 2004, they made, executed and delivered a Promissory Note and Mortgage to US Bank's predecessor in interest in the principal sum of \$999,500.00. (R. pp. 220-226; R. pp. 227-248). Subsequently, Otto and her husband conveyed their respective interests in the Property to trusts. (R. pp. 284-291). Mr. Otto died testate on December 2, 2009, (R. p. 43), and Otto, as substitute trustee of his trust, conveyed his interest in the Property to her trust, (R. pp. 292-296). As such, Otto, as sole trustee of her trust ("Otto trust"), became the sole owner of the Subject Property. (*Id.*).

On March 4, 2011, the Otto trust entered a Contract for Deed with Munsey, (R. pp. 249-268), for which the Memorandum of Contract for Deed was recorded March 9, 2011, (*see* R. p. 44). Pursuant to the terms of the Contract for Deed, Munsey was to pay the US Bank mortgage in monthly installments until April 1, 2016, when the remaining balance became due and payable. (R. pp. 250-251). Munsey was also required to pay monthly mortgage installments for the second

and third mortgages, pay the homeowner association dues and assessments, and pay the real estate taxes. (*Id.* at pp. 251-252).

Munsey failed to timely pay the amounts due to US Bank. (R. p. 35; R. p. 12). As a result, on November 2, 2011, US Bank issued a demand letter to Otto, advising her of the default of the mortgage obligation. (R. pp. 269-272). When the default was not cured pursuant to the terms of the demand letter, the mortgage loan was accelerated. (R. p. 43). The Otto action and mortgage foreclosure were then filed. (R. pp. 31-36; R. pp. 37-46). Notwithstanding his default, Munsey has been in possession of the Property for the duration of this litigation. (*See* R. p. 302; R. p. 312; R. p. 409).

ARGUMENT

- I. As an initial matter, there is not an appealable order in this case and Munsey's arguments relating to the Master's denial of Munsey's requests that the entry of default be set aside are not preserved.

Munsey's appeal is barred because he did not seek relief under Rule 60, SCRPC. Munsey cannot directly appeal from a default judgment because his "sole remedy is to move to set aside the judgment under Rule 60(b), SCRPC." *Winesett v. Winesett*, 287 S.C. 332, 334, 338 S.E.2d 340, 341 (1985). A party in default "has no status in court which will enable him to appeal from the judgment rendered." *Id.* at 333, 338 S.E.2d at 341 (quoting *Washington v. Hesse*, 56 S.C. 28, 29, 33 S.E. 787, 787 (1899)). Further, a party attempting to appeal a default judgment is precluded from raising any issues on appeal because they were not raised to the trial court below. *Id.* (citing *American Hardware Supply Co., Inc. v. Whitmire*, 278 S.C. 607, 300 S.E.2d 289 (1983); *Murphy v. Hagan*, 275 S.C. 334, 271 S.E.2d 311 (1980)).

In addition, Munsey's arguments that the Master applied the wrong standard in considering his motions for relief from the entry of default are not preserved because they were

never raised to the Master, either by way of the motions themselves or in the form of a 59(e), SCRCF motion. To be preserved for appellate review, an argument must have been raised to and ruled on by the trial court. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 734 (1998).

II. The Master correctly determined that the entry of default against Munsey should not be set aside because Munsey failed to provide a satisfactory explanation for the default.

The standard of review governing the granting of relief from the entry of default is well settled and has been stated as follows:

The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge. The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support.

Sundown Operating Co. v. Intedge Industries, Inc., 383 S.C. 601, 606-07, 681 S.E.2d 885, 888 (Ct. App. 2009) (citations omitted).

In this case, the Master did not abuse his discretion in denying Munsey's motions to set aside the entry of default. In his brief, Munsey contends that the Master abused his discretion by (i) determining that Munsey failed to provide a satisfactory explanation for the default, and (ii) failing to determine that Munsey was entitled to relief based upon the factors outline in *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989).

Munsey's argument that good cause existed to set aside the default judgment is fatally flawed as Munsey assumes that any excuse for failure to respond to the complaint satisfies the good cause standard. This notion is rejected by numerous decisions, discussed more fully below, which state that a party seeking relief from default must first provide a satisfactory explanation for the default.

In *Regions Bank v. Owens*, 402 S.C. 642, 647-48, 741 S.E.2d 51, 55 (Ct. App. 2013), the trial court refused to set aside an entry of default on facts very similar to those in this matter. In *Owens*, one of the defendants argued he had established good cause to set aside the entry of default because he claimed another co-defendant had misled him into believing an attorney had been hired to file an answer on his behalf. However, the co-defendant disputed that contention, and provided evidence that he had retained an attorney to represent only himself. Additionally, the trial court determined the defendant against whom the default had been entered took no additional steps to protect himself by confirming an answer would be filed. On appeal, this Court affirmed the trial court's decision that Mr. Owens failed to show a good cause and a substantial explanation for failing to file an answer.

Additionally, in *Sundown Operating Co.*, 383 S.C. at 606-07, 681 S.E.2d at 888, the party seeking to set aside an entry of default contended the default should be set aside due to the negligence of its insurance agent in failing to file an answer. The trial court and this Court rejected this argument, and stated that solely relying upon an insurance agent to file an answer did not establish good cause.

Likewise, in this matter the evidence in the record supports the Master's ruling that Munsey did not provide a satisfactory explanation for the default. The record reflects that Munsey was served with the complaint filed by U.S. Bank on August 31, 2012, (R. p. 405), yet failed to attempt to file any responsive pleading until December 27, 2012, (See R. p. 410; R. pp. 47-81). In affidavits submitted in support of both motions for relief from default, Munsey and his wife contend they contacted counsel for Otto with respect to resolution of the case. (R. p. 302; R. pp. 314-315). However, there is no contention or any evidence they ever contacted counsel for

U.S. Bank to discuss settlement, or an extension of time to file a responsive pleading. (*Id.*). Moreover, Munsey never responded to the Complaint in the Otto action. (R. p. 407).

The explanation proffered by Munsey in both his motions for relief from default is that Munsey relied solely upon discussions with counsel for Otto regarding settlement of a foreclosure action filed by U.S. Bank. (R. pp. 297-305; R. 306-401). In fact, Munsey states in his brief that "Appellee maintained constant contact with Respondent Otto's counsel in relation to both claims." (Appellant's Brief at 15). Munsey has never produced evidence, and cannot produce evidence that he ever attempted to contact counsel for U.S. Bank.¹ Consequently, the Master's determination that Munsey did not provide a satisfactory explanation as to why the default occurred is supported by evidence in the record; thus, the Master's decision must be affirmed.

III. Once the Master determined that Munsey had not provided a satisfactory explanation for his default, the Master was not required to consider the *Wham* factors.

In addition to asserting that he provided a satisfactory explanation for the default, Munsey also asserts that the Master failed to determine that Munsey demonstrated good cause to set aside the entry of default. Specifically, Munsey contends that the Master erred by failing to examine the factors outlined in *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989).

Munsey's argument is contrary to the well-settled rule that the factors set forth in *Wham* only are considered after a court determines that a satisfactory explanation for the default has been provided. For example, in *Regions Bank*, 402 S.C. at 647-48, 741 S.E.2d at 55, one of the

¹ In his brief, Munsey alleges that U.S. Bank would not speak with him regarding Otto's loan, but he never alleges that he or his attorney attempted to contact counsel for U.S. Bank to protect himself from default judgment. (Appellant's Brief at Section I).

co-defendants never provided a satisfactory explanation for the failure to file an answer, yet argued that he was entitled to relief from the entry of the default judgment pursuant to the criteria set forth in *Wham*. This Court disagreed with the argument, instead holding that because the mortgagor failed to show good cause for failing to file an answer, the Court did not have to consider the factors in *Wham*. See also, *Sundown Operating Co.*, 383 S.C. at 607, 681 S.E.2d at 888 (determining that a court only needs to analyze *Wham* factors after a party has provided a satisfactory explanation for the default), *Dixon v. Besco Engineering, Inc.*, 320 S.C. 174, 179, 463 S.E.2d 636, 639 (Ct. App. 1995) (trial court not required to make specific findings on each *Wham* factor for the record if the record contains sufficient evidentiary support that the party in default failed to establish good cause).

For the same reasons set forth in *Owens*, *Sundown*, and *Dixon*, the Master was not required to consider the *Wham* factors because Munsey failed to provide a satisfactory explanation for the default. However, even though the Master was not required to consider the *Wham* factors, the record reflects that he did consider them. (R. pp. 6-7). After a discussion of the *Wham* factors, the Master stated “[a]s far as the motion filed by Mr. Munsey to set aside default and leave to file an answer. I am going to deny that Motion. I don’t feel like that there has been enough showing of the requirements of why he did not timely file an answer. There has been no excuse offered. Mr. Anthony did not represent Mr. Munsey. And I don’t see that there is any good cause showing why he did not respond.” (*Id.*). For these reasons, the Master’s denial of the motions for relief from the entry of default were supported by the law and the evidence and were not an abuse of discretion.

IV. The Master correctly found that Munsey did not have an equitable right of redemption in the Property.

A. As discussed above, Munsey was in default and thus did not assert any defense to the foreclosure of the Property.

Munsey was not an omitted junior lien holder in these actions. (R. pp. 31-36; R. pp. 37-46). Instead, he was a named party in default. (R. p. 407; R. p. 406). For that reason, any cases relating to the rights of omitted junior lien holders are inapplicable. *See e.g., Green Tree Servicing, LLC v. Adams*, 375 S.C. 583, 585, 654 S.E.2d 100, 101 (Ct. App. 2007); 27 S.C. Jurisprudence § 109 (“The foreclosure is void against omitted junior lienholders.”).

As a result of his default, Munsey did not assert any defense to the foreclosure of the Property. *See Roche v. Young Bros., of Florence*, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998) (“It is well settled that by suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff’s allegations and to have conceded liability.”); *State ex rel. Medlock v. Love Shop, Ltd.*, 286 S.C. 486, 488, 334 S.E.2d 528, 530 (Ct. App. 1985) (“[E]ntry of an order of default is an admission by the defaulting party of the well-pleaded allegations of the complaint[.]”). This includes any claim that he had an equitable interest in the property and an equitable right of redemption in the Property. Thus, the Master correctly found in both actions that Munsey did not have an equitable right of redemption.

B. The Master preserved Munsey’s right to pursue a claim against any surplus funds following the sale of the Property.

The Master did not strip Munsey of all rights in the foreclosure order.² Instead, he found that Munsey “has no equitable right of redemption in the mortgaged property described hereinafter, based upon the fact that he is not a junior lienholder.” (R. p. 28). However, the

² The order in the *Otto* action is not a foreclosure order, but rather a “judgment against Munsey for amounts due under the Contract for Deed.” (R. p. 12, ¶ 4). Thus, the applicable order for purposes of any right of redemption is the order in the foreclosure action.

Master found that Munsey “may claim a subordinate lien upon or subordinate legal interest in the subject property” and that Munsey may present a claim to any surplus following the sale in Paragraph 20 of the foreclosure order. (R. pp. 29-30). Munsey’s claim is listed in subsection (f), following other creditors, including mortgagees and lien and judgment holders. (*Id.*). Thus, the Master has preserved Munsey’s ability to pursue a claim for any surplusage following the sale.³ For this reason, Munsey has not presented a basis for reversal in Section II(A) of his brief.

C. The Master correctly concluded no equitable right to redeem existed due to Munsey’s conduct and the absence of any evidence that the Property was worth more than the prior encumbrances or that Munsey had the ability to buy the Property.

As previously argued, Munsey’s default should serve to resolve this issue. In the event the Court is inclined to reach the merits, Munsey has failed to establish any equitable right of redemption. Again, Munsey was not an omitted lienholder and he retains the ability to make a claim against any surplusage.

This Court may affirm the Master’s ruling for any reason appearing in the record. Rule 220, SCACR. In this case, Munsey should be barred from any equitable relief based on his own

³ The finding in the April 19, 2016 Order relating to Munsey’s interest in the Property was only directed to the *Otto* action and does not have any impact on the Master’s rulings in the foreclosure action. (R. pp. 17-20). This is confirmed in the following exchange at the February 16, 2016 hearing:

Ms. Culbertson: It is Your Honor’s ruling then that Mr. Munsey does not have an equitable interest and therefore no right of redemption?

The Court: I think that is what I said at the hearing.

Ms. Culbertson: Okay. I just wanted to make sure I had the language.

The Court: As far as the Otto, that was in the Otto portion of it, correct?

(R. p. 8, lines 5-9). Thus, to the extent Munsey suggests that both cases include a finding that Munsey did not have an equitable interest in the Property, that characterization is in error.

unclean hands in allowing the Property to go into default in breach of his obligations under the Contract for Deed and in remaining in possession of the Property notwithstanding that default for the pendency of this litigation. Courts have long recited “[h]e who seeks equity must do equity.” *Provident Life and Acc. Ins. Co. v. Driver*, 317 S.C. 471, 479, 451 S.E.2d 924, 929 (Ct. App. 1994). Therefore, in considering this claim, the Court must balance the equities between the parties to determine what relief, if any, is appropriate. *Anderson v. Buonforte*, 365 S.C. 482, 493, 617 S.E.2d 750, 755 (Ct. App. 2005). As found by the Master in the *Otto* action, “Munsey has failed to make all payments required by the Contract for Deed, which has resulted in foreclosure of the property by the first mortgage[] holder and default on the other obligations.” (R. p. 12, ¶ 3). Munsey cannot now assert an equitable right of redemption as to a default he caused.

Moreover, there is no evidence in the record that the Property will sell for more than the amount of the respective liens on it. Nor is there any evidence that Munsey stands ready, willing, and able to satisfy those encumbrances. As such, the Master correctly declined to extend an equitable right of redemption. As set forth in *Union National Bank of Columbia v. Cook*, 110 S.C. 99, 115, 96 S.E. 484, 488 (1918):

But it should appear to the Court that the junior incumbrancer has a substantial right in the land to be protected and his lien enforced for some practical purpose, and not merely the prosecution of a fictitious cause of action. In other words, it must appear to the court *prima facie* that the land is worth more than prior incumbrances and that in probability upon a resale of the land the proceeds would reach the claim of the junior incumbrancer.

Id. at 115, 96 S.E. at 488 (quoted in *Green Tree Servicing, LLC*, 375 S.C. at 587-88, 654 S.E.2d at 102-03). *Green Tree Servicing* further found that an omitted junior lienholder had no right of redemption in a case where he stipulated that the property value was less than the debt and that “he had neither the ability nor the willingness to buy the property.” *Id.* In this case, the right of redemption was raised at the hearing, but there was no evidence that the Property would bring

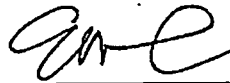
more than the amount owed, nor was there any evidence that Munsey had the ability to redeem the property if given the chance. (*See R.* pp. 26-38). Therefore, there was no prejudice stemming from the Master's ruling that Munsey did not have an equitable right of redemption.

For all of these reasons, the Master's ruling that Munsey does not have an equitable right of redemption must be affirmed.

CONCLUSION

As shown above, Munsey's appeal is barred as he did not seek relief pursuant to Rule 60, SCRCp, and a party cannot directly appeal a default judgment. Moreover, the issues raised in the appeal regarding the standards the Master used in deciding Munsey's motions for relief from the entry of default are not properly before the Court as they were never raised to the Master. Notwithstanding the foregoing, the Master properly exercised his discretion in denying Munsey's motions to set aside the entry of default judgment and properly found that Munsey did not have an equitable right of redemption in the Property. Accordingly, Respondents respectfully request that the decision and orders of the Master be affirmed and that all of Munsey's challenges in this appeal be denied in their entirety.

Respectfully submitted,



Erica Greer Lybrand, SC Bar No. 79052
Rogers Townsend & Thomas, PC
14th Floor, 1221 Main Street
Columbia, SC 29201
Telephone: 803.771.7900
Email: erica.lybrand@rtt-law.com

Richard C. Keller
Burr & Forman LLP
Suite 3400, 420 North 20th Street
Birmingham, AL 35203
Telephone: 205.251.3000
Email: rkeller@burr.com

*Attorneys for Respondent U.S. Bank, NA as Trustee
relating to the Chevy Chase Funding, LLC
Mortgage Backed Certificates, Series 2004-B*

Sarah P. Spruill w/ permission by 
Sarah P. Spruill, SC Bar No. 68337
Haynsworth Sinkler Boyd, P.A.
ONE North Main, 2nd Floor
Greenville, SC 29601-2772
Telephone: 864.240.3200
Email: sspruill@hsblawfirm.com

Kenneth C. Anthony, Jr.
The Anthony Law Firm, PA
P.O. Box 3565
Spartanburg, SC 29304
Telephone: 864.582.2355
Email: kanthony@anthonylaw.com

Attorneys for Respondent Alyce F. Otto

December 15, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master-in-Equity Judge

Case No.: 2012-CP-42-3549
2012-CP-42-2874

Appellate Case No. 2016-000099

U.S. Bank, NA, as trustee
relating to the Chevy Chase
Funding, LLC Mortgage
Backed Certificates, Series
2004-B,

Plaintiff,

v.

Alyce F. Otto, Individually;
Alyce F. Otto Trustee Under
Declaration of Trust of Alyce
F. Otto dated the 17th of
November 2009; TD Bank,
NA; The United States of
America, acting by and
through its agency, the
Internal Revenue Service;
Laura Kerhulas Giese, as Co-
Trustee of the Theodore
Ernest Kerhulas Trust Under
Declaration of Trust dated
May 25, 2004; Mark Warner
Kerhulas, as Co-Trustee of the
Theodore Ernest Kerhulas
Trust Under Declaration of
Trust dated May 25, 2004;
Jackson L. Munsey, Jr.;
Citibank, NA,

Defendants,

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DEC 21 2016

SC Court of Appeals

Of whom Jackson L. Munsey,
Jr., is the

Appellant.

and

U.S. Bank, NA and Alyce F.
Otto are the

Respondents.

Alyce F. Otto, Trustee,

Plaintiff,

v.

Jackson L. Munsey, Jr.,

Defendant,

FINAL REPLY BRIEF OF APPELLANTS

David R. Price, Jr. (S.C. Bar # 75140)
Samuel B. Tooker (S.C. Bar # 78999)
DAVID R. PRICE, JR., P.A.
318 West Stone Avenue (29609)
Post Office Box 2446
Greenville, South Carolina 29602-2446
(864) 271-2636 office
(864) 271-2637 fax
David@GreenvilleLegal.com
Sam@GreenvilleLegal.com
Attorneys for the Appellants

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ARGUMENTS IN REPLY

The arguments supporting Appellant's Issues on Appeal have already been adequately briefed, thus further reply to Respondents' rebuttal arguments as to the Issues on Appeal is not necessary. Without restating the issues or making redundant arguments that have been thoroughly set forth in their opening brief, the Appellant offers the following points of clarification and rebuttal to the arguments raised by Respondents that Appellant was required to seek relief pursuant to Rule 60, SCRP, before filing this appeal and that Appellants' arguments were not preserved for appeal.

I. APPELLANT WAS NOT REQUIRED TO SEEK RELIEF PURSUANT TO RULE 60, SCR, TO APPEAL THE TRIAL COURT'S RULINGS AND ORDERS.

Respondents argue that Appellant's appeal should be barred because Appellant did not move to set aside the trial court's judgment pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure. Respondents rely exclusively on Winesett v. Winesett, 287 S.C. 332, 338 S.E.2d 340 (1985) to support this argument and fail to acknowledge that Balloon Plantation, Inc. v. Head Balloons, Inc. distinguishes cases like Appellant's from the circumstances contemplated by the Court in Winesett.

In Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 399 S.E.2d 439 (Ct. App. 1990), the South Carolina Court of Appeals ruled on circumstances nearly identical to those in the instant matter and determined that despite the respondent's argument that the appellant should have filed a Rule 60(b) motion to set aside default to preserve appellant's issues on appeal, a Rule 60(b) motion was unnecessary as there existed a sufficient record for the purpose of the appeal and "there [was] no point in

requiring [the appellant] to ask the circuit court judge to rule on the same question twice.”
Id. at 157, 399 S.E.2d at 442.

The trial court sanctioned the defendant in Balloon Plantation for failing to satisfy a previous order by striking the defendant’s answer and granting a default judgment in favor of the plaintiff. Id. at 153-154, 399 S.E.2d at 440. The defendant requested relief, and the trial court “explicitly ruled on the question of whether the defendants should be in default.” Id. at 157, 399 S.E.2d at 442. The Court of Appeals was “not being asked to rule on an issue not first presented [to the trial court].” Id. The Court of Appeals determined that it is unnecessary to request the trial court to rule on the same issue multiple times as “the appellants [were] able to provide [the Court of Appeals] with a sufficient record on appeal.” Id.

The circumstances in Balloon Plantation are easily distinguishable from those in Winesett. In Winesett, the family court entered a default order terminating the respondent’s responsibility to pay the appellant alimony. Winesett v. Winesett, 287 S.C. 332, 333, 338 S.E.2d 340, 341 (1985). The appellant, who had not appeared at all during the course of the family court litigation, then appealed the trial court’s order. Id. The Supreme Court reasoned that “a party appealing a default judgment will ordinarily be precluded from raising any issues on appeal because they were not first presented below.” Id. In addition, the Supreme Court noted that “the appellant will often not be able to meet his burden of providing this Court with a record sufficient to permit an adequate review.” Id.

The Appellant’s case is very much analogous to the circumstances in Balloon Plantation and readily distinguishable from those in Winesett. There is ample record in

this case, including motions, affidavits, exhibits, and oral arguments, creating a record sufficient for the Court of Appeals to permit an adequate review of the issues on appeal. Likewise, the issues on appeal were those same issues raised by Appellant, addressed by Respondents, and ruled on by the trial court.

Appellant filed responsive pleadings. (See R. pp. 314-316, ¶¶ 12-20 and R. pp. 47-81). Appellant filed a Motion to Set Aside Default and Leave to File Answer Outside of Time. (See R. pp. 297-303). The trial court permitted counsel for Appellant to argue the merits of Appellant's motion based on the documents submitted and ruled that Appellant was in default and denied Appellant's Motion to Set Aside Default. (See R. pp. 7-8).

After litigation continued for two and a half years following the initial order denying relief from entry of default, Appellant again moved the court for relief from default and submitted exhibits in support of his motion, and the trial court again heard arguments, on the record, before ruling on Appellant's second motion to be relieved from default. (See R. pp. 306-310 and R. pp. 100-103). On November 24, 2015, the trial court heard arguments from Appellant's counsel and Respondents regarding Appellant's motion for relief, Appellant's equitable rights in the property, and Appellant's equitable right to redeem the property. (See R. pp. 100-103, 130-133). The trial court then issued a judgment ruling on these issues. (See R. pp. 21-30).

Appellant subsequently filed a motion to alter or amend the court's ruling, requesting clarification from the trial court. (See R. pp. 402-404 and R. pp. 208-219). The trial court again heard oral arguments and ruled on Appellant's motion. (See R. pp.

208-219). The trial court then issued an order ruling on Appellant's motion to alter or amend. (See R. pp. 17-20).

Appellant's answer, counterclaims, motions, exhibits, affidavits, and oral arguments all distinguish the circumstances in the instant matter from those contemplated by the court in Winesett. In Appellant's case, unlike Winesett, Appellant appeared and filed an answer and counterclaims. In Winesett, the appellant failed to appear or file responsive pleadings, and her alimony was terminated by the court. Winesett at 332, 338 S.E.2d 341. She then appealed the termination of her alimony after having failed to appear at any stage before the trial court. Id.

Appellant Munsey, like the appellant in Balloon Plantation, had the trial court explicitly rule on the question of whether he should be in default, so the Court of Appeals "is not being asked to rule on an issue not first presented below." Balloon Plantation at 157, 399 S.E.2d at 442. As the Court acknowledges in Balloon Plantation, "[t]here is no point in requiring the [Appellant] to ask the circuit judge to rule on the same question twice," so in this case a Rule 60 motion would not have been appropriate. Id. In addition, Appellant Munsey is "able to provide this Court with a sufficient record on appeal" for all issues under appeal. Id. As Appellant's circumstances and trial and trial record sufficiently mirror those in Balloon Plantation and are obviously divergent from the facts of Winesett "the procedure required by the Court in Winesett [should not be] required in the instant case." Id.

II. APPELLANT'S ISSUES ON APPEAL WERE PRESERVED.

Respondents further argue that Appellant failed to preserve all his arguments for appeal. "[T]o preserve an issue for appellate review, the issue must be raised to and

ruled upon by the trial court.” Whaley v. CSX Transp., Inc., 362 S.C. 456, 609 S.E.2d 286, 299 (2005). It is important to remember, too, that issue preservation “is not a ‘gotcha’ game aimed at embarrassing attorneys or harming litigants.” State v. Haygood, 409 S.C. 420, 430, 762 S.E.2d 69, 74 (Ct. App. 2014). When an issue is clearly unpreserved, our appellate courts should adhere to longstanding precedent and resolve an issue on preservation grounds; however “it is good practice for [appellate courts] to reach the merits of an issue when error preservation is doubtful.” Id. Our courts have further held that:

Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review. Instead, a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue.

State v. Brannon, 388 S.C. 498, 502, 697 S.E.2d 593, 595-96 (2010).

The fundamental issues on appeal are whether the trial court should have let the Appellant out of default and whether the trial court should have concluded that the Appellant not only had an equitable interest in the subject property but that he had an equitable right to redeem the property.

Appellant’s trial counsel twice requested the trial court to relieve the default judgment entered against the Appellant. (See R. pp. 297-303 and R. pp. 306-318). Appellant, in both written motion and oral argument, requested that the court consider whether the circumstances in Appellant’s case were such that relief from default was appropriate. (See Id. See also R. pp. 84-11 and R. pp. 100-106). Appellant’s counsel twice argued that Appellant had shown good cause to warrant setting aside the original entry of default. (See Id.). The trial court twice declined to grant Appellant’s motions for relief despite Appellant’s arguments. (See R. pp. 7-8 and R. pp. 15-16).

Appellant also argued both orally and in written motion that Appellant had an equitable interest in the subject property. (See R. pp. 130-133 and R. pp. 402-404). The trial court concluded, over Appellant's objections, that Appellant did not possess an equitable interest in the property and was not entitled to redeem the property before it was sold at foreclosure sale. (See R. pp. 17-20).

The issues raised on appeal were argued by trial counsel and ruled on by the trial court repeatedly over the course of the litigation of Appellant's case. Respondents' issue preservation argument is an attempt to skirt around Respondents' improper articulation of and the trial court's improper reliance on the law as expressed in Regions Bank v. Owens, 402 S.C. 642, 741 S.E.2d 51 (Ct. App. 2013). Rather than seeking a judicial determination on the merits, Respondents prefer a 'gotcha' game to a fair adjudication of the issues.

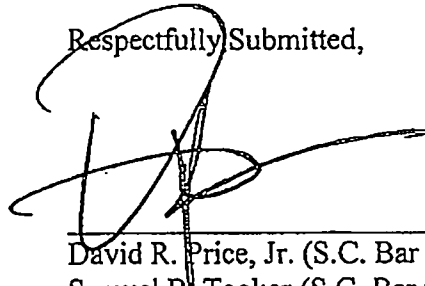
CONCLUSION

Appellant did not need to seek relief pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure as the trial court had twice heard and twice ruled on the merits of Appellant's request for relief from default. Because Appellant filed an answer and counterclaims, participated in litigation, made several motions before the court, provided the trial court supporting exhibits and affidavits, and obtained from the court specific rulings regarding each motion for relief, there exists a record sufficient for appeal and this Court is not being asked to rule on an issue not first presented below.

In addition, because Appellant actively participated in the process as much as the trial court permitted and created a record from which an appeal could be taken, the issues articulated in Appellant's initial brief were fairly raised before the trial court, and the trial

court had an opportunity to rule on each of the issues raised by Appellant on appeal. The issues before this Court are, therefore, sufficiently preserved to warrant a review of the legal and factual questions presented by Appellant.

Respectfully Submitted,

A handwritten signature in black ink, appearing to be 'DRP', is written over a horizontal line.

David R. Price, Jr. (S.C. Bar # 75140)

Samuel B. Tooker (S.C. Bar # 78999)

DAVID R. PRICE, JR., P.A.

318 West Stone Avenue (29609)

Post Office Box 2446

Greenville, South Carolina 29602-2446

(864) 271-2636 office

(864) 271-2637 fax

David@GreenvilleLegal.com

Sam@GreenvilleLegal.com

Attorneys for Appellants

Greenville, South Carolina

Date: December 16, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

DEC 05 2016

SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master-in-Equity Judge

Case No.: 2012-CP-42-3549
2012-CP-42-2874

Appellate Case No. 2016-000099

U.S. Bank, NA, as trustee relating to the Chevy Chase Funding, LLC Mortgage
Backed Certificates, Series 2004-B,

Plaintiff,

v.

Alyce F. Otto, Individually; Alyce F. Otto Trustee Under Declaration of Trust
of Alyce F. Otto dated the 17th of November 2009; TD Bank, NA; The United
States of America, acting by and through its agency, the Internal Revenue
Service; Laura Kerhulas Giese, as Co-Trustee of the Theodore Ernest Kerhulas
Trust Under Declaration of Trust dated May 25, 2004; Mark Warner Kerhulas,
as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of
Trust dated May 25, 2004; Jackson L. Munsey, Jr.; Citibank, NA,

Defendants,

Of whom Jackson L. Munsey, Jr., is the

Appellant.

and

U.S. Bank, NA and Alyce F. Otto are the

Respondents.

Alyce F. Otto, Trustee,

Plaintiff,

v.

Jackson L. Munsey, Jr.,

Defendant,

RECORD ON APPEAL

David R. Price, Jr., Esq.
PO Box 2446
Greenville, SC 29602

Samuel B. Tooker, Esq.
PO Box 2446
Greenville, SC 29602

Erin Culbertson, Esq.
114 Manly St.
Greenville, SC 29601

ATTORNEYS FOR APPELLANT

Kenneth C. Anthony, Jr., Esq.
PO Box 3565
Spartanburg, SC 29304-3565

Sarah Patrick Spruill, Esq.
PO Box 2048
Greenville, SC 29602

ATTORNEYS FOR RESPONDENT
ALYCE F. OTTO

Erica Greer Lybrand, Esq.
Post Office Box 100200
Columbia, SC 29201

Richard Carlton Keller, Esq.
420 North 20th Street
Suite 3400
Birmingham, AL 35203

ATTORNEYS FOR RESPONDENT
U.S. BANK, NA AS TRUSTEE TO
THE CHEVY CHASE FUNDING,
LLC MORTGAGE BACKED
CERTIFICATES, SERIES 2004-B

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

Alyce F. Otto, Trustee,
Plaintiff,

vs.

Jackson L. Munsey, Jr.,
Defendant.

ORDER OF REFERENCE

C.A. No.: 2010-GP-42-
Non Jury

2874

Upon motion of Kenneth C. Anthony, Jr. of the Anthony Law Firm, P.A. Attorney for Plaintiff, this is a foreclosure action and is a proper matter to refer to The Honorable Gordon Cooper, as Master-in-Equity for Spartanburg County, pursuant to Rule 53 of the SOUTH CAROLINA RULES OF CIVIL PROCEDURE (SCRCP).

NOW, THEREFORE, IT IS ORDERED, pursuant to Rule 53 of the SCRCP that the above-titled matter be and the same hereby is referred to The Honorable Gordon Cooper, Master-in-Equity for Spartanburg County, to make appropriate findings of fact and conclusions of law with authority to enter a final judgment in this cause and any appeal from the final judgment in this cause shall be to the South Carolina Court of Appeals.

July 6, 2012

Spartanburg, South Carolina.

Hope Blackley
Clerk of Court

FILED
CLERK OF COURT
SPARTANBURG COUNTY
JUL -6 PM 3:18
HOPE BLACKLEY

\\250svr01\lanthony\DATA\Clients\Otto, Alyce P\12-467\Order of Reference.WPD

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

U.S. Bank, NA as trustee relating to the Chevy Chase Funding,
LLC Mortgage Backed Certificates, Series 2004-B,

Plaintiff,

v.

Alyce F. Otto, individually; Alyce F. Otto, Trustee Under
Declaration of Trust of Alyce F. Otto dated the 17th day of
November 2009; TD Bank, NA; The United States of
America, acting by and through its agency, the Internal
Revenue Service; Laura Kerhulas Gicse, as Co-Trustee of
the Theodore Ernest Kerhulas Trust Under Declaration of
Trust dated May 25, 2004; Mark Warner Kerhulas, as Co-
Trustee of the Theodore Ernest Kerhulas Trust Under
Declaration of Trust dated May 25, 2004; Jackson L.
Munsey, Jr.; Citibank, NA;

Defendant(s).

IN THE COURT OF COMMON PLEAS

DOCKET NO. 12-CP-42-3549

ORDER OF REFERENCE

Deficiency Judgment Waived

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 OCT 15 AM 11:11
M. HOPE SLACKLEY

(005071-00160)

Pursuant to Rules 53(b) of the South Carolina Rules of Civil Procedure, the above-entitled case is an action for
foreclosure and may be referred to a Master in Equity or Special Referee in the above-entitled county by order of a circuit court judge or
the clerk of court.

IT IS HEREBY ORDERED, that this action is referred to the Honorable Gordon G. Cooper, as Master in Equity to take
testimony and to direct entry of final judgment in this action under Rule 53(b), SCRPC, and all matters arising from or reasonably related
to such action. The Master in Equity shall retain jurisdiction to perform all necessary acts incident to this foreclosure action including
issuance of a writ of assistance or issuance of any rule to show cause including but not limited to any rule to show cause why a party should
not be bound by the judgment of foreclosure. Further, the Master in Equity shall retain jurisdiction to hear any action contesting the
validity of the foreclosure action or sale or any motions pursuant to the South Carolina Rules of Civil Procedure including but not limited
to Rule 60(b). Judicial sales will be conducted pursuant to S.C. Code Section 15-39-680 or on any other convenient sale's date as may be
determined by the Master in Equity/Special Referee.

The hearing shall be held in the Office of the Honorable Gordon G. Cooper, as Master in Equity for Spartanburg
County, located at:

Spartanburg County Courthouse,
3rd Floor, 180 Magnolia Street
Spartanburg, SC 29306

Spartanburg, South Carolina

Oct 15, 2012.

M. Hope Blackley
Circuit Court Judge for Spartanburg County or
Clerk of Court for Spartanburg County
Natalie Bishop DC

P. O. Box 100200 (29202) • 220 Executive Center Drive, Suite 109 • Columbia, South Carolina 29210
Tel: 803-744-4444 • Fax: 803-343-7017 • Web: www.rtt-law.com

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

U.S. Bank, NA as trustee relating to the Chevy Chase
Funding, LLC Mortgage Backed Certificates, Series 2004-B,

Plaintiff,

v.

Alyce F. Otto, individually; Alyce F. Otto, Trustee Under
Declaration of Trust of Alyce F. Otto dated the 17th day of
November 2009; TD Bank, NA; The United States of
America, acting by and through its agency, the Internal
Revenue Service; Laura Kerhulas Giese, as Co-Trustee of the
Theodore Ernest Kerhulas Trust Under Declaration of Trust
dated May 25, 2004; Mark Warner Kerhulas, as Co-Trustee
of the Theodore Ernest Kerhulas Trust Under Declaration of
Trust dated May 25, 2004; Jackson L. Munsey, Jr.; Citibank,
NA;

Defendant(s).

(005071-00160)

IN THE COURT OF COMMON PLEAS

DOCKET NO. 12-CP-42-3549

CERTIFICATE OF DEFAULT AND NON-MILITARY
SERVICE
Deficiency Judgment Waived

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 OCT 15 AM 11:11
M. HOPE BLACKLEY

The undersigned attorney for Plaintiff asserts that more than thirty (30) days have elapsed since the service of the Summons and Complaint upon the Defendant(s). The following Defendant(s) has/have not answered, plead, or otherwise defended this action, pursuant to Rule 55(a), SCRCP: TD Bank, NA, Jackson L. Munsey, Jr., and Citibank, NA. Therefore, the Defendant(s) TD Bank, NA, Jackson L. Munsey, Jr., and Citibank, NA, are in default.

According to Plaintiff's business records, affidavit(s) of service, search(es) of the Department of Defense or any other obtained information, the Defendant(s) Alyce F. Otto, individually, Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated the 17th day of November 2009, Laura Kerhulas Giese, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004, Mark Warner Kerhulas, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004, and Jackson L. Munsey, Jr., are not in the Military Service of the United States as contemplated by the provisions of the Servicemembers Civil Relief Act, 50 U.S.C. § 501 et. seq.

I certify under penalty of perjury under the laws of the United States of
America that the foregoing is true and correct.
Executed on 10/19/12

Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

Samuel C. Waters (SC Bar #5958)
Reginald P. Corley (SC Bar #69453)
Eljia C. Floyd (SC Bar #68635)
Eve Moredock Stacy (SC Bar #5300)
Robert P. Davis (SC Bar #74030)
Vance L. Brubham, III (SC Bar #71250)
Andrew W. Montgomery (SC Bar #79893)

Cheryl H. Fisher (SC Bar #15213)
Jennifer W. Rubin (SC Bar #16727)
Michael P. Morris (SC Bar #73560)
Mary R. Powers (SC Bar #16534)
William S. Koehler (SC Bar #74935)
Jacelynn B. Goings (SC Bar #77501)
Andrew A. Powell (SC Bar #100210)

220 Executive Center Drive
Columbia, SC 29210
(005071-00160)

Post Office Box 100200 (29202)
(803) 744-4444

Columbia, South Carolina

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

CASE NO. 12-CP-42-3549

MOTION AND ORDER
INFORMATION FORM
AND COVER SHEETU.S. Bank, NA as trustee relating to the Chevy Chase Funding, LLC Mortgage Backed Certificates, Series 2004-B ☒ Plaintiff
v.Alyce F. Otto, individually; Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated the 17th day of November 2009; TD Bank, NA; The United States of America, acting by and through its agency, the Internal Revenue Service; Laura Kerhulas Giesse, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004; Mark Warner Kerhulas, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004; Jackson L. Munsey, Jr.; Citibank, NA; ☐ Defendant

name, S.C. Bar no. and address of plaintiff's attorney

Samuel C. Waters (SC Bar #5958)
Reginald P. Corley (SC Bar #69453)
Ellie C. Floyd (SC Bar #68635)
Eve Moredock Stacey (SC Bar #5300)
Robert P. Davis (SC Bar #74030)
Vance L. Brabham, III (SC Bar #71250)
John P. Felner (SC Bar #77460)
Andrew W. Montgomery (SC Bar #79893)
Andrew A. Powell (SC Bar #100210)
220 Executive Center Drive, Columbia, SC 29210
telephone: 803-744-4444Cheryl H. Fisher (SC Bar #15213)
Jennifer W. Rubin (SC Bar #16727)
Michael P. Morris (SC Bar #73560)
Mary R. Powers (SC Bar #16534)
William S. Kozlter (SC Bar #74935)
Jaclynn B. Golins (SC Bar #77501)
Kelley K. Lipscomb (SC Bar #77519)
Taryn M. Zango (SC Bar #70357)

fax: 803-343-7013

name, S.C. Bar no. and address of
Defendant's attorneytelephone:
email: other:

- ☐
- MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
-
- ☒
- FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
-
- ☒
- PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion:

Estimated Time Needed:

Court Reporter Needed: YES/NO

SECTION II: Motion Fee

☒ PAID — AMOUNT: \$25.00☐ EXEMPT:

- ☐
- Rule to Show Cause in Child or Spousal Support
-
- ☐
- Domestic Abuse or Abuse and Neglect
-
- ☐
- Indigent status
- ☐
- State Agency v. Indigent Party
-
- ☐
- Sexually Violent Predator Act
- ☐
- Post-Conviction Relief
-
- ☐
- Motion for Stay in Bankruptcy
-
- ☐
- Motion for Publication
- ☐
- Motion for Execution (Rule 69, SCRPC)
-
- ☐
- Proposed order submitted at request of the court; or,
-
- reduced to writing from motion made in open court per judge's instructions
-
- Name of Court Reporter: _____
-
- ☐
- Other: Referred to Master by Motion and Order of Court

SECTION III: Motion Type

☐ Written motion attached☒ Form Motion —

I hereby move for relief or action by the court as set forth in the attached proposed order. /

Signature of Attorney for Plaintiff/Defendant

October 9, 2012
Date submitted

JUDGE'S SECTION

- ☐
- Motion Fee to be paid upon filing of the attached order.
-
- ☐
- Other

JUDGE
CODE: _____

Date: _____

CLERK'S VERIFICATION

DATE FILED

Collected by: _____

☐ MOTION FEE COLLECTED: _____☐ CONTESTED — AMOUNT DUE: _____

SCCA/233 (1/2/003)

COPY



ROGERS TOWNSEND
ATTORNEYS AT LAW

ROGERS TOWNSEND & THOMAS, PC
DEFAULT SERVICES DEPARTMENT

POST OFFICE BOX 100200 (29202)
220 EXECUTIVE CENTER DRIVE
COLUMBIA, SOUTH CAROLINA 29210
P 803.744.4444 F 803.343.7017
WWW.RTT-LAW.COM

October 9, 2012

The Honorable Gordon G. Cooper
Master in Equity for Spartanburg County
Post Office Box 5666
Spartanburg, SC 29304

Re: U.S. Bank, NA as trustee relating to the Chevy Chase Funding, LLC Mortgage Backed
Certificates, Series 2004-B vs. Rudrick & Alyce Otto
Case No. 12-CP-42-3549; Spartanburg County
Our File No. 005071-00160

Dear Sir/Madam:

I am enclosing originals and copies of a proposed Motion and Order of Reference along with our check in the amount of \$100. I would appreciate your having the originals executed and returning the clocked copies to my office in the envelope provided.

Thank you for your kind assistance in this matter. Do not hesitate to contact me should you have any questions or need anything further.

Rogers Townsend & Thomas, PC
Default Servicing Section

Enclosures

cc: Kenneth Anthony
The Anthony Law Firm, PA
P.O. Box 3565
250 Magnolia Street (29306)
Spartanburg, SC 29304
Attorney for Alyce F. Otto, individually

Kenneth Anthony
The Anthony Law Firm, PA
P.O. Box 3565
250 Magnolia Street (29306)
Spartanburg, SC 29304

FILED
CLERK OF COURT
2012 OCT 15 AM 11:10
M. ROSE BLANCHET

P. O. Box 100200 (29202) • 220 Executive Center Drive, Suite 109 • Columbia, South Carolina 29210
Tel: 803-744-4444 • Fax: 803-343-7017 • Web: www.rtt-law.com

Attorney for Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated the
17th day of November 2009

George Conits
55 Beattie Place, Suite 700
Greenville, SC 29601
Attorney for The United States of America, acting by and through its agency, the Internal
Revenue Service

David L. Walsh, Attorney at Law
PO Box 5156
Spartanburg, SC 29304
Attorney for Laura Kerhulas Giese, as Co-Trustee of the Theodore Ernest Kerhulas Trust
Under Declaration of Trust dated May 25, 2004

David L. Walsh, Attorney at Law
PO Box 5156
Spartanburg, SC 29304
Attorney for Mark Warner Kerhulas, as Co-Trustee of the Theodore Ernest Kerhulas
Trust Under Declaration of Trust dated May 25, 2004

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 OCT 15 AM 11:10
M. HOPE BLANCHETT

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

U.S. Bank, NA as trustee relating to the Chevy Chase Funding, LLC Mortgage Backed Certificates, Series 2004-B,

Plaintiff,

v.

Alyce F. Otto, individually; Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated the 17th day of November 2009; TD Bank, NA; The United States of America, acting by and through its agency, the Internal Revenue Service; Laura Kerhulas Giese, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004 ; Mark Warner Kerhulas, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004 ; Jackson L. Munsey, Jr.; Citibank, NA;

Defendant(s).

(505071-00160)

IN THE COURT OF COMMON PLEAS

DOCKET NO. 2012-CP-42-3549

ORDER DENYING DEFENDANT JACKSON L. MUNSEY, JR.'S MOTION TO SET ASIDE DEFAULT AND LEAVE TO FILE ANSWER OUTSIDE OF TIME

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2013 MAY -6 PM 3:34
M. HOPE BLANCHLEY

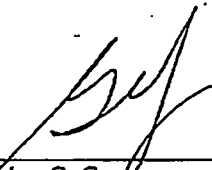
This matter came before me for a hearing held May 6, 2013 at 2:30 PM, regarding Defendant Jackson L. Munsey, Jr.'s ("Munsey") Motion to Set Aside Default and Leave to File Answer Outside of Time. Erica G. Lybrand appeared on behalf of the Plaintiff. Erin Culbertson appeared on behalf of Defendant Munsey. Other parties appearing are as follows:
Kenneth C. Anthony, Jr. on behalf of ALYCE F. OTTO. *AK*

Based on the record and arguments made at the hearing, the Court denies Munsey's motion as Munsey has failed to put forth a satisfactory explanation for his default. As Munsey has not met this initial burden in seeking to set aside the entry of default against him, this Court need not consider the factors as set forth in *Wham v. Shearson Lehman Brothers*.

#1
AK

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Defendant Munsey's Motion to Set Aside Default and Leave to File Answer Outside of Time is denied and Munsey shall remain in default.

AND IT IS SO ORDERED.



Gordon G. Cooper
Master-in-Equity for Spartanburg County

Spartanburg, South Carolina

May 6, 2013

A CERTIFIED COPY
M. Hope Blaciley
CLERK OF COURT
SPARTANBURG COUNTY
BY: [Signature] D.C.
DATED 5/10/13

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2013 MAY -6 PM 3:34
M. HOPE BLACILEY

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

C. A. NO.: 2012-CP-42-3549

U.S. Bank, NA as Trustee relating to
The Chevy Chase Funding, LLC
Mortgage Backed Certificates,
Series 2004-B,

Plaintiff,

-vs-

Alyce F. Otto, individually;
Alyce F. Otto, Trustee Under
Declaration of Trust of Alyce F.
Otto, dated 11/17/09; TD Bank, NA;
The United States of America,
Acting by and through its agency,
The Internal Revenue Service;
Laura Kerhulas Giese, as co-
Trustee of the Theodore Ernest
Kerhulas Trust Under Declaration
Of Trust dated 5/25/04; Mark
Warner Kerhulas, as co-Trustee of
The Theodore Ernest Kerhulas
Trust Under Declaration of Trust
Dated 5/25/04; Jackson L. Munsey,
Jr.; and Citibank, NA,

Defendants.

And

Jackson L. Munsey, Jr.

Cross-Claim Plaintiff,

-vs-

Alyce F. Otto, Individually; and
Alyce F. Otto, Trustee under
Declaration of Trust of Alyce F.
Otto, dated 11/17/09,

Cross-Claim Defendants.

ORDER TO CONSOLIDATE WITH
C. A. NO.: 2012-CP-42-2874

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M. HOPE BLAUGLEY

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This matter is before the Court on Defendant Jackson L. Munsey, Jr.'s ("Munsey"), Motion to Consolidate. The Motion was heard before me on May 6, 2013, at which time Munsey was represented by Erin Culbertson, the Plaintiff was represented by Erica Lybrand, and the Defendant Alyce F. Otto, Individually and as Trustee ("Otto"), was represented by Ken Anthony.

I have carefully reviewed the Motion of Munsey, the Plaintiff's Return to Munsey's Motion, and the procedural history of this case. I have also considered the oral arguments on the parties' legal theories.

Based upon the facts of the case and applicable law, this Court hereby orders that the instant matter, bearing Civil Action No. 2012-CP-42-3549 be consolidated with a companion action filed by Otto against Munsey, bearing Civil Action No. 2012-CP-42-2874. The Court holds that the two actions involve the same property, the same parties, and a single source of money for the payment of the subject mortgage. Thus, pursuant to the standard of Rule 42 of the South Carolina Rules of Civil Procedure, I find that there are multiple common questions of law and fact. In the interests of judicial economy, the two actions are hereby consolidated.

IT IS SO ORDERED.


The Hon. Gordon G. Cooper
Spartanburg County Master in Equity

Spartanburg, SC
May 6, 2013

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H. H. C. COOPER

#2


STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT
Case No. 2012-CP-42-3549
Case No. 2012-CP-42-2874

U.S. Bank, NA, as trustee relating to the)
Chevy Chase Funding, LLC Mortgage)
Backed Certificates, Series 2004-B,)
Plaintiff.)

v.)
Alyce F. Otto, Individually; Alyce F. Otto)
Trustee Under Declaration of Trust of)
Alyce F. Otto dated the 17th of November)
2009; TD Bank, NA; The United States)
of America, acting by and through its)
agency, the Internal Revenue service;)
Laura Kerhulas Giese, as Co-Trustee of the)
Theodore Ernest Kerhulas Trust Under)
Declaration of Trust dated May 25, 2004;)
Mrk Warner Kerhulas, as Co-Trustee of)
the Theodore Ernest Kerhulas Trust Under)
Declaration of Trust dated may 25, 2004;)
Jackson L. Munsey, Jr.; Citibank, N.A.;)
Defendants.)

ORDER AS TO OTTO VS. MUNSEY

And

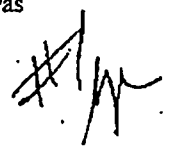
Alyce F. Otto, Trustee,)
Plaintiff,)
v.)
Jackson L. Munsey, Jr.,)
Defendants.)

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N. HOPE BLANCHETTE

A hearing was held before me on November 24, 2015 in these two cases which were consolidated, one arising out of the foreclosure of the first mortgage against the subject property, the other arising out of the foreclosure of a Contract for Deed between these parties as to the same property. This Order relates to the foreclosure and termination of the Contract for Deed. At the time scheduled for hearing, the Court heard testimony and received evidence as to both cases. This Order relates to the action between these parties.

FINDINGS OF FACT

1. I find that this Court has jurisdiction of the parties and subject matter of this action.
2. I find that the parties entered a certain Contract for Deed as to property located at 1825 Fairview Farms Road, Campobello, SC on March 4, 2011, by which the Defendant Munsey was



to purchase from Otto the subject property. This was to be done by paying a total of One Million Four Hundred Thousand and no/100 (\$1,400,000) Dollars for the property. The essence of this transaction was that Munsey was to make a cash downpayment to Otto but then was to take on the responsibility of making the first mortgage payment on the property directly to the first mortgage holder, make the second mortgage payment directly to the second mortgage holder, make a third mortgage payment directly back to Otto, pay the Homeowners Association dues and assessments and any other costs associated with the property. If all such payments were made, the property would ultimately belong to Munsey.

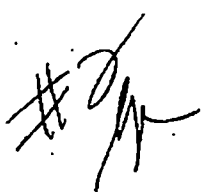
3. I find that Munsey has failed to make all payments required by the Contract for Deed, which has resulted in foreclosure of the property by the first mortgager holder and default on the other obligations.

4. I find that, in light of the foreclosure by the first mortgage holder, Otto has waived her right to foreclose on the Contract for Deed and instead has elected to seek judgment against Munsey for amounts due under the Contract for Deed.

5. I find that the amount due Otto as a result of the default in the Contract for Deed are as shown on the attached Exhibit A, which is established through testimony and evidence presented at the hearing, giving all appropriate credits to Munsey.

6. I find that, since the first mortgage holder which brought the foreclosure action has waived any deficiency judgment against Otto, the amount actually due the first mortgage holder and for which Otto should have claim against Munsey should be adjusted based on the actual foreclosure sale, the amount of the judgment against Munsey should likewise be adjusted once the foreclosure sale occurs. Therefore, the actual amount of the judgment against Munsey will be adjusted after the foreclosure sale occurs on February 1, 2015. Therefore, this Court reserves the right to enter a Supplemental Order concerning the judgment amount.

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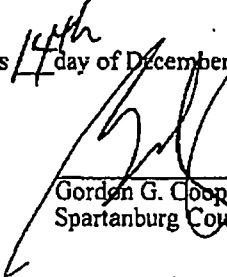


7. I find that since the actual amount of judgment will not be entered until after the foreclosure sale, Munsey's rights to the property shall not terminate until the foreclosure sale and he shall not be required to deliver possession of the property until the time specified in the Order of Foreclosure.

NOW, THEREFORE, I CONCLUDE AND IT IS ORDERED that Otto have judgment against Munsey in the amount shown on the attached Exhibit A, subject to revision by Supplemental Order following the foreclosure sale.

IT IS FURTHER ORDERED that Munsey's rights in the property and rights under the Contract for Deed are hereby terminated and possession is to be delivered according to the terms of the Order of Foreclosure.

AND IT IS SO ORDERED this 14th day of December 2015.



Gordon G. Cooper, Master-In-Equity
Spartanburg County, SC

Spartanburg, SC

SPARTANBURG COUNTY, SC
2015 DEC 15 PM 2:35
M. HOPE BLACKLEY

#3


EXHIBIT A

First Mortgage	\$1,183,451.00
Second Mortgage	\$177,564.00
Third Mortgage	\$15,008.49
Carolina First Payments	\$11,052.00
Greenspace	\$39,200.00
Attorney Fees	\$12,600.00
Attorney Costs	\$295.00
Returned Checks	(\$15,723.00)
Funds in Trust	(\$6,044.10)
TOTAL	\$1,417,403.39

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

U.S. Bank, NA as trustee relating to the Chevy
Chase Funding, LLC Mortgage Backed
Certificates, Series 2004-B,

Plaintiff,

v.

Alyce F. Otto, individually; Alyce F. Otto,
Trustee Under Declaration of Trust of Alyce F.
Otto dated the 17th day of November 2009; TD
Bank, NA; The United States of America, acting
by and through its agency, the Internal Revenue
Service; Laura Kerhulas Giese, as Co-Trustee of
the Theodore Ernest Kerhulas Trust Under
Declaration of Trust dated May 25, 2004 ; Mark
Warner Kerhulas, as Co-Trustee of the
Theodore Ernest Kerhulas Trust Under
Declaration of Trust dated May 25, 2004 ;
Jackson L. Munsey, Jr.; Citibank, NA;

Defendants.

AND

Alyce F. Otto, Trustee,

Plaintiff,

v.

Jackson L. Munsey, Jr.,

Defendant.

IN THE COURT OF COMMON PLEAS

DOCKET NO. 2012-CP-42-03549

ORDER ON DEFENDANT JACKSON L.
MUNSEY'S MOTION FOR RELIEF
FROM ENTRY OF DEFAULT

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M. HOPE BLACKLEY

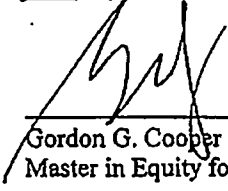
SPARTANBURG COUNTY

A hearing was held on November 24, 2015 on Defendant Jackson L. Munsey, Jr.'s
Motion for Relief from the Default Judgment, which was filed on November 23, 2015, one day

prior to the trial in this matter. After reviewing motion, and hearing oral argument from counsel for all parties, the Court finds as follows:

1. Mr. Munsey failed to file a responsive pleading to the Complaint filed by Plaintiff U.S. Bank, N.A., as trustee relating to the Chevy Chase Funding, LLC Mortgage Backed Certificates, Series 2004-B until December 27, 2012, which was more than thirty (30) days after Mr. Munsey was served on August 31, 2012. Accordingly, default was entered on October 15, 2012.
2. On February 4, 2013, Defendant Munsey filed a Motion to Set Aside Default and Leave to File Answer Outside of Time.
3. On May 6, 2013, a hearing was held on Defendant Munsey's motion and an order was entered on the same day denying the motion.
4. Defendant Munsey never sought relief from the entry of the May 6, 2013 order.
5. Accordingly, this Court finds that Mr. Munsey's Motion for Relief from Default Judgment is due to be denied on the grounds of *res judicata*, as this Court has previously denied a motion requesting the same relief in May 2013.

AND IT IS SO ORDERED this 22nd day of December, 2015.


Gordon G. Cooper
Master in Equity for Spartanburg County

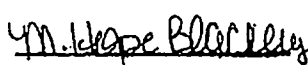
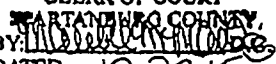
Spartanburg, South Carolina

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2

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

U.S. Bank, NA as Trustee relating to)
The Chevy Chase Funding, LLC)
Mortgage Backed Certificates,)
Series 2004-B,)

Plaintiff,)

-vs-)

Alyce F. Otto, individually;)
Alyce F. Otto, Trustee Under)
Declaration of Trust of Alyce F.)
Otto, dated 11/17/09; TD Bank, NA;)
The United States of America,)
Acting by and through its agency,)
The Internal Revenue Service;)
Laura Kerhulas Giese, as co-)
Trustee of the Theodore Ernest)
Kerhulas Trust Under Declaration)
Of Trust dated 5/25/04; Mark)
Warner Kerhulas, as co-Trustee of)
The Theodore Ernest Kerhulas)
Trust Under Declaration of Trust)
Dated 5/25/04; Jackson L. Munsey,)
Jr.; and Citibank, NA,)

Defendants.)

And)

Jackson L. Munsey, Jr.)

Cross-Claim Plaintiff,)

-vs-)

Alyce F. Otto, Individually; and)
Alyce F. Otto, Trustee under)
Declaration of Trust of Alyce F.)
Otto, dated 11/17/09,)

Cross-Claim Defendants.)

IN THE COURT OF COMMON PLEAS

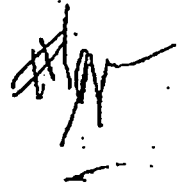
C. A. NO.: 2012-CP-42-3549

ORDER ON JACKSON L. MUNSEY, JR.'S
MOTION TO ALTER OR AMEND

M. HOPE BLACKLEY

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SPARTANBURG COUNTY



This issue is before me on Defendant Jackson L. Munsey, Jr.'s ("Munsey") Motion to Alter or Amend Order (the "Motion"), related to this Court's Order as to Otto v. Munsey, dated December 14, 2015 (the "Otto Order"). At a hearing on the Motion held before this Court on February 15, 2016, counsel for the parties were given the opportunity to argue their respective positions, all of which were more fully stated and argued in their written submissions to the Court. Additionally, counsel for Plaintiff U.S. Bank ("Plaintiff") and counsel for Defendants Laura Kerhulas Giese and Mark Warner Kerhulas were present for the hearing.

After a thorough review of Munsey's Motion, Defendant Alyce F. Otto's ("Otto") Return to Motion to Alter or Amend Order, common and statutory law, and oral arguments presented by counsel at the hearing, I find that Munsey's Motion, based upon Rules 59(e) and 60(b)(1), SCRCF, is granted, and the Order is hereby amended as follows:

(1) Exhibit A. The document attached hereto as Exhibit A and incorporated herein by reference is hereby also deemed attached to and incorporated into the Otto Order.

(2) Reference to Foreclosure Sale Date. The foreclosure sale date of the Plaintiff's mortgage, as referenced in Section 6 of the Otto Order is hereby corrected to read "February 1, 2016."

(3) Munsey's Interest in the Property. To accurately reflect the Court's ruling from the bench at the hearing on November 24, 2015, the Otto Order is hereby amended to include the following Finding of Fact:

I find that Munsey has no equitable interest in the property, and consequently no equitable right of redemption, because he is not a junior lienholder.

(4) No Additional Bond Required. In response to Otto's Return to Motion, which requested that the Court require Munsey to post a *supersedeas* bond (in addition to that bond in

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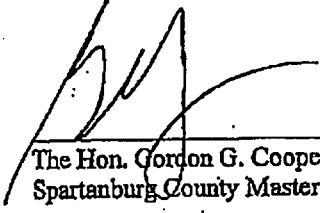
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[Signature]

the amount of \$243,000.00, posted with the Clerk of Court on January 29, 2016 (the "Bond")) to stay the proceedings pending his appeal, the Otto Order is hereby amended to include the following Conclusion of Law:

The proceedings shall be stayed without the requirement of an additional *supersedeas* bond pending the disposition of Munsey's appeal in this matter. The Bond currently on deposit with the Clerk of Court shall stand as bond for the entire case, and hence secures a stay of execution of both the Otto Order and the Order of Foreclosure issued by the Court on December 22, 2015 (the "Foreclosure Order"). Further, pending the disposition of Munsey's appeal, no final judgment amount shall be established by either the Otto Order or this Order. A final judgment amount will only be determined by the Court in a separate damages hearing subsequent to the foreclosure sale of the Plaintiff's mortgage as ordered by this Court in the Foreclosure Order.

All other terms and conditions of the Otto Order shall remain in full force and effect.

IT IS SO ORDERED.


The Hon. Gordon G. Cooper
Spartanburg County Master-in-Equity

Spartanburg, SC.
Dated: April 19, 2016

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M. HOPE BLACKLEY



EXHIBIT A

First Mortgage	\$1,183,451.00
Second Mortgage	\$177,564.00
Third Mortgage	\$15,008.49
Carolina First Payments	\$11,052.00
Greenspace	\$39,200.00
Attorney Fees	\$12,600.00
Attorney Costs	\$295.00
Returned Checks	(\$15,723.00)
Funds in Trust	(\$6,044.10)
TOTAL	\$1,417,403.39

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SPARTANBURG COUNTY
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M. HOPE BLACKLEY

#4
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STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

U.S. Bank, NA as trustee relating to the Chevy
Chase Funding, LLC Mortgage Backed
Certificates, Series 2004-B,

Plaintiff,

IN THE COURT OF COMMON PLEAS

DOCKET NO. 2012-CP-42-03549

JUDGMENT OF FORECLOSURE AND
SALE

Deficiency Judgment Waived

v.

Alyce F. Otto, individually; Alyce F. Otto,
Trustee Under Declaration of Trust of Alyce F.
Otto dated the 17th day of November 2009; TD
Bank, NA; The United States of America, acting
by and through its agency, the Internal Revenue
Service; Laura Kerhulas Giese, as Co-Trustee of
the Theodore Ernest Kerhulas Trust Under
Declaration of Trust dated May 25, 2004; Mark
Warner Kerhulas, as Co-Trustee of the
Theodore Ernest Kerhulas Trust Under
Declaration of Trust dated May 25, 2004;
Jackson L. Munsey, Jr.; Citibank, NA;

Defendants.

AND

Alyce F. Otto, Trustee,

Plaintiff,

v.

Jackson L. Munsey, Jr.,

Defendant.

(505071-00160 EL1)

Erica G. Lybrand, Esquire
Richard C. Keller, Esquire
Attorneys for the Plaintiff

2015 DEC 22 AM 9:25
H. HOFFER & ASSOCIATES

Kenneth Anthony, Jr., Esquire
Attorney for Alyce F. Otto, individually and Alyce F. Otto; Trustee Under Declaration of
Trust of Alyce F. Otto dated the 17th day of November 2009

George Conits, Esquire
Attorney for The United States of America, acting by and through its agency, the Internal Revenue
Service

David Walsh, Esquire
Attorney for Laura Kerhulas Giese, as Co-Trustee of the Theodore Ernest Kerhulas Trust
Under Declaration of Trust dated May 25, 2004 and Mark Warner Kerhulas, as Co-Trustee of the
Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004

Erin Culbertson, Esquire
Attorney for Jackson L. Munsey, Jr.

Pursuant to Rule 53 of the South Carolina Rules of Civil Procedure, the above-entitled matter
was referred to the undersigned. A hearing was held November 24, 2015 at 9:30A.M. Evidence was
presented, which is reported herewith, and from the evidence, I find and conclude as follows:

FINDINGS OF FACT:

1. The Lis Pendens was filed on August 21, 2012.
2. The Summons and Complaint were filed on August 21, 2012.
3. Service was made upon all Defendant(s) as shown by the proof(s) of service filed
herein.
4. The Defendants Alyce F. Otto, Laura Kerhulas Giese, Mark Warner Kerhulas, and
Jackson L. Munsey, Jr. 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.
5. No Defendant raised any issues related to Plaintiff's standing to prosecute this action.
6. Pursuant to the South Carolina Supreme Court Administrative Order 2009-05-22-
01 dated May 22, 2009, the Plaintiff set forth its belief in its Complaint or by Affidavit, which is
already of record in this case, that the mortgage loan which is the subject of this foreclosure action is
not eligible for modification pursuant to the terms of the Home Affordable Modification Program
(HMP). Pursuant to the South Carolina Supreme Court Administrative Order dated May 22, 2009,
Plaintiff's attorney has not received a counter affidavit from any Defendant(s).
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. Alyce F. Otto, individually and Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated the 17th day of November 2009 (collectively herein referred to as "Otto") filed an Answer and Counterclaim through her attorney Kenneth Anthony, Jr. on September 10, 2012. Subsequently, Otto dismissed her counterclaim against Plaintiff with prejudice on July 21, 2014. Her Answer was later amended on July 15, 2015, in which she raised no additional allegations against Plaintiff, but contested the validity of the liens of Defendants Laura Kerhulas Giese, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004 and Mark Warner Kerhulas, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004.

9. Defendants Laura Kerhulas Giese, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004, and Mark Warner Kerhulas, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004, filed an Answer on September 14, 2012 by and through their attorney David L. Walsh.

10. The Defendant, The United States of America, has duly filed its Answer, which is of record herein, and as asserted therein has a 120 day right of redemption pursuant to 28 U.S.C.A. §2410(c).

11. The Defendant TD Bank, NA is represented by attorneys Jada Wylie and William Stork. An Answer was not filed, but a Notice of Appearance was filed on February 12, 2015.

12. The Defendant Jackson L. Munsey, Jr. ("Munsey") is represented by attorney Erin Culbertson. Munsey filed an Answer, Counterclaims and Crossclaims on December 27, 2012, after having already been deemed in default pursuant to the Certificate of Default filed on October 15, 2012. On January 25, 2013, counsel for the Plaintiff wrote a letter to the Clerk of Court for Spartanburg County in which it notified the Court that the Answer, Counterclaims and Crossclaims were received after Munsey was in default and that Plaintiff did not intend to accept or respond to the late Answer unless directed to do so from the Court. Thereafter, on February 4, 2013, Munsey filed a Motion to Set Aside Default and Leave to File Answer. An Order Denying Munsey's Motion to Set Aside Default was entered on May 6, 2013. Munsey renewed his Motion to be Relieved of Default on November 23, 2015. That Motion was denied prior to the hearing on the Plaintiff's foreclosure action on November 24, 2015.

13. The Defendants Jackson L. Munsey, Jr., TD Bank, NA, and Citibank, NA, are in default.

14. All Pro Se Defendants and all attorneys of record were notified of the time, date, and place of the hearing by letter and certificate of mailing of record herein.

15. Rudrick G. Otto and Alyce F. Otto for value received, made, executed and delivered a(n) Adjustable Rate Note dated August 18, 2004 promising thereby to pay to Plaintiff or its predecessor the sum of \$999,500.00 with interest at 1.950% per annum. Other terms and conditions are stated in the Adjustable Rate Note, of record herein.

16. To better secure the payment of the Adjustable Rate Note described above, Rudrick G. Otto and Alyce F. Otto made, executed, and delivered to Mortgage Electronic Registration Systems, Inc., as nominee for Chevy Chase Bank, FSB, its successors and assigns (MIN# 100015305541858019) a certain real estate Mortgage in writing, dated August 18, 2004 covering real property in Spartanburg County, which is the same as that described in the Complaint. This Mortgage was filed on August 24, 2004, and is of record in the Office of RMC/ROD in Book 3290 at Page 70. Subsequently, this mortgage was assigned to U.S. Bank, N.A. as trustee relating to the Chevy Chase Funding LLC Mortgage Backed Certificates, Series 2004-B by assignment dated December 23, 2010 and recorded January 14, 2011 in Book 4429 at Page 658.

17. The sum of \$25,994.10 is a reasonable fee to allow Plaintiff's counsel for services performed and anticipated to be performed until final adjudication of this action, under the terms of the Adjustable Rate Note and Mortgage. This fee is likewise reasonable based on the time necessarily devoted to representation of Plaintiff during the several month course of these proceedings. The services of counsel performed for Plaintiff, which include the number and types of pleadings and documents prepared, the incumbent liabilities, and the difficulties involved in this particular case also support the fee awarded. The fee is also reasonable given the professional standing of Plaintiff's counsel and their experience in handling foreclosure matters. The fee awarded herein is also reasonable in light of the fees customarily awarded by this court for similar services in this locality. Moreover, the efforts of Plaintiff's counsel have had the beneficial result of a prompt foreclosure of the Mortgage. Services anticipated to be performed until final adjudication contemplate completion of this matter within a reasonable time and does not include exceptional circumstances delaying conclusion beyond the normal time.

18. According to Plaintiff's accounting, after all payments received by Plaintiff have been credited to the subject loan, the amount due and owing on the Adjustable Rate Note, with interest at the rate provided in the Adjustable Rate Note, advances made by Plaintiff, and other costs and expenses of the action, including a reasonable attorney fee, all secured by the Adjustable Rate Note and Mortgage, is as follows:

(a) Principal due January 1, 2012 \$1,008,286.11

- (b) Interest from December 1, 2011 through November 24, 2015.....\$129,017.00
- (c) Escrow Advances:.....\$20,154.43
Hazard Insurance\$14,107.42
Taxes:.....\$6,047.01
- (d) Attorney's Fees and Costs\$25,994.10
- TOTAL debt secured by Adjustable Rate Note and Mortgage, including interest to date shown.....\$1,183,451.60**

Interest shall accrue to the above stated "Total Debt" after the date of judgment at the rate of 1.950% per annum (pursuant to the terms of the Adjustable Rate Note and first Mortgage). Accrued interest shall be added to the "Total Debt" and shall comprise the amount of the Plaintiff's debt secured by the first Mortgage through the date to which such interest is computed.

19. Pursuant to 28 U.S.C.A §2410(c), the Defendant, The United States of America, has a right of redemption upon proper application to redeem the within property for 120 day from the date of sale of the subject property. Plaintiff is seeking the usual foreclosure of the first mortgage and has in the Complaint (or subsequently thereto in writing) expressly waived the right to a personal or deficiency judgment.

20. The following Defendant(s) may claim a subordinate lien upon or subordinate legal interest in the subject property and in the event there is a surplus from the sale of the subject property, these Defendant(s) may present through any such lien or legal interest a claim to the surplus at a hearing subsequent to the sale, in accordance with Rule 71(c) South Carolina Rules of Civil Procedure. The said Defendant(s) and such liens or legal interests are as follows:

a. TD Bank, NA, by virtue of a mortgage given by Rudrick G. Otto and Alyce F. Otto to Carolina First Bank in the amount of \$218,807.82, dated June 18, 2008, and recorded June 20, 2008 in Book 4100 at Page 708. TD Bank, NA is successor to Carolina First Bank. This mortgage was re-recorded July 22, 2008 in Book 4113 at Page 506.

b. The United States of America acting by and through its agent The Internal Revenue Service, by virtue of liens of record, including, but not limited to, a Notice of Federal Tax Lien Under Internal Revenue Laws against Alyce F. Otto, Identifying No. 622616410, in the amount of \$16,273.04, dated February 2, 2010, and recorded in Spartanburg County on February 11, 2010, in Book 13 at Page 43 and a Notice of Federal

Tax Lien Under Internal Revenue Laws against Alyce F. Otto, Identifying No. 816926111, in the amount of \$6,577.50, dated September 26, 2011, and recorded in Spartanburg County on October 12, 2011, in Book 14 at Page 932.

c. The United States of America acting by and through its agent The Internal Revenue Service, by virtue of liens of record, including, but not limited to, a Notice of Federal Tax Lien Under Internal Revenue Laws against Patrick & Associates, LLC and Alyce F. Otto, Identifying No. 664747910, in the amount of \$35,450.60, dated June 8, 2010, and recorded in Spartanburg County on June 17, 2010, in Book 13 at Page 527.

d. Laura Kerhulas Giese and Mark Warner Kerhulas as Co-Trustees of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004, by virtue of a judgment against Shamrock Realty Investments, LLC, Alyce F. Otto, and Patty Otto in the amount of \$571,329.90, dated December 27, 2011 and recorded on January 3, 2012 in Judgment Roll No. 2012-CP-42-0014.

e. Citibank, NA, by virtue of a judgment against Alyce F. Otto in the amount of \$12,396.66, dated May 2, 2012 and recorded on May 2, 2012 in Judgment Roll No. 2012-CP-42-0234.

f. Jackson L. Munsey, Jr. by virtue of that Memorandum of Contract for deed dated March 4, 2011 and recorded March 9, 2011 in Book 97-Z at Page 748.

IT IS THEREFORE ORDERED:

1. Plaintiff has fully complied with The South Carolina Supreme Court Administrative Orders 2009-05-22-01 dated May 22, 2009 and 2011-05-02-01 dated May 2, 2011, and the foreclosure action may proceed.

2. There is due on the Adjustable Rate Note and first Mortgage set forth in the Complaint the sum of \$1,183,451.60, as set out in the Findings of Fact *supra*, together with interest at the rate provided therein on the balance of principal from the date aforesaid to the date hereof.

3. 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 note rate(s) per annum and together with such interest shall constitute the total judgment debt due Plaintiff.

4. The amount of the judgment shall be subject to increase to permit 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 attorneys' 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 or supplemental compensation. Such additional costs, commissions and expenses may be established by affidavit and shall be adjudicated by the court without further hearing.

5. The Defendant(s) liable for the aforesaid judgment debt of the Adjustable Rate Note and Mortgage including interest at the rate of 1.950% per annum shall pay on or before the date of sale of the property hereinafter described, to Plaintiff or Plaintiff's attorney the amount of Plaintiff's debt as aforesaid, including with the costs and disbursements of this action.

6. On default of payment at or before the time of the sale of the property, the mortgaged property described hereinafter shall be sold by the below signed Master in Equity or Special Referee or other court-appointed or designated agent or auctioneer at public auction at the Spartanburg County Courthouse, in the City of Spartanburg, and State of South Carolina on a sales day determined by the below signed Master in Equity or Special Referee, on the following terms:

a. For cash or its equivalent: An immediate deposit of 5% is required on the amount of the bid. The deposit will be applied to the purchase price when total compliance is made. In the event compliance is not made, the deposit shall be forfeited without further hearing and applied first to costs and expense of the action and then to plaintiff's debt. Should the successful bidder at the regularly conducted sale fail or refuse either to make the required deposit at time of bid or to 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 and at the risk of the defaulting bidder.

b. Interest on the balance of the bid after the deposit is applied shall be paid through the day of compliance at the Note rate of 1.950%.

c. The sale shall be subject to taxes and assessments, existing easements and restrictions, and any other senior encumbrances.

d. The sale shall also be subject to the right of redemption by the Defendant United States of America, pursuant to 28 U.S.C.A. §2410(c), for a period of 120 day from the date of sale of the subject property.

e. Purchaser shall pay for any statutory commission on sale from the

proceeds of the final bid amount.

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

g. Purchaser shall be entitled to possession of the premises only after Purchaser fully complies with the bid amount and a deed is issued by the Master in Equity or Special Referee.

7. The Court finds that Defendant Jackson L. Munsey, Jr., has no equitable right of redemption in the mortgaged property described hereinafter, based upon the fact that he is not a junior lienholder.

8. A personal or deficiency judgment having been waived, the bidding will not remain open after the date of sale and compliance with the bid may be made immediately.

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

10. The Master in Equity will give notice of the time and place of the sale by advertisement according to law and the terms thereof by advertisement according to law and will execute to the Purchaser a deed to the property sold. Plaintiff or any other party to this action may become a purchaser at such sale. If, upon such sale being made, the Purchaser 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.

11. In the event an agent of Plaintiff does not appear at the time of sale, the within property shall be withdrawn from sale and sold at the next available sales date upon the same terms and conditions as set forth in this Judgment of Foreclosure and Sale or such terms as may be set forth in a supplemental order.

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

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

FIRST: To the payment of the permitted costs, charges, and expenses of this action, including any Guardian ad Litem fee, Servicemember Civil Relief Act attorney fee, or any other attorney's awarded under this or any other Order of this Court;

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#8
gk

NEXT: To the payment to Plaintiff or 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; and the Plaintiff's attorney shall receive and disburse such funds only in absolute compliance with Plaintiff's principal, interest allowable advances, and related calculations of this Court, including the Court's award for attorney fees, court permitted charges and taxable costs pursuant to Rules 54 and 71 of the South Carolina Rules of Civil Procedure and the terms of the Note and Mortgage;

NEXT: Any surplus will be held pending further Order of the Court as provided for in the South Carolina Rules of Civil Procedure, particularly Rule 71(c) of the South Carolina Rules of Civil Procedure.

14. In the event the successful bidder is someone other than the Defendant(s) in possession of the subject property, the Sheriff of Spartanburg County is ordered and directed to eject and remove from the property the occupant(s) of the property sold, together with all personal property located thereon, and put the successful bidder or his assigns in full, quiet, and peaceable possession of said property without delay, and to keep said successful bidder or his assigns in such peaceable possession.

15. In the event the successful bidder is other than the Defendant(s) in possession of the subject property and the occupants have voluntarily vacated the property or have been ejected from the property leaving furnishings, fixtures and items not subject to Plaintiff's Mortgage in said property, the Purchaser is authorized to remove from the property all furnishings, fixtures and items not subject to the lien of Plaintiff's Mortgage. The personal property, being deemed abandoned, shall be removed by the Purchaser or its agents from the subject property by placing said personal property on the public street or highway or by any other means.

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

17. In accordance with Rule 77(d), of the South Carolina Rules of Civil Procedure, 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 in this action.

18. The deed of conveyance made pursuant to the foreclosure 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 mortgaged property at the time of the filing of the notice of pendency of the within action, and the name of the grantee. 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.

19. 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.

20. The following is a description of the property herein ordered to be sold:

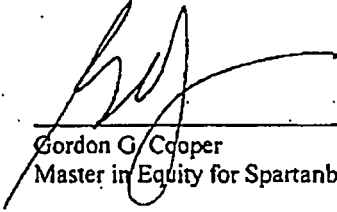
All that certain piece, parcel or lot of land situate, lying and being in the State of South Carolina, County of Spartanburg, containing 25.08 acres, more or less, and being shown and designated as Distribution Tract G on plat entitled "Survey for Greenspace of Fairview, LLC Tract 5" dated November 26, 2001, prepared by Joe E. Mitchell, Registered Land Surveyor, recorded in Plat Book 151, Page 523, and having such metes and bounds as appear thereon, incorporated herein by reference.

This being the same property conveyed to Rudrick G. Otto and Alyce F. Otto by deed of Fairview Associates, LLC, dated July 12, 2004 and recorded July 12, 2004 in Book 80-T at Page 257. Subsequently, Rudrick G. Otto conveyed his interest in the subject property to Rudrick George Otto, Trustee Under Declaration of Trust of Rudrick George Otto dated the 17th Day of November, 2009, dated November 18, 2009 and recorded November 24, 2009 in Book 95A at Page 435. Subsequently Alyce F. Otto conveyed her interest in the subject property to Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated the 17th Day of November, 2009, dated November 18, 2009 and recorded November 24, 2009 in Book 95A at Page 439. Subsequently, Rudrick George Otto died testate on December 2, 2009. Subsequently, Alyce F. Otto, Successor Trustee Under Declaration of Trust of Rudrick George Otto dated the 17th day of November, 2009, conveyed that interest in the subject property to Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated the 17th day of November, 2009, dated February 9, 2011 and recorded February 10, 2011 in Book 97V at Page 181.

Property Address: 1841 Fairview Farms
Campobello, SC 29322

TMS# 10300003.00

December 22 2015
Spartanburg, South Carolina


Gordon G. Cooper
Master in Equity for Spartanburg County

H. HOPE LACHLEY

2015 DEC 22 AM 9:25

2012LP42 1031

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

Alyce F. Otto, Trustee,

Plaintiff,

vs.

Jackson L. Munsey, Jr.,

Defendant.

LIS PENDENS

C.A. No.: 2010-CP-42-12-2874

Non Jury

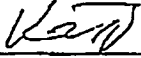
NOTICE IS HEREBY GIVEN that an action has been commenced and is now pending in this Court upon Complaint of the above-named Plaintiff against the above-named Defendant. The premises covered and affected by the said action were, at the time of the making hereof, and at the time of the filing of this notice, described as follows:

All that certain piece, parcel or tract of land lying, situate and being in the State of South Carolina, County of Spartanburg, containing 25.08 acres, more or less, and being shown as Distribution Tract G on a plat of survey for Greenspace of Fairview, LLC, dated August 2, 2001, by Mitchell Surveying and recorded in Plat Book 151, Page 523. Reference is made to said plat and the record thereof for a more complete and accurate description.

This is a portion of the same property conveyed to Alyce F. Otto, Trustee, under Declaration of Trust of Alyce F. Otto dated the 17th day of November, 2009 by Deed of Alyce F. Otto recorded November 24, 2009 in Deed Book 95A, page 435. Also being a portion of the same property conveyed to Rudrick George Otto, trustee under Declaration of Trust of Rudrick George Otto dated the 17th day of November, 2009 by Deed of Rudrick G. Otto recorded November 24, 2009 in Deed Book 95A, Page 435. Reference is also made to the deed from Alyce F. Otto, Successor Trustee under Declaration of Trust of Rudrick George Otto dated the 17th day of November, 2009, to Alyce F. Otto, Trustee under Declaration of Trust of Alyce F. Otto dated the 17th day of November, 2009, said deed being dated February 9, 2011 and recorded February 10, 2011 in Deed Book 97V, Page 181.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 JUL - 18 PM 3:18
M. HOEHL

All referenced recordings are in the Register of Deeds Office for Spartanburg
County, South Carolina, unless otherwise noted herein.



Kenneth C. Anthony, Jr.
Attorney for Plaintiff
Post Office Box 3565
Spartanburg, SC 29304
864-582-2355
864-583-9772

July 6, 2012

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 JUL -6 PM 3:18
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

Alyce F. Otto, Trustee,
Plaintiff,

vs.

Jackson L. Munsey, Jr.,
Defendant.

SUMMONS

C.A. No. 2010-GP-42-
Non Jury

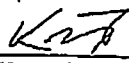
2874

TO THE DEFENDANT NAMED ABOVE:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action,
a copy of which is herewith served upon you, and to serve a copy of your Answer to the
Complaint on the undersigned at his office located at P.O. Box 3565, 250 Magnolia Street,
Spartanburg, S.C. 29304, within thirty (30) days after the service hereof, exclusive of the day of
such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in
this action will apply to the Court for the relief demanded in the Complaint.

Dated at Spartanburg, South Carolina, on June 28, 2012.

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CLERK OF COURT
SPARTANBURG COUNTY
2012 JUL -6 PM 3:18
M. HOPE BLACKLEY


Kenneth C. Anthony, Jr.
THE ANTHONY LAW FIRM, P.A.
250 Magnolia Street (29306)
P.O. Box 3565 (29304)
Spartanburg, South Carolina
(864) 582-2355
(864) 583-9772
kathony@anthonylaw.com

July 6, 2012
Spartanburg, SC

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

Alyce F. Otto, Trustee,

Plaintiff,

vs.

Jackson L. Munsey, Jr.,

Defendant.

COMPLAINT

C.A. No.: 2010-CP-42-
Non July

2874

Plaintiff would respectfully show unto this Court:

FOR A FIRST CAUSE OF ACTION

1. Plaintiff is a citizen and resident of Spartanburg County, South Carolina.

2. Plaintiff is informed and believes that Defendant Jackson L. Munsey,

is a citizen and resident of Richland County, South Carolina.

3. Plaintiff is the owner of the following described property:

All that certain piece, parcel or tract of land lying, situate and being in the State of South Carolina, County of Spartanburg, containing 25.08 acres, more or less, and being shown as Distribution Tract G on a plat of survey for Greenspace of Fairview, LLC, dated August 2, 2001, by Mitchell Surveying and recorded in Plat Book 151, Page 523. Reference is made to said plat and the record thereof for a more complete and accurate description.

This is a portion of the same property conveyed to Alyce F. Otto, Trustee, under Declaration of Trust of Alyce F. Otto dated the 17th day of November, 2009 by Deed of Alyce F. Otto recorded November 24, 2009 in Deed Book 95A, page 439. Also, being a portion of the same property conveyed to Rudrick George Otto, trustee under Declaration of Trust of Rudrick George Otto dated the 17th day of November, 2009 by Deed of Rudrick G. Otto recorded November 24, 2009 in Deed Bok 95A, Page 435. Reference is also made to the deed from Alyce F. Otto, Successor Trustee under Declaration of Trust of Rudrick George Otto dated the 17th day of November, 2009, to Alyce F. Otto, Trustee under Declaration fo Trust of Alyce F. Otto dated the 17th day of November, 2009, said

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SPARTANBURG COUNTY
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deed being dated February 9, 2011 and recorded February 10, 2011 in Deed Book 97V, Page 181.

All referenced recordings are in the Register of Deeds Office for Spartanburg County, South Carolina, unless otherwise noted herein.

4. On or about March 4, 2011, Plaintiff entered into a Contract for Deed with Defendant for the purchase of the property described above, a copy of which is attached hereto.

5. Defendant has failed and refused to make payments as provided in said Contract for Deed and is now in default thereof.

6. Plaintiff has demanded said payments from the Defendant but he has failed and refused to pay same.

7. Plaintiff is informed and believes that she is entitled to have this Court issue its Order declaring the Contract for Deed cancelled and the property free and clear of any claim of the Defendant.

FOR A SECOND CAUSE OF ACTION

8. Plaintiff reiterates and realleges all of the allegations contained in Paragraphs 1 through 6 as fully as though set forth verbatim.

9. In the alternative, Plaintiff is informed and believes that she is entitled to judgment of foreclosure as to the interest, if any, of the Defendant, and to have the property sold at public auction in accordance with law and the practices of this Court

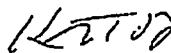
10. Plaintiff does not waive but specifically demands judgment against the Defendant for the full amount found to be due to the Plaintiff, with the right to enter personal judgment against the Defendant for any deficiency in this action.

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SPARTANBURG COUNTY
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M. HOPE BLACKBERRY

WHEREFORE, Plaintiff prays for judgment as follows:

1. All consideration and payments be forfeited as liquidated damages. The Contract for Deed declared cancelled and the property confirmed free of any claims of the Defendant.
2. In the alternative, that the property be sold at foreclosure, according to law and practices of this Court, with leave to seek a deficiency judgment, and that the proceeds of the sale be applied as follows:
 - A. To the costs and expenses of the within action and sale, and any outstanding real property taxes.
 - B. The payment in full of all sums due the Plaintiff under the Contract for Deed.
 - C. To the payment and discharge of any outstanding liens against the property in their order of priority.
 - D. Surplus, if any, to be distributed according to law.
3. For such other and further relief as may seem just and proper.

July 6, 2012
Spartanburg, SC


Kenneth C. Anthony, Jr.
THE ANTHONY LAW FIRM, P.C.
Attorney for Plaintiff
P.O. Box 3565 (29304)
250 Magnolia Street (29306)
Spartanburg, South Carolina
(864) 582-2355
(864) 583-9772
kanthony@anthonylaw.com

M. HOPE BLACKLEY

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CLERK OF COURT
SPARTANBURG COUNTY

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

U.S. Bank, NA as trustee relating to the Chevy Chase Funding, LLC Mortgage Backed Certificates, Series 2004-B,

Plaintiff,

v.

Alyce F. Otto, individually; Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated the 17th day of November 2009; TD Bank, NA; The United States of America, acting by and through its agency, the Internal Revenue Service; Laura Kerhulas Giese, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004; Mark Warner Kerhulas, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004; Jackson L. Munsey, Jr.; Citibank, NA;

Defendant(s).

(005071-00160)

IN THE COURT OF COMMON PLEAS

DOCKET NO.

2012-CP-42-3549

LIS PENDENS
Deficiency Judgment Waived

201244201212

NOTICE IS HEREBY GIVEN THAT an action has been or will be commenced in this Court upon complaint of the above-named Plaintiff against the above-named Defendant(s) for the foreclosure of a certain mortgage of real estate given by Rudrick G. Otto and Alyce F. Otto to Mortgage Electronic Registration Systems, Inc., as nominee for Chevy Chase Bank, FSB, its successors and assigns (MIN# 100015305541858019) dated August 18, 2004, and recorded in the Office of the RMC/ROD for Spartanburg County on August 24, 2004, in Mortgage Book 3290 at Page 70. Subsequently, this mortgage was assigned to U.S. Bank, N.A. as trustee relating to the Chevy Chase Funding LLC Mortgage Backed Certificates, Series 2004-B by assignment dated December 23, 2010 and recorded January 4, 2011 in Book 4429 at Page 658.

The premises covered and affected by the said mortgage and by the foreclosure thereof were the time of the making thereof and at the time of the filing of this notice, described as follows:

All that certain piece, parcel or lot of land situate, lying and being in the State of South Carolina, County of Spartanburg, containing 25.08 acres, more or less, and being shown and designated as Distribution Tract G on plat entitled "Survey for Greenspace of Fairview, LLC Tract 5" dated November 26, 2001,

prepared by Joe E. Mitchell, Registered Land Surveyor, recorded in Plat Book 151, Page 523, and having such metes and bounds as appear thereon, incorporated herein by reference.

This being the same property conveyed to Rudrick G. Otto and Alyce F. Otto by deed of Fairview Associates, LLC, dated July 12, 2004 and recorded July 12, 2004 in Book 80-T at Page 257. Subsequently, Rudrick G. Otto conveyed his interest in the subject property to Rudrick George Otto, Trustee Under Declaration of Trust of Rudrick George Otto dated the 17th Day of November, 2009, dated November 18, 2009 and recorded November 24, 2009 in Book 95A at Page 435. Subsequently Alyce F. Otto conveyed her interest in the subject property to Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated the 17th Day of November, 2009, dated November 18, 2009 and recorded November 24, 2009 in Book 95A at Page 439. Subsequently, Rudrick George Otto died testate on December 2, 2009. Subsequently, Alyce F. Otto, Successor Trustee Under Declaration of Trust of Rudrick George Otto dated the 17th day of November, 2009, conveyed that interest in the subject property to Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated the 17th day of November, 2009, dated February 9, 2011 and recorded February 10, 2011 in Book 97V at Page 181.

Property Address: 1841 Fairview Farms
Campobello, SC 29322

TMS# 10300003.00

Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

Samuel C. Waters (SC Bar #5958)
Reginald P. Corley (SC Bar #69453)
Ellie C. Floyd (SC Bar #68635)
Eve Moredock Stacey (SC Bar #5300)
Robert P. Davis (SC Bar #74030)
Vance L. Brabham, III (SC Bar #71250)
Andrew W. Montgomery (SC Bar #79893)

Cheryl H. Fisher (SC Bar #15213)
Jennifer W. Rubin (SC Bar #16727)
Michael P. Morris (SC Bar #73560)
Mary R. Powers (SC Bar #16534)
William S. Koehler (SC Bar #74935)
Jaclynn B. Goings (SC Bar #77501)
Andrew A. Powell (SC Bar #100210)

220 Executive Center Drive
Columbia, SC 29210

Post Office Box 100200 (29202)
(803) 744-4444

Columbia, South Carolina
August 20, 2012

FILED
CLERK OF COURT
SPRINGFIELD COUNTY
2012 AUG 21 PM 1:29
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

U.S. Bank, NA as trustee relating to the Chevy
Chase Funding, LLC Mortgage Backed
Certificates, Series 2004-B,

Plaintiff,

v.

Alyce F. Otto, individually; Alyce F. Otto, Trustee
Under Declaration of Trust of Alyce F. Otto dated
the 17th day of November 2009; TD Bank, NA;
The United States of America, acting by and
through its agency, the Internal Revenue Service;
Laura Kerhulas Giese, as Co-Trustee of the
Theodore Ernest Kerhulas Trust Under
Declaration of Trust dated May 25, 2004; Mark
Warner Kerhulas, as Co-Trustee of the Theodore
Ernest Kerhulas Trust Under Declaration of Trust
dated May 25, 2004; Jackson L. Munsey, Jr.;
Citibank, NA;

Defendant(s).

(005071-00160)

IN THE COURT OF COMMON PLEAS

DOCKET NO.

2012-CP-42-3549

SUMMONS
(NON-JURY)
FORECLOSURE OF REAL ESTATE
MORTGAGE
Deficiency Judgment Waived

TO THE DEFENDANT(S) ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to appear and defend by answering the
Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your
Answer on the subscribers at their offices, 220 Executive Center Drive, Suite 109, Post Office Box
100200, Columbia, South Carolina 29202, within thirty (30) days after the service hereof, exclusive of the
day of such service, except that the United States of America, if named, shall have sixty (60) days
answer after the service hereof, exclusive of the day of such service; and if you fail to do so, judgment by
default will be rendered against you for the relief demanded in the Complaint.

YOU WILL ALSO TAKE NOTICE that Plaintiff will move for an order of reference or
that the Court may issue a general order of reference of this action to a master in equity/special referee,
pursuant to Rule 53, of the South Carolina Rules of Civil Procedure.

TO MINOR(S) OVER FOURTEEN YEARS OF AGE, AND/OR TO MINOR(S)
UNDER FOURTEEN YEARS OF AGE AND THE PERSON WITH WHOM THE MINOR(S)
RESIDES, AND/OR TO PERSONS UNDER SOME LEGAL DISABILITY:

YOU ARE FURTHER SUMMONED AND NOTIFIED to apply for the appointment of a guardian ad litem within thirty (30) days after the service of this Summons and Notice upon you. If you fail to do so, application for such appointment will be made by U.S. Bank, NA as trustee relating to the Chevy Chase Funding, LLC Mortgage Backed Certificates, Series 2004-B.

Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

Samuel C. Waters (SC Bar #5958)
Reginald P. Corley (SC Bar #69453)
Ellie C. Floyd (SC Bar #68635)
Eve Moredock Stacey (SC Bar #5300)
Robert P. Davis (SC Bar #74030)
Vance L. Bradham, III (SC Bar #71250)
Andrew W. Montgomery (SC Bar #79893)

Cheryl H. Fisher (SC Bar #15213)
Jennifer W. Rubin (SC Bar #16727)
Michael P. Morris (SC Bar #73560)
Mary R. Powers (SC Bar #16534)
William S. Koshier (SC Bar #74935)
Jaclyn B. Goings (SC Bar #77501)
Andrew A. Powell (SC Bar #100210)

220 Executive Center Drive
Columbia, SC 29210

Post Office Box 100200 (29202)
(803) 744-4444

Columbia, South Carolina
August 20, 2012

FILED
CLERK OF COURT
STANLEYBURG COUNTY
2012 AUG 21 PM 1:29
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

U.S. Bank, NA as trustee relating to the Chevy Chase
Funding, LLC Mortgage Backed Certificates, Series
2004-B,

Plaintiff,

v.

Alyce F. Otto, individually; Alyce F. Otto, Trustee Under
Declaration of Trust of Alyce F. Otto dated the 17th day
of November 2009; TD Bank, NA; The United States of
America, acting by and through its agency, the Internal
Revenue Service; Laura Kerhulas Giese, as Co-Trustee
of the Theodore Ernest Kerhulas Trust Under
Declaration of Trust dated May 25, 2004; Mark Warner
Kerhulas, as Co-Trustee of the Theodore Ernest Kerhulas
Trust Under Declaration of Trust dated May 25, 2004;
Jackson L. Munsey, Jr.; Citibank, NA;

Defendant(s).

IN THE COURT OF COMMON PLEAS

DOCKET NO.

2012-CP-42-3549

COMPLAINT

(NON-JURY)

FORECLOSURE OF REAL ESTATE
MORTGAGE
Deficiency Judgment Waived

(005071-00160)

Plaintiff alleges:

1. This is an action for the foreclosure of a mortgage upon certain real estate in Spartanburg County, South Carolina.
2. Pursuant to S.C. Code Section 33-15-101(b)(8) Plaintiff is a corporation or other legal entity collecting debts and / or enforcing mortgages, security interests or other rights in property securing debts.
3. Plaintiff has the legal right to enforce the negotiable instrument secured by the Mortgage and is the real party in interest as defined by Rule 17(a) of the South Carolina Rules of Civil Procedure.
4. The Subject note and mortgage are not owned, securitized, or guaranteed by Fannie Mae or Freddie Mac; and, the current loan servicer is not currently participating in the Home Affordable Modification Program ("HMP").
5. Some lien on or interest in the real estate, the subject of this action, may be claimed by the Defendant(s) herein.

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IN THE COURT OF COMMON PLEAS
SPARTANBURG COUNTY
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M. H. BLACKBURN, CLERK

6. The Defendant(s) herein described as judgment creditors have by filing said judgments designated their attorney entering the judgment as their agent for service of process under the provisions of South Carolina Code Section 15-35-840.

7. Heretofore, on or about August 18, 2004, Rudrick G. Otto and Alyce F. Otto made, executed and delivered a certain Adjustable Rate Note ("Note") in the principal sum of \$999,500.00, payable in monthly installments.

8. In order to secure the payment of the Note according to the terms and conditions thereof, Rudrick G. Otto and Alyce F. Otto made, executed and delivered unto Mortgage Electronic Registration Systems, Inc., as nominee for Chevy Chase Bank, FSB, its successors and assigns (MIN# 100015305541858019) a certain real estate mortgage ("Mortgage") covering the following described property and any and all improvements to the property, including but not limited to a mobile/manufactured home:

All that certain piece, parcel or lot of land situate, lying and being in the State of South Carolina, County of Spartanburg, containing 25.08 acres, more or less, and being shown and designated as Distribution Tract G on plat entitled "Survey for Greenspace of Fairview, LLC Tract 5" dated November 26, 2001, prepared by Joe E. Mitchell, Registered Land Surveyor, recorded in Plat Book 151, Page 523, and having such metes and bounds as appear thereon, incorporated herein by reference.

This being the same property conveyed to Rudrick G. Otto and Alyce F. Otto by deed of Fairview Associates, LLC, dated July 12, 2004 and recorded July 12, 2004 in Book 80-T at Page 257. Subsequently, Rudrick G. Otto conveyed his interest in the subject property to Rudrick George Otto, Trustee Under Declaration of Trust of Rudrick George Otto dated the 17th Day of November, 2009, dated November 18, 2009 and recorded November 24, 2009 in Book 95A at Page 435. Subsequently Alyce F. Otto conveyed her interest in the subject property to Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated the 17th Day of November, 2009, dated November 18, 2009 and recorded November 24, 2009 in Book 95A at Page 439. Subsequently, Rudrick George Otto died testate on December 2, 2009. Subsequently, Alyce F. Otto, Successor Trustee Under Declaration of Trust of Rudrick George Otto dated the 17th day of November, 2009, conveyed that interest in the subject property to Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated the 17th day of November, 2009, dated February 9, 2011 and recorded February 10, 2011 in Book 97V at Page 181.

Property Address: 1841 Fairview Farms
Campobello, SC 29322

TMS# 10300003.00

9. The Mortgage was signed, witnessed and probated August 18, 2004; thereafter, the Mortgage was recorded in the Office of the RMC/ROD for Spartanburg County on August 24, 2004 in Mortgage Book 3290 at Page 70. Subsequently, this mortgage was assigned to U.S. Bank, N.A. as Trustee relating to the Chevy Chase Funding LLC Mortgage Backed Certificates, Series 2004-B by assignment dated December 23, 2010 and recorded January 14, 2011 in Book 4429 at Page 658.

10. The Mortgage evidences and secures the repayment of money advanced by Plaintiff or its predecessor in interest to, or on behalf of, the mortgagor(s) and constitutes a first lien on the mortgaged premises.

11. Subsequently, Rudrick G. Otto conveyed his interest in the subject property to Rudrick

George Otto, Trustee Under Declaration of Trust of Rudrick George Otto dated the 17th Day of November, 2009, dated November 18, 2009 and recorded November 24, 2009 in Book 95A at Page 435. Subsequently Alyce F. Otto conveyed her interest in the subject property to Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated the 17th Day of November, 2009, dated November 18, 2009 and recorded November 24, 2009 in Book 95A at Page 439. Subsequently, Rudrick George Otto died testate on December 2, 2009. Subsequently, Alyce F. Otto, Successor Trustee Under Declaration of Trust of Rudrick George Otto dated the 17th day of November, 2009, conveyed that interest in the subject property to Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated the 17th day of November, 2009, dated February 9, 2011 and recorded February 10, 2011 in Book 97V at Page 181..

12. After all payments received by the Plaintiff have been credited to the subject loan, the loan is in default and due for January 1, 2012, and the conditions of the Note and Mortgage have been broken. Plaintiff elects to and does declare the entire balance of said indebtedness due and payable, and that there is due on the Note and Mortgage as of January 1, 2012, the principal sum of \$1,008,286.11, with interest from December 1, 2011, advances, late charges, and also for the costs and disbursements of this action, including attorney's fees.

13. Plaintiff's right to a personal or deficiency judgment pursuant to South Carolina Code Sections 29-3-650 and 29-3-660 is expressly waived.

14. Pursuant to the terms of the Mortgage, Plaintiff has employed counsel to prosecute this action and a reasonable value of services of counsel in this action is the sum as the Court may find appropriate.

15. Plaintiff may be forced to pay sums for taxes and insurance and costs for securing the property, which sums, according to the terms of the Mortgage, should be added to the amount of the debt.

16. Pursuant to the terms of the Mortgage and applicable state law, Plaintiff requests the mortgage be foreclosed and that the property be sold at public auction in accordance with law, subject to any liens for taxes, special assessments of record against such property, and existing easements or restrictions of record..

17. The hereinafter named Defendant(s) may have some interest in or lien upon the premises covered by the Mortgage set forth above, or some part thereof, but that such interests or liens are junior and subsequent to the lien of Plaintiff's Mortgage or, if specified below, have been paid in full and either should be satisfied of record or the lien released from the subject real estate. Said liens or interests are of record in the Office of the RMC or Clerk of Court of the aforesaid county and are described as follows:

A. TD Bank, NA, by virtue of a mortgage given by Rudrick G. Otto and Alyce F. Otto to Carolina First Bank in the amount of \$218,807.82, dated June 18, 2008, and recorded June 20, 2008 in Book 4100 at Page 708. Also including any other liens they may have. TD Bank, NA is successor to Carolina First Bank. This mortgage was re-recorded July 22, 2008 in Book 4113 at Page 506.

B. The United States of America acting by and through its agency The Internal Revenue Service, by virtue of liens of record, including, but not limited to, a Notice of Federal Tax Lien Under Internal Revenue Laws against Alyce F. Otto, Identifying No. 622616410, in the amount of \$16,273.04, dated February 2, 2010, and recorded in Spartanburg County on February 11, 2010, in Book 13 at Page 43

C. The United States of America acting by and through its agency The Internal Revenue Service, by virtue of liens of record, including, but not limited to, a Notice of Federal Tax Lien Under Internal Revenue Laws against Alyce F. Otto, Identifying No. 816926111, in the amount of \$6,577.50, dated September 26, 2011, and recorded in Spartanburg County on October 12, 2011, in Book 14 at Page 932

D. Laura Kerhulas Giese and Mark Warner Kerhulas as Co-Trustees of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004, by virtue of a judgment against Shamrock Realty Investments, LLC, Alyce F. Otto, and Patty Otto in the amount of \$571,329.90, dated December 27, 2011 and recorded on January 3, 2012 in Judgment Roll No. 2012-CP-42-0014 Also including any other liens they may have.

E. Citibank, NA, by virtue of a judgment against Alyce F. Otto in the amount of \$12,396.66, dated May 2, 2012 and recorded on May 2, 2012 in Judgment Roll No. 2012-CP-42-0234 Also including any other liens they may have.

F. Jackson L. Munsey, Jr. by virtue of that Memorandum of Contract for deed dated March 4, 2011 and recorded March 9, 2011 in Book 97-Z at Page 748.

G. The United States of America acting by and through its agency The Internal Revenue Service, by virtue of liens of record, including, but not limited to, a Notice of Federal Tax Lien Under Internal Revenue Laws against Patrick & Associates, LLC and Alyce F. Otto, Identifying No. 664747910, in the amount of \$35,450.60, dated June 8, 2010, and recorded in Spartanburg County on June 17, 2010, in Book 13 at Page 527

WHEREFORE, having fully set forth its Complaint, Plaintiff prays that this Honorable Court inquire into the matters as set forth herein and:

(1) Under the direction of this Court, ascertain and determine the amount due upon the Note and Mortgage held by Plaintiff together with attorney's fees and costs of this action.

(2) Declare Plaintiff's Mortgage a first lien and render judgment of foreclosure for the amount so found to be due and owing thereon, together with any ad valorem taxes, of insurance premiums, and any other expenses which may be due and have been advanced by Plaintiff, with reasonable attorney's fees, and for the costs of this action.

(3) Order the reimbursement of all costs for inspecting and securing the property incurred by the Plaintiff as a result of the delinquency.

(4) Appoint a Receiver to collect the rents, issues, profits or designated sums

from the mortgagor(s), and/or the grantee(s) of the mortgagor(s), and/or tenant(s) occupying or exercising control over the mortgaged premises and hold the same subject to the further order of this Court.

(5) Under the direction of this Court, sell the mortgaged premises, bar any equity of redemption, and apply the proceeds of sale as follows:

First, to the costs and expenses of the within action and sale;

Second, to the payment and discharge of the amount due on Plaintiff's Note and Mortgage, together with attorney's fees as aforesaid; and

Third, to the distribution of any surplus pursuant to Rule 71, of the South Carolina Rules of Civil Procedure;

(6) Issue an order directing the Sheriff of Spartanburg County, South Carolina, to place the successful purchaser at said foreclosure sale in possession of the property should the same become necessary;

(7) Order such other and further relief as may be just and proper.

Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

Samuel C. Waters (SC Bar #5938)
Reginald P. Corley (SC Bar #69453)
Ellie C. Floyd (SC Bar #68635)
Eve Mordock Stacey (SC Bar #5300)
Robert P. Davis (SC Bar #74030)
Vance L. Brabham, III (SC Bar #71250)
Andrew W. Montgomery (SC Bar #79893)

Cheryl H. Fisher (SC Bar #15213)
Jennifer W. Rubin (SC Bar #16727)
Michael P. Morris (SC Bar #73560)
Mary R. Powers (SC Bar #16534)
William S. Koehler (SC Bar #74935)
Jaclyn B. Goings (SC Bar #77501)
Andrew A. Powell (SC Bar #100210)

220 Executive Center Drive
Columbia, SC 29210

Post Office Box 100200 (29220)
(803) 744-4444.

Columbia, South Carolina
August 20, 2012

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 AUG 21 PM 1:29
M. HOPE BLACKLEY

NOTICE

1. As of August 17, 2012, you owe \$1,039,169.77. Because of interest, late charges, attorney fees and other charges that vary from day to day, the amount due on the day you pay may be greater.
2. U.S. Bank, NA as trustee relating to the Chevy Chase Funding, LLC Mortgage Backed Certificates, Series 2004-B is the Creditor to whom the debt is owed. Capital One, NA. is the servicing agent for the Creditor to whom the debt is owed.
3. The debt described in this notice will be assumed to be valid by the Creditor's law firm unless you, the Consumer, within thirty (30) days after the receipt of this notice, dispute the validity of the debt or any portion thereof.
4. If you, the Consumer, notify the Creditor's law firm in writing within thirty (30) days of the receipt of this notice that the debt or any portion thereof is disputed, the Creditor's law firm will obtain verification of the debt, and a copy of the verification will be mailed to you, the Consumer, by the Creditor's law firm.
5. If the Creditor named in this notice is different from the original Creditor, and if you, the Consumer, make a written request to the Creditor's law firm within the (30) days from the receipt of this notice, the name and address of the original Creditor will be mailed to you by the Creditor's law firm.
6. This notice should not be construed as a thirty (30) day grace period. If, in writing, you dispute the debt or any portion thereof or if, in writing, you request the name and address of the original creditor within the thirty (30) day period that begins with your receipt of this notice, the law requires the Creditor's law firm to suspend its efforts (through litigation or otherwise) to collect the debt until the Creditor's law firm mails the requested information to you.
7. This notice pertains to your dealings with the Creditor's law firm as a debt collector. It does not affect your dealings with the court, and in particular it does not change the time at which you must answer the complaint. The summons attached to the complaint is a command from the court, not from the Creditor's law firm, and you must follow its instructions even if you dispute the validity or amount of the debt. The advice in this notice also does not affect the Creditor's law firm's relations with the court. The Creditor's law firm may file papers in any such suit according to the court's rules and the judge's instructions.
8. This is an attempt to collect a debt, and any information obtained will be used for that purpose. The information provided in paragraphs 1 and 2 above has been provided to us by the Creditor or Servicer. If you have previously received a discharge in bankruptcy, this notice is not and should not be construed as an attempt to collect a debt but only as an attempt to enforce a lien.

FILED
U.S. DISTRICT COURT
DISTRICT OF COLUMBIA
AUG 21 PM 1:29
SHLOPE BLACKLEY

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

U.S. Bank, NA as Trustee relating to
The Chevy Chase Funding, LLC
Mortgage Backed Certificates,
Series 2004-B,

Plaintiff,

-vs-

Alyce F. Otto, individually;
Alyce F. Otto, Trustee Under
Declaration of Trust of Alyce F.
Otto, dated 11/17/09; TD Bank, NA;
The United States of America,
Acting by and through its agency,
The Internal Revenue Service;
Laura Kerhulas Giese, as co-
Trustee of the Theodore Ernest
Kerhulas Trust Under Declaration
Of Trust dated 5/25/04; Mark
Warner Kerhulas, as co-Trustee of
The Theodore Ernest Kerhulas
Trust Under Declaration of Trust
Dated 5/25/04; Jackson L. Munsey,
Jr.; and Citibank, NA,

Defendants.

And

Jackson L. Munsey, Jr.

Cross-Claim Plaintiff,

-vs-

Alyce F. Otto, Individually; and
Alyce F. Otto, Trustee under
Declaration of Trust of Alyce F.
Otto, dated 11/17/09,

Cross-Claim Defendants.

IN THE COURT OF COMMON PLEAS

C. A. NO.: 2012-CP-42-3549

SUMMONS FOR COUNTERCLAIMS
AND CROSS-CLAIMS
(Jury Trial Requested)

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 DEC 27 PM 3:02
MICHAEL A. BOILEY

TO THE PLAINTIFF AND CROSS-CLAIM DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Counterclaims and Cross-Claims herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Counterclaims and Cross-Claims upon the subscribers at their office at Kehl Culbertson, LLC, 114 Manly Street, Greenville, South Carolina 29601, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to Answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Counterclaims and Cross-Claims.

Dated: December 21, 2012

Erin Culbertson
Erin Culbertson (SC Bar # 68271)

KEHL CULBERTSON, LLC
114 Manly St.
Greenville, South Carolina 29601
Telephone: 864/370-8222
Facsimile: 864/370-8227

FILED
CLERK OF COURT
SPRINGFIELD
2012 DEC 27 PM 3:02
JIMMY L. CULBERTSON

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

U.S. Bank, NA as Trustee relating to)
The Chevy Chase Funding, LLC)
Mortgage Backed Certificates,)
Series 2004-B,)

Plaintiff,)

-vs-)

Alyce F. Otto, individually;)
Alyce F. Otto, Trustee Under)
Declaration of Trust of Alyce F.)
Otto, dated 11/17/09; TD Bank, NA;)
The United States of America,)
Acting by and through its agency,)
The Internal Revenue Service;)
Laura Kerhulas Giese, as co-)
Trustee of the Theodore Ernest)
Kerhulas Trust Under Declaration)
Of Trust dated 5/25/04; Mark)
Warner Kerhulas, as co-Trustee of)
The Theodore Ernest Kerhulas)
Trust Under Declaration of Trust)
Dated 5/25/04; Jackson L. Munsey,)
Jr.; and Citibank, NA,)

Defendants.)

And)

Jackson L. Munsey, Jr.)

Cross-Claim Plaintiff,)

-vs-)

Alyce F. Otto, Individually; and)
Alyce F. Otto, Trustee under)
Declaration of Trust of Alyce F.)
Otto, dated 11/17/09,)

Cross-Claim Defendants.)

IN THE COURT OF COMMON PLEAS

C. A. NO.: 2012-CP-42-3549

ANSWER, COUNTERCLAIMS, and
CROSS-CLAIMS AGAINST DEFENDANT
ALYCE F. OTTO, INDIVIDUALLY AND
AS TRUSTEE
(Jury Trial Requested)

CLERK OF COURT
SPARTANBURG COUNTY
2012 DEC 27 PM 3:02
MIRRORELL CLOUTLEY

Defendant Jackson L. Munsey, Jr. ("Munsey"), in answer to the Complaint of Plaintiff, alleges and states as follows:

FIRST DEFENSE
(General Denial)

1. Each and every allegation that is not hereinafter admitted, explained, or modified is hereby denied.
2. The allegations contained in Paragraph 1 of the Complaint do not require a response.
3. The allegations contained in Paragraph 2 of the Complaint do not require a response.
3. The allegations contained in Paragraph 3 of the Complaint contain a legal conclusion about which Munsey lacks sufficient information to admit or deny.
4. Munsey lacks sufficient information to admit or deny the allegations contained in Paragraph 4 of the Complaint; such allegations are, therefore, denied, and strict proof thereof demanded.
5. The allegations contained in Paragraph 5 of the Complaint are admitted.
6. The allegations contained in Paragraph 6 of the Complaint are admitted.
7. Munsey lacks sufficient information to admit or deny the allegations contained in Paragraph 7 of the Complaint; such allegations are, therefore, denied, and strict proof thereof demanded.
8. In responding to the allegations contained in Paragraph 8 of the Complaint, Munsey craves reference to the document identified in this paragraph, avers that it speaks for itself, and denies any allegations that are contrary thereto or inconsistent therewith.

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JANICE DEANLEY

9. In responding to the allegations contained in Paragraph 9 of the Complaint, Munsey craves reference to the document identified in this paragraph, avers that it speaks for itself, and denies any allegations that are contrary thereto or inconsistent therewith.

10. Munsey lacks sufficient information to admit or deny the allegations contained in Paragraph 10 of the Complaint; such allegations are, therefore, denied, and strict proof thereof demanded.

11. In responding to the allegations contained in Paragraph 11 of the Complaint, Munsey craves reference to the document identified in this paragraph, avers that it speaks for itself, and denies any allegations that are contrary thereto or inconsistent therewith.

12. The allegations contained in Paragraph 12 of the Complaint are denied and strict proof thereof is demanded.

13. The allegations contained in Paragraph 13 of the Complaint do not require a response.

14. The allegations contained in Paragraph 14 of the Complaint do not require a response.

15. The allegations contained in Paragraph 15 of the Complaint are denied and strict proof thereof demanded. Further, Munsey would affirmatively allege that he has paid all hazard insurance premiums and ad valorem real property taxes; as such, Plaintiff will be under no obligation to make such payments during the pendency of this litigation.

16. The allegations contained in Paragraph 16 of the Complaint are denied and strict proof thereof demanded.

17. In responding to the allegations contained in Paragraph 17 (and subparts) of the Complaint, Munsey craves reference to the documents identified in this paragraph, avers that

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SUPERIOR COURT
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NOT RECORDED

they speak for themselves, and denies any allegations that are contrary thereto or inconsistent therewith.

FACTUAL ALLEGATIONS

18. Munsey reiterates all of the responses and allegations contained in the above paragraphs which are not inconsistent with the following allegations.

19. In March of 2011, Munsey entered into an agreement with Defendant Alyce F. Otto, as Trustee under the Declaration of Trust of Alyce F. Otto dated November 17, 2009 (collectively, with Defendant Alyce F. Otto, Individually, "Otto"), to purchase the property which is the subject matter of this foreclosure action (the "Property"). A copy of this agreement is attached hereto as Exhibit A and made a part hereof by reference (the "Agreement").

20. Pursuant to the terms and conditions of the Agreement, Munsey agreed to pay monthly payments directly to Otto's lender, the Plaintiff.

21. Munsey did, in fact, make all payments to Plaintiff in a timely fashion, from April, 2011, through August, 2012.

22. Munsey requested that Otto provide him with monthly statements from Plaintiff and that Otto provide him with online access to Otto's account with Plaintiff on numerous occasions. Otto failed and refused to do so.

23. At some point, Plaintiff inexplicably began returning checks to Otto and refusing to apply the payments made by Munsey to Otto's account.

24. Otto failed to notify Munsey of any such refunded amounts or refused payments.

25. Munsey continued making all agreed payments to Plaintiff, unaware of any alleged default on Otto's account.

26. As a further condition of the Agreement, Otto agreed that the Property would not be further encumbered by any liens or judgments, and that the encumbering party would be responsible for the cost of removing the encumbrance, including costs, expenses, and attorney's fees.

27. In fact, Otto has permitted the following non-disclosed encumbrances to attach to and remain of record against the Property: (a) an IRS tax lien in the amount of \$16,273.04; (b) an IRS tax lien in the amount of \$6,577.50; (c) an IRS tax lien in the amount of \$35,450.60; (d) a judgment held by Laura Kerhulas Giese and Mark Warner Kerhulas, as co-Trustees of the Theodore Ernest Kerhulas Trust under Declaration of Trust dated May 25, 2004, in the amount of \$571,329.90; and (e) a judgment held by Citibank, NA, in the amount of \$12,396.66 (the "Encumbrances"), all of which are in direct violation of the Agreement.

28. The Agreement also contains a provision requiring Otto to indemnify and hold Munsey harmless from any and all costs, expenses, fees, or damages related to the Plaintiff's mortgage on the Property.

FOR A SECOND DEFENSE
(Waiver and Estoppel)

29. Munsey reiterates all of the responses and allegations contained in the above paragraphs which are not inconsistent with the following allegations.

30. On the facts of this case, Munsey pleads that the Plaintiff should be estopped from asserting any claims against Defendants and that the Plaintiff has waived its right to present such claims.

FOR A THIRD DEFENSE
(Unclean Hands)

CLERK OF COURT
STATE OF CALIFORNIA
2012 DEC 27 PM 3:02
M. JOE BLANCHLEY

31. Munsey reiterates all of the responses and allegations contained in the above paragraphs which are not inconsistent with the following allegations.

32. The Plaintiff is prevented from recovery by the equitable doctrine of unclean hands.

FOR A FOURTH DEFENSE
(Prior Breach)

33. Munsey reiterates all of the responses and allegations contained in the above paragraphs which are not inconsistent with the following allegations.

34. The Plaintiff may not recover because of its own prior breach of the Note.

FOR A FIFTH DEFENSE
AND BY WAY OF FIRST COUNTERCLAIM
(Negligent and Intentional Misrepresentation)

35. Munsey reiterates all of the responses and allegations contained in the above paragraphs which are not inconsistent with the following allegations.

36. Plaintiff made false representations to Defendants in stating that any payments were not timely received.

37. Plaintiff made these false statements in an effort to further its own pecuniary interests.

38. Plaintiff owed Defendants a duty to communicate truthful information to them.

39. Plaintiff breached these duties by making false statements to Defendants.

40. Defendants justifiably relied on Plaintiff's representations.

41. As a proximate result of their reliance on Plaintiff's fraudulent representations, Defendants have incurred and will continue to incur actual and consequential damages.

42. Munsey is entitled to actual and punitive damages resulting from Plaintiff's fraudulent representations.

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SPARTANBURG COUNTY
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FOR AN SIXTH DEFENSE
AND BY WAY OF SECOND COUNTERCLAIM
(Accounting)

43. Munsey reiterates all of the responses and allegations contained in the above paragraphs which are not inconsistent with the following allegations.

44. Munsey requests a full and complete accounting from Plaintiff of every payment and transaction related to the loan or the Property.

FOR A SEVENTH DEFENSE,
BY WAY OF SECOND COUNTERCLAIM,
AND BY WAY OF FIRST CROSS-CLAIM
(Negligence and Gross Negligence)

45. Munsey reiterates all of the responses and allegations contained in the above paragraphs which are not inconsistent with the following allegations.

46. Plaintiff and Otto owed a duty of care to Munsey, based on his relationship with Otto and pursuant to the terms and conditions of the Agreement.

47. Plaintiff and Otto breached this duty to Munsey by refusing to accept proper and timely payments, by returning the payments to Otto, and by failing to notify Munsey that the payments had been returned. Plaintiff and Otto were negligent, careless, willful, wanton, reckless, and grossly negligent in these actions and omissions.

48. As a direct and proximate result of Plaintiff and Otto's negligence, carelessness, willfulness, wantonness, recklessness, and gross negligence, Munsey has suffered economic harm.

49. Munsey is entitled to damages, both actual and punitive, from Plaintiff and Otto in an amount to be determined by a jury based on Plaintiff's and Otto's negligence, carelessness, willfulness, wantonness, recklessness, and gross negligence.

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CLERK OF COURT
STARK COUNTY, OHIO
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JANICE L. ADLEY

FOR AN EIGHTH DEFENSE
AND BY WAY OF SECOND CROSS-CLAIM
(Breach of Contract)

50. Munsey reiterates all of the responses and allegations contained in the above paragraphs which are not inconsistent with the following allegations.

51. As stated above, pursuant to the terms and conditions of the Agreement, Otto was under an obligation not to allow any further encumbrances against the Property.

52. As further stated above, Otto has allowed the Encumbrances to be filed and remain of record against the Property.

53. Munsey is entitled to an Order requiring Otto to remove the Encumbrances, and is further entitled to damages from Otto in an amount to be determined by the jury for her breach of contract.

FOR A NINTH DEFENSE
AND BY WAY OF THIRD CROSS-CLAIM
(Fraud)

54. Munsey reiterates all of the responses and allegations contained in the above paragraphs which are not inconsistent with the following allegations.

55. Otto made material, false representations to Munsey in order to induce him to not only enter into the Agreement, but also to continue making her mortgage payments to Plaintiff as described in the Agreement.

56. Even when not intentionally dishonest, Otto has made misrepresentations in reckless disregard of the truth.

57. Otto knew or should have known these representations were false. Otto intended that Munsey believe these false representations and remain ignorant of the true facts.

58. At all times, Munsey was ignorant of the falsity of Otto's representations to him.

CLERK OF COURT
SPRINGFIELD
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H. M. C. BLACKEY

59. Munsey relied upon Otto's false representations.

60. As a proximate result of his reliance on Otto's fraudulent statements, Munsey has incurred and will continue to incur actual and consequential damages.

61. Defendants entitled to actual and punitive damages resulting from Plaintiff's fraudulent acts.

FOR A TENTH DEFENSE
AND BY WAY OF FOURTH CROSS-CLAIM
(Breach of Contract Accompanied by Fraudulent Act)

62. Munsey reiterates all of the responses and allegations contained in the above paragraphs which are not inconsistent with the following allegations.

63. As alleged above, Otto breached her contract with Munsey.

64. Otto acted with fraudulent intent in breaching her contract with Munsey.

65. Otto acted fraudulently when she breached her contract with Munsey by failing to act with any sort of reasonable diligence or commercial fairness in notifying Munsey that Plaintiff had returned certain mortgage payments to her.

66. Munsey is entitled to actual and punitive damages from Otto, based upon her breach of contract accompanied by a fraudulent act, as well as attorneys' fees incurred in this action, pursuant to the attorneys' fees provision in the Agreement.

FOR AN ELEVENTH DEFENSE
AND BY WAY OF FIFTH CROSS-CLAIM
(Breach of Fiduciary Duty)

67. Munsey reiterates all of the responses and allegations contained in the above paragraphs which are not inconsistent with the following allegations.

68. As a lender and seller of real property, Otto owed Munsey a fiduciary duty to account for Munsey's loan payments in a commercially standard and reasonable manner.

CLERK OF COURT
SPRINGFIELD, ILL.
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M. J. C. BLANKLEY

69. Otto breached her fiduciary duty to Munsey by failing to notify Munsey of Plaintiff's return of Munsey's loan payments in a commercially standard and reasonable manner, and by failing to apply Munsey's loan payments as agreed.

70. As a direct and proximate result of Otto's breach of its fiduciary duty, Munsey has suffered actual and consequential damages and is entitled to recover these damages from Otto.

71. Munsey is also entitled to punitive damages resulting from Otto's breach of her fiduciary duties.

FOR A TWELFTH DEFENSE
AND BY WAY OF SIXTH CROSS-CLAIM
(Conversion)

72. Munsey reiterates all of the responses and allegations contained in the above paragraphs which are not inconsistent with the following allegations.

73. At no time was Otto entitled to receive payments made by Munsey to Plaintiff, pursuant to the terms of the Agreement.

74. When Plaintiff negligently and inexplicably began returning Munsey's payments to Otto, Otto converted those payments to her own use, in that she did not ensure that they were properly credited to her mortgage (for Munsey's benefit) and did not return the funds to Munsey.

75. Munsey has never granted permission for Otto to be in possession of the payments he made to Plaintiff pursuant to the Agreement.

76. Munsey has suffered, as a direct and proximate result of Otto's conversion of her payments to Plaintiff, economic harm in the form of additional interest, fees, costs, including the cost of defending this foreclosure action.

CLERK OF COURT
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H. J. CLARKE

77. Munsey is entitled to damages, both actual and punitive, from Otto in an amount to be determined by a jury based on her conversion of the payments made by Munsey to Plaintiff.

WHEREFORE, having fully answered the Plaintiff's Complaint, Munsey prays as follows:

- (a) For the dismissal of Plaintiff's Complaint in its entirety;
- (b) For a full and complete accounting from Plaintiff;
- (c) For judgment against the Plaintiff, in an amount including actual and punitive damages, to be determined by the finder of fact;
- (d) For judgment against Otto, in an amount including actual and punitive damages, to be determined by the finder of fact;
- (e) For an award of attorney's fees and costs; and
- (f) For such other and further relief as this Court may deem just and proper.


Erin Culbertson (SC Bar # 68271)
KEHL CULBERTSON, LLC
114 Manly Street
Greenville, SC 29601
864/370-8222 864/370-8227 (fax)
Attorney for Defendant Jackson L. Munsey, Jr.

December 21, 2012
Greenville, SC

CLERK OF COURT
SPRINGFIELD
2012 DEC 27 PM 3:02
H. J. HUNTER

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

CONTRACT FOR DEED

THIS CONTRACT FOR DEED made and entered into this 4th day of March, 2011,
between the following parties:

PARTIES:

Seller: Alyce F. Otto, as Trustee under the Declaration of Trust of
Alyce F. Otto dated November 17, 2009, with an address of 1841 Fairview
Farms Road, Campobello, South Carolina 29322 (hereinafter referred to as
"Seller").

Purchaser: Jackson L. Munsey, Jr., an Individual, with an address of 405
East Springs Road, Columbia, South Carolina 29223 (hereinafter referred
to as "Purchaser").

WITNESSETH:

In consideration of the monetary amounts as stated herein, the sufficiency of
which is hereby acknowledged by both parties, and subject to the covenants and
agreements hereinafter contained and provided, Seller hereby covenants and agrees to
convey and assure to Purchaser and Purchaser hereby agrees to purchase from Seller
the following described property, to wit:

1825, 1835 and 1841 Fairview Farms Road, Campobello, SC 29322, more

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particularly described as as Tract G of Greenspace of Fairview, LLC, more particularly and specifically described on Exhibit "A" attached hereto and incorporated herein by reference (hereinafter referred to as the "Property").

It is mutually covenanted and agreed that this Contract for Deed is made and entered into upon the following covenants and agreements:

1. The purchase price to be paid by Purchaser directly to or for the benefit of the Seller is the sum of \$1,400,000.00, said purchase price to be paid in the following manner:
 - (a) The credit of the sum of \$10,000.00 in check or electronic funds paid directly to Seller as a non-refundable deposit prior to the execution of this instrument;
 - (b) A note, a copy of which is attached hereto and incorporated herein, payable to the Seller in the current principal amount at closing of the Seller's note to Chevy Chase Bank, F.S.B., secured by a first mortgage to Chevy Chase Bank & Trust, or its successor and/or assign (hereinafter referred to as "Mortgage No. 1"), in the amount of \$1,061,968.32, under the same current or modified terms and conditions of the note and mortgage between the Seller and Mortgage No. 1 dated August 18, 2004. Said note shall be paid with monthly installments directly to the holder of Mortgage No. 1.

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the first payment of such Installment due and payable on April 1, 2011, and a like amount thereafter every month until April 1, 2016, when on that date the balance shall be due and payable. Purchaser acknowledges and agrees that this monthly Installment may adjust from time to time based on the terms and conditions set forth in loan documents upon notice from Mortgage No. 1. The Purchaser shall have the option to extend the maturity date to April 1, 2019 with a principal of reduction of five percent (5%) of the outstanding balance;

- (c) A note, a copy of which is attached hereto and incorporated herein, payable to the Seller in the current principal amount at closing of the Seller's note to Carolina First Bank, secured by a second mortgage to Carolina First Bank, or its successor and/or assigns (hereinafter referred to as "Mortgage No. 2") in the amount of \$193,665.68, under the payments to reflect the current or modified terms and conditions of the note and mortgage between the Seller and Carolina First Bank Mortgage No. 2 dated June 18, 2008. Said note shall be paid in monthly Installments of \$1,842.00 directly to the holder of Mortgage No. 2, with the first payment of \$1,842.00 on March 17, 2011, and a like amount thereafter every month until June 17, 2013, when on that date the

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balance shall be due and payable. The Purchaser hereby acknowledges and agrees that the original terms and conditions of this note contain a prepayment penalty;

- (d) The payment of the Seller's lien to the United States Internal Revenue Service (hereinafter referred to as the "IRS") in the estimated amount of \$14,601.71. In the event that said estimated payoff amount is in excess of the actual payoff amount, any excess shall be held in escrow by the closing attorney and shall be paid to the Seller after recorded satisfaction of the lien.
- (e) The payment of the 2010 *ad valorem* (real property) taxes now due and payable to Spartanburg County in the amount of \$5,978.87;
- (f) The payment of 2010 assessments due and payable to Greenspace of Fairview, LLC, along with penalties in the amount of \$4,590.34 plus \$500.13 due for fire ant treatment of the property;
- (g) The payment of arrears, penalties and legal fees of the first mortgage held by Mortgage No. 1 in the amount of \$50,839.96;
- (h) Intentionally Deleted.
- (i) The payment to Seller in cash or certified funds estimated in the amount of \$43,076.84 after payment of Seller's pro-rata portion of 2011 taxes and assessments;
- (j) The remaining sum shall be payable with a note, a copy of which is

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attached hereto and incorporated herein, to the Seller in the principal amount of \$13,000.00 with an interest rate of two and one-half percent (2.5%) per annum to be amortized over seven years with a balloon payment due and payable in four years. Said note shall be paid directly to the Seller with the first payment of such installment due and payable on April 1, 2011, and a like amount thereafter every month until April 1, 2015, when on that date the balance, if any, shall be due and payable. Monthly payments may be anticipated and more than the required amount can be paid without penalty. Additional payments to principal may also be made without penalty. Purchaser shall make the monthly payments to the Seller at set forth under Paragraph 17 herein, or any other place of designation agreed upon by Purchaser and Seller. If any monthly payment is made after the 10th day of the month, a late fee of five percent (5%) will be charged (hereinafter referred to the "Late Payment Fee"). The Late Payment Fee will be charged for each and every month that the Purchaser makes payment after the 10th day of such month. Upon default, including failure to pay upon final maturity, the interest rate on the amount due from Purchaser shall be Nine and 00/100 (9.00%) percent per annum.

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2. Seller hereby represents and warrants that the Property is free and clear of all liens and encumbrances and other objections, except for those items set forth in the certified title opinion of Joshua O.C. Lonon, Esq. dated December 30, 2010, and updated as of the date of this instrument, attached hereto as Exhibit "B" and incorporated herein by reference. Purchaser hereby subordinates this Contract for Deed to first and second mortgages on the Property listed on Exhibit "B" under item(s) 16 and 17 and referenced herein as Mortgage No. 1 and Mortgage No. 2, respectively.
3. Upon Purchaser making all payments and performing all other covenants and agreements herein set forth to be performed by Purchaser, Seller shall convey the Property, more particularly described in Exhibit "A" attached hereto and incorporated herein by reference, to Purchaser free and clear of all liens, encumbrances and other objections by a good, fee simple general warranty deed. At the time of the conveyance of the Property by Seller to Purchaser, Purchaser shall be responsible for and pay (a) the cost of the preparation of the Deed and (b) the fees associated with the transfer and recording of the Deed and (c) the costs associated with or arising out of the transfer of the LLC shares.
4. Purchaser shall pay, when due, *ad valorem* (real property) taxes and other governmental charges for the tax year 2011, and thereafter for a full

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J. L. LEE

year until the Contract for Deed is completed. The tax map reference number for the property is: 1 03-00 003.00. Purchaser shall receive a pro-rata credit for 2011 taxes at the execution and closing of this Contract for Deed.

5. Neither party shall, as a result of an act or omission, cause the Property in any way to be further encumbered, either voluntarily or involuntarily, without the written consent of the other party and to immediately, after notice thereof, remove, or cause to be removed, any encumbrances placed against the Property. In the event that said encumbrances are not removed, the non-encumbering party, after thirty (30) days notice of intent, may institute whatever proceeding may be necessary or required in order to have said encumbrances removed or the Property released therefrom. For so removing said encumbrances or releasing said Property, the encumbering party shall be responsible for the payment of the non-encumbering party's costs, and expenses including, but not limited to reasonable attorney's fees. In the event the encumbering party, after demand, fails or refuses to pay said expenses, costs, or attorney's fees, the non-encumbering party may bring an action against the encumbering party for the costs and expenses of collection, including, but not limited to reasonable attorney's fees. Should a judgment be filed against the Seller affecting the Property, or should an encumbrance be placed against the

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Property as a result of Seller's acts or omissions, Purchaser after actual notice thereof, may in addition, cease to make payments to Seller under the note directly payable to Seller as called for set forth under Paragraph 1(j) and shall have the right of setoff against any amounts due for any such liens or encumbrances including costs arising therefrom and reasonable attorney fees. Should a judgment be filed against the Purchaser affecting the Property, or should an encumbrance be placed against the Property as a result of Purchaser's acts or omissions, Seller after actual notice thereof, may in addition, add to the principal balance of the promissory note under Paragraph 1(j) any amounts due for any such lien or encumbrances including costs arising therefrom and reasonable attorney fees.

6. Purchaser shall receive possession of the Property upon the execution of this Contract for Deed, and thereafter Purchaser shall be entitled to use and enjoy the Property to the same extent as if Purchaser had full and complete legal and equitable title thereto, subject to the terms, conditions, rules and regulations of the Conservation Easement and Greenspace of Fairview, LLC, as fully disclosed to the Purchaser prior to execution of this Contract for Deed.
7. Purchaser shall pay when due all charges for utility services, including, but not limited to, water, heating, gas, electricity, telephone and sewer.

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service furnished to the Property.

8. Purchaser shall pay when due all fees and assessments associated with Greenspace of Fairview, LLC, in accordance with the restrictive covenants and/or operating agreement. Seller shall consult with Purchaser regarding any votes cast and exercising any voting rights under the Property's membership interest in Greenspace of Fairview, LLC.
9. In the event of a disallowance by the IRS and/or the South Carolina Tax Commission, which prevents both parties from the benefits of a deduction for interest or depreciation or capital gain on the Property, then it is hereby agreed by and between the parties hereto that those deductions disallowed by both parties resulting from transactions occurring after the date hereof shall accrue to the benefit of the Purchaser. As a result, upon receipt of the governmental agencies reports, commonly known as IRS Form 1098, for payment of interest of the respective first and second mortgages as set forth herein, issued by Mortgage No. 1 and Mortgage No. 2 to Seller, Seller shall issue the same governmental agencies reports for all interest payments paid by Purchaser on behalf of and directly to Seller. Seller may assign this task to Purchaser's obligations with Seller's verification of information reported.
10. Seller shall report to all credit reporting agencies the payment history of the Purchaser for each payment obligation hereunder. Seller may assign

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this task to Purchaser's obligations with Seller's verification of Information reported.

11. Purchaser shall keep all improvements upon the Property in good repair and shall not commit waste or permit impairment or deterioration of said improvements. Purchaser accepts possession of the property in its present "AS-IS" condition as of the date of this Contract for Deed. It is understood and agreed that Purchaser accepts and assumes any and all risk of loss to all trees, shrubs, or other damage to the property due to fire or other casualty, acts of God and the elements from the date hereof. It is understood and agreed between the Seller and Purchaser that Purchaser will maintain a policy of hazard insurance on the Property in an amount not less than \$1,400,000.00 and will name Seller on such policy as a loss payee and provide Seller annual notice of same.
12. The following shall constitute events of default of Purchaser hereunder:
 - (a) The Purchaser's failure to pay an installment of principal or interest, or any other sum, within thirty (30) days of the date when it is due under this instrument. Any default by Purchaser under any one of the notes referred to hereinabove in Paragraph 1 shall be deemed a default under all of the notes.
 - (b) The Purchaser's assignment of any or all of Purchaser's interest in the Property, without the Seller's prior written consent.

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- (c) The Purchaser's failure to maintain the Property in good condition and in compliance with all restrictive covenants and in compliance with the Conservation Easement and the rules and regulations promulgated by Greenspace of Fairview, LLC and the restrictive covenants, as fully disclosed to the Purchaser prior to execution of this Contract for Deed.
- (d) The commencement of any proceeding under the Federal Bankruptcy Code or any law of the United States or of any state relating to insolvency, receivership or debt adjustment by the Purchaser, or the commencement of any such proceeding against the Purchaser which results in the institution of any such proceedings against the Purchaser and is consented to by the Purchaser or remains undismissed for sixty (60) days, or the Purchaser is adjudicated a bankrupt, or a trustee or receiver is appointed for any substantial part of the Purchaser's property, or the Purchaser makes an assignment for the benefit of creditors, admits in writing an inability to pay debts generally as they become due or becomes insolvent.
- (e) The Purchaser's failure to pay when due and payable all *ad valorem* (real property) taxes against the Property.
- (f) The Purchaser's failure to maintain a policy of hazard insurance on

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the Property in an amount not less than \$1,400,000.00 and to name Seller on such policy as a loss payee, and to provide Seller annual notice of same.

(g) The Purchaser's failure to pay, when due, all fees and assessments associated with Greenspace of Fairview, LLC in accordance with the restrictive covenants and/or operating agreement.

13. Upon the occurrence of any event of default or other nonperformance or noncompliance by Purchaser of any term or condition herein, Seller shall give Purchaser written notice of same and Purchaser shall cure such default, non-performance or non-compliance within thirty (30) days after the Purchaser's receipt of written notice thereof from Seller. In the event that Purchaser fails to cure such default, nonperformance or noncompliance, then the Seller at its option, may seek to divest the Purchaser of its interest under the terms of this Contract for Deed. The Seller's interest in the Property shall be treated as the interest of the holder of a third mortgage on the Property and the remedy of the Seller shall be to foreclose the interest of the Purchaser in the same manner as the Seller would foreclose the interest of the Purchaser as if the Seller were the Mortgagee under a third mortgage and the Purchaser were the Mortgagor, and the Purchaser shall be liable for all costs arising therefrom including reasonable attorney fees. The remedies set forth herein in all

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instances are not exclusive, but cumulative and in addition to all other remedies which may exist under the law.

14. In the event Seller fails, neglects, or refuses to perform, in whole or part, any of the covenants, agreements, or obligations herein provided upon the part of the Seller to be performed, Purchaser shall give Seller written notice of same and Seller shall cure such default, non-performance or non-compliance within thirty (30) days after the Seller's receipt of written notice thereof from Purchaser. In the event that Seller fails to cure such default, nonperformance or noncompliance, then the Purchaser, at its option, is hereby authorized and empowered, at the cost of the Seller, to perform or cause to be performed, any or all of said covenants, agreements and obligations, and expend such sums of money as may be reasonable therefore, or for any other purpose which is, in the opinion of the Purchaser, reasonably necessary for the protection of the Property. All such sums of money so expended by Purchaser, together with interest thereon, at the rate of five percent (5%) from the several dates of expenditure thereof until paid, shall become indebtedness under this agreement and shall be repaid by Seller to the Purchaser, immediately upon demand, at the address of the Purchaser as set forth in Paragraph 17 herein. Any failure, neglect, or refusal by Seller to repay the sums as herein provided shall constitute a default hereunder and the Seller shall be

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liable for any and all costs arising therefrom including reasonable attorney fees. Purchaser, at its option, may deduct from any payments due directly to Seller under the terms and conditions of this agreement as set forth under Paragraph 1(j). In the event Purchaser fails, neglects, or refuses to perform, in whole or part, any of the covenants, agreements, or obligations herein provided upon the part of the Purchaser to be performed, Seller shall give Purchaser written notice of same and Purchaser shall cure such default, non-performance or non-compliance within thirty (30) days after the Purchaser's receipt of written notice thereof from Seller. In the event that Purchaser fails to cure such default, nonperformance or noncompliance, then the Seller, at its option, is hereby authorized and empowered, at the cost of the Purchaser, to perform or cause to be performed, any or all of said covenants, agreements and obligations, and expend such sums of money as may be reasonable therefore, or for any other purpose which is, in the opinion of the Seller, reasonably necessary for the protection of the Property. All such sums of money so expended by Purchaser, together with interest thereon, at the rate of five percent (5%) from the several dates of expenditure thereof until paid, shall become indebtedness under this agreement and shall be repaid by Purchaser to the Seller, immediately upon demand, at the address of the Seller as set forth in Paragraph 7

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H. BURTON C. HILL JR.

herein. Any failure, neglect, or refusal by Purchaser to repay the sums as herein provided shall constitute a default hereunder and the Purchaser shall be liable for any and all costs arising therefrom including reasonable attorney fees.

15. Failure or delay of either party hereto to enforce any right or to exercise any option available because of any default hereunder shall not constitute a waiver of the right to exercise same in the event of any subsequent default.

16. At all times while this Contract for Deed is in effect or while said Property is occupied by Purchaser, Seller shall not be liable or responsible for any activities or accidents that may occur on or in connection with Purchaser's use of said Property. Purchaser shall be solely responsible for any damage, injury or other loss, to persons or property that may occur upon the property as a result of the negligent, unlawful or willful act or omission of the Purchaser or their visitors and shall defend, indemnify and hold the Seller harmless for any damage, loss or expense resulting therefrom.

17. All notices, requests and other communications between the parties and or in connection with this Contract for Deed shall be in writing and mailed by registered or certified mail, return receipt requested, at the below address, until written notice to the contrary:

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M. HUSTON, CLERK

Seller: 101 E. Rutherford Street
Landrum, SC 29356

Purchaser: 405 East Springs Road
Columbia, SC 29223

18. This Contract for Deed represents the entire agreement between the parties, and no warranties, representations, promises or statements have been made by either party unless endorsed hereon in writing and duly executed by the parties.
19. This Contract for Deed shall be construed according to the laws of South Carolina.
20. This Contract for Deed shall be binding upon the heirs, personal representatives, successors and assigns of the parties hereto. All rights and remedies given to either party herein, or by law, shall be cumulative and alternative. If any provision of this Contract for Deed is held invalid or unenforceable, the remainder of it shall not be affected thereby and to this end the provisions hereof are declared severable.
21. The Seller represents that there is no real estate commission due to any real estate broker as a result of the execution of this contract for deed for the future transfer of legal title to the subject property.
22. The parties acknowledge that the Property is currently encumbered by mortgages which give the mortgagee(s) the right to demand immediate

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payment in full from the mortgagor in the event of any full or partial transfer of legal or equitable title by the mortgagor (the "Due on Sale Clause"). This Contract for Deed may be construed to be in violation of the Due on Sale Clause and may cause the Mortgagee(s) to demand full payment on its/their respective note(s). The mortgage(s) also allow(s) for the mortgagee(s) to bring a foreclosure action upon the subject property for failure to make payments when due, failure to insure the property or other violations of the terms of mortgage(s), which could result in a loss of the Purchaser's equitable interest in the subject property and other damages to the Purchaser. The Seller expressly agrees to hold the Purchaser harmless and to indemnify the Purchaser for proximate damages resulting from enforcement of the Due on Sale Clause of the mortgage(s). The Seller also expressly agrees to hold the Purchaser harmless and to indemnify the Purchaser for proximate damages or for any violation of the terms of the mortgage(s) that is/are not the fault of the Purchaser.

[SIGNATURES ON FOLLOWING PAGES]

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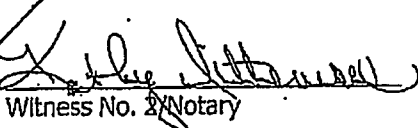
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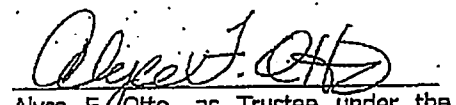
IN WITNESS WHEREOF, the undersigned party hereto has caused this Contract
for Deed to be executed the day and year first above written.

WITNESSES:

AS TO SELLER:

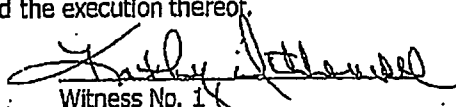
Witness No. 1


Witness No. 2 Notary

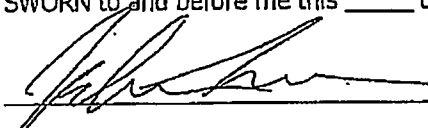

Alyce F. Otto, as Trustee under the
Declaration of Trust of Alyce F. Otto
dated November 17, 2009, Seller

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG) PROBATE

PERSONALLY appeared before me the undersigned witness and made oath that
she saw the within named Alyce F. Otto, as Trustee under the Declaration of Trust of
Alyce F. Otto dated November 17, 2009, Seller, sign, seal and as its act and deed,
deliver the within written Contract for Deed and that she with the other witness whose
name is subscribed above witnessed the execution thereof.


Witness No. 1

SWORN to and before me this _____ day of March, 2011.


(SEAL)

Notary Public for South Carolina
My commission expires: 4/6/2012

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M. HURD BLAUCKLEY

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AS TO PURCHASER:

Jackson L. Munsey, Jr., Purchaser

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

PERSONALLY appeared before me the undersigned witness and made oath that she saw the within named Jackson L. Munsey, Jr., Purchaser, sign, seal and as his act and deed, deliver the within written Contract for Deed and that he with the other witness whose name is subscribed above witnessed the execution thereof.

[Signature] (SEAL)
Notary Public for South Carolina
My commission expires: 6/6/2024

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SPARTANUS 0:00
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H. BURDELLA/CLEVER

7.8

EXHIBIT A

PROPERTY DESCRIPTION
1825/1841/1835 Fairview Farms Road
Tax Map No: 1 03-00 003.00

All that certain piece, parcel or tract of land lying, situate and being in the State of South Carolina, County of Spartanburg containing 25.08 acres, more or less, and being shown as Distribution Tract G on a plat of survey for Greenspace of Fairview, LLC, dated August 2, 2001 by Mitchell Surveying and recorded in Plat Book 151 at page 523. Reference is made to said plat and the record thereof for a more complete and accurate description.

This being a portion of the same property conveyed to Alyce F. Otto, Trustee under Declaration of Trust of Alyce F. Otto dated the 17th Day of November, 2009 by Deed of Alyce F. Otto recorded November 24, 2009 in Deed Book 95 A at page 439. Also, being a portion of the same property conveyed to Rudrick George Otto, Trustee under Declaration of Trust of Rudrick George Otto dated the 17th day of November, 2009 by Deed of Rudrick G. Otto recorded November 24, 2009 in Deed Book 95 A at page 435. Reference is also made to the deed from Alyce F. Otto, Successor Trustee under Declaration of Trust of Rudrick George Otto dated the 17th day of November, 2009 to Alyce F. Otto, Trustee under Declaration of Trust of Alyce F. Otto dated the 17th day of November, 2009, said deed being dated February 9, 2011 and recorded February 10, 2011 in Deed Book 97-V, Page 181.

All referenced recordings are in the Register of Deeds Office for Spartanburg County, South Carolina unless otherwise noted herein.

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STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

U.S. Bank, NA as Trustee relating to)
The Chevy Chase Funding, LLC)
Mortgage Backed Certificates,)
Series 2004-B,)

Plaintiff,)

-vs-)

Alyce F. Otto, individually;)
Alyce F. Otto, Trustee Under)
Declaration of Trust of Alyce F.)
Otto, dated 11/17/09; TD Bank, NA;)
The United States of America,)
Acting by and through its agency,)
The Internal Revenue Service;)
Laura Kerhulas Giese, as co-)
Trustee of the Theodore Ernest)
Kerhulas Trust Under Declaration)
Of Trust dated 5/25/04; Mark)
Warner Kerhulas, as co-Trustee of)
The Theodore Ernest Kerhulas)
Trust Under Declaration of Trust)
Dated 5/25/04; Jackson L. Munsey,)
Jr.; and Citibank, NA,)

Defendants.)

And)

Jackson L. Munsey, Jr.)

Cross-Claim Plaintiff,)

-vs-)

Alyce F. Otto, Individually; and)
Alyce F. Otto, Trustee under.)
Declaration of Trust of Alyce F.)
Otto, dated 11/17/09,)

Cross-Claim Defendants.)

IN THE COURT OF COMMON PLEAS

C. A. NO.: 2012-CP-42-3549

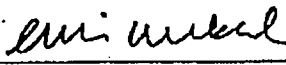
CERTIFICATE OF SERVICE

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M. HOFF BLAUMLEY

The undersigned certifies that she served the **SUMMONS and ANSWER, COUNTERCLAIMS, AND CROSS-CLAIMS** in the above-captioned matter, by depositing the same into the U.S. Mail, first class delivery, postage prepaid, addressed as follows:

Mary R. Powers
Rogers Townsend & Thomas, PC
PO Box 100200
Columbia, SC 29202
ATTORNEY FOR THE PLAINTIFF

Kenneth C. Anthony, Jr.
PO Box 3565
Spartanburg, SC 29304
ATTORNEY FOR THE DEFENDANT ALYCE F. OTTO


Erin Culbertson

December 21, 2012
Greenville, SC

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SPARTANBURG COUNTY
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M. R. C. DEANLEY

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG)

COURT OF COMMON PLEAS

3 U.S. BANK, NA, AS TRUSTEE RELATING)
4 TO THE CHEVY CHASE FUNDING, LLC,)
5 MORTGAGE BACKED CERTIFICATES,)
6 SERIES 2004-B,)

7 PLAINTIFF,)

8 -VS-)

9 ALYCE F. OTTO, INDIVIDUALLY; ALYCE F.)
10 OTTO, TRUSTEE UNDER DECLARATION OF)
11 TRUST OF ALYCE F. OTTO, DATED 11/17/09;)
12 TD BANK, NA; THE UNITED STATES OF)
13 AMERICA, ACTING BY AND THROUGH ITS)
14 AGENCY, THE INTERNAL REVENUE)
15 SERVICE ; LAURA KERHULAS GIESE, AS)
16 CO-TRUSTEE OF THE THEODORE ERNEST)
17 KERHULAS TRUST UNDER DECLARATION)
18 OF TRUST DATED 5/25/04; MARK WARNER)
19 KERHULAS, AS CO-TRUSTEE OF THE)
20 THEODORE ERNEST KERHULAS TRUST)
21 UNDER DECLARATION OF TRUST DATED)
22 5/25/04; JACKSON L. MUNSEY, JR., AND)
23 CITIBANK, NA,)

24 DEFENDANTS.)
25

TRANSCRIPT OF MOTIONS

(2012CP42-3549)

MAY 6, 2013

Spartanburg, South Carolina

18 REFERENCE HELD: MAY 6, 2013.

19 BEFORE: HONORABLE GORDON G. COOPER,
20 MASTER-IN-EQUITY FOR SPARTANBURG COUNTY.

21 APPEARANCES: ROGERS, TOWNSEND & THOMAS, PC
22 BY: ERICA G. LYBRAND, ESQUIRE,
23 Attorneys for the Plaintiff.

24 THE ANTHONY LAW FIRM, PA
25 BY: KENNETH C. ANTHONY, JR., ESQUIRE,
Attorneys for Alyce Otto, Individually and as Trustee
under Declaration of Trust of Alyce F. Otto.

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KEHL, CULBERTSON, ANDRIGHETTI, KORNFELD
BY: ERIN CULBERTSON, ESQUIRE,
Attorneys for Jackson Munsey, Jr.

Sarah Hollis, Court Reporter

1 THE COURT: All right. This is Case number 2012-3549, U. S. Bank, NA, versus Alcy F.
2 Otto, et al. It looks like we have got two Motions filed by the Defendant, by one of the
3 Defendants Jackson L. Munsey, Jr. One of them is the Motion to Set Aside Default and Leave to
4 File Answer Outside of Time and the other is a Motion to Consolidate. Are those the Motions
5 that we have pending?
6 MS. LYBRAND: Yes, Your Honor.
7 THE COURT: All right. Are we ready to proceed?
8 MS. CULBERTSON: We are Judge.
9 THE COURT: All right.
10 MS. CULBERTSON: I am Erin Culbertson. I am here on behalf of the moving Defendant
11 Jackson Munsey. I figured that maybe we could do the Default hearing first.
12 THE COURT: All right.
13 MS. CULBERTSON: That may result on our consolidation issue. And by way of background
14 there is a companion action pending. And to explain the situation between them all. My client
15 has purchased a piece of property in Campobello. A pretty significant piece of property at a
16 million and half dollars from the Defendant, Mrs. Otto. He purchased it by means of a bond for
17 title and Mrs. Otto is the mortgagor. Her mortgage is with U. S. Bank who has brought this
18 foreclosure action. U. S. Bank is foreclosing against Mrs. Otto and we are named as a Defendant
19 because our Bond for Title is of record. Mrs. Otto has also filed a foreclosure against my client
20 to foreclose that Bond for Title. So there are two foreclosures pending against the subject
21 property. My client is in default and I am not sure exactly what the date of default was, I am
22 sorry. I will double check that. But he was served the end of August and at that point he was in
23 fairly regular contact with Mr. Anthony who represents Mrs. Otto. And he was hopeful that they
24 were going to be able to get a reinstatement amount and make the foreclosure go away. In fact,
25 however, they weren't able to do so. When it became apparent that there wasn't going to be a

1 quick and amicable resolution my client hired me. I filed our Answer, I filed the Motion to Set
2 Aside the Default as well I filed the Motion to Consolidate the two actions. So we are here today
3 on my Motions. I don't think that there is any magic to any of this case. Obviously the "good
4 cause" standard is a lenient one. I think it is fairly important to look at the other three set aside
5 default issues which is the timing. My client clearly was in default and did not answer within his
6 thirty (30) day period. But as I said I think he was hopeful to reach a resolution such that an
7 Answer would not be necessary. As soon as he contacted me, I filed immediately. I think that
8 there is also several meritorious defenses in this action. Judge we have alleged that Chase, who is
9 the servicer of this loan, and also Judge by way of background I want you to know that my client
10 was making payments directly to Chase without going through Mrs. Otto. Chase began returning
11 all payments sending checks back to Mrs. Otto. Which we were not ever in the chain of
12 communication when all of that began happening. We simply were served with a Notice of
13 Default and the note got called due. The first we learned that our payments had been refused was
14 several months after they had started the foreclosure proceedings. So we filed some
15 Counterclaims and some Cross-claims saying that there is no reason for those payments to be
16 refused. Mrs. Otto breached her duty under our Bond for Title to communicate that information
17 with us. To date, I have never seen an accounting and I don't know why those payments began
18 being refused. So I believe that there are some meritorious defenses to take a look at. And then
19 the final default that we will talk about is prejudice to the non-moving party. And I would say
20 that the foreclosure is a classic example of no prejudice because their interest can continue to
21 accrue should this not get resolved. Any prejudice on their part can be resolved in the form of
22 monetary damages. Obviously, Ms. Lybrand is opposed to my Motion and does not want us to be
23 allowed to set aside our default. So I will be glad to stop and let her address it.
24 THE COURT: Ms. Lybrand.
25 MS. LYBRAND: Thank you, Your Honor. My name is Erica Lybrand from Rogers, Townsend

1 and I represent the Plaintiff in this matter. We have filed a Memorandum in Opposition to Ms.
2 Culbertson's motion. Basically what we were looking at and case law state, we understand and
3 we recognize that the Motion to be Relieved from Default as you know is completely within your
4 discretion. However, there is a recent case, *Regions Bank v. Owens*, which was appealed from
5 Judge Spence, a Lexington County foreclosure case. In that case, the Defendant had not filed an
6 Answer based upon conversations with his co-Defendant. He was under some understanding that
7 the co-Defendant was going to file an Answer and had hired an attorney to file an Answer on
8 behalf of both of them. When he figured out that was not the case, he went and hired an attorney.
9 The attorney filed a motion to be relieved from default. In that particular case Judge Spence held
10 that he hadn't provided a good explanation for the default and that under our State law in the State
11 of South Carolina before you can get to those *Wham* factors which are you know, timing,
12 prejudice and meritorious defenses, the Defendant first has to show a good reason, a good cause
13 for the default in the first place. And that is where Judge Spence ruled that Defendant in the
14 *Owens* case has failed to meet that first standard. That initial step in keeping to have his default
15 set aside. Whether it was relying on another attorney or another Defendant who promises you
16 that they are going to file an Answer on your behalf is not sufficient to show a reason for your
17 default. Especially in light of the fact that particular Defendant in that case did not call that other
18 attorney to confirm that they were going to file an Answer on his behalf and had failed to follow
19 up on the status of the case. We have similar facts in this case. Mr. Munsey believed that Mrs.
20 Otto and or her attorney were working out some sort of settlement, with the Plaintiff. He didn't
21 call my law firm to find out about the status of the imminent settlement. He didn't file an
22 Answer or seek to protect his interest in any way in light of the fact that the settlement which they
23 do all the time, would fall apart. So it is our position in this case that Mr. Munsey did not have
24 that initial step to be relieved from default and that he has not shown good reason or a good
25 excuse or a good explanation for the default in the first place. And that *Owens* case cited within

1 our Memorandum in Opposition hold that you have to meet that first step before you can get to
2 the *Wham* factor analysis. If you don't meet that first step there is no need even to move onto the
3 *Wham* factors. That would be our position. And just for purposes of covering all of the bases,
4 you know we would obviously hold that Mr. Munsey, who is not a party to the loan documents,
5 does not have any meritorious defenses against the Plaintiff. As you know and it is kind of
6 unusual for me to be arguing just one motion when there are other motions that also affect this
7 case but the second action that Ms. Culbertson has discussed between Mrs. Otto, who is the
8 mortgagor, and Mr. Munsey who lives on the property and were paying payments apparently, Mr.
9 Munsey in that case apparently is in default. And he could have asserted and claimed what
10 defenses or whatever he had against Mrs. Otto in that case. So it kind of seems like this is an
11 attempt to double dip. It is an attempt to come back and rectify a situation that they are unable to
12 fix in the other case or he should be filing a Motion to Set Aside Default in the other case if he has
13 claims against Mrs. Otto, but obviously we feel as though there are no meritorious defenses
14 against the Plaintiff with Mr. Munsey. And then prejudice, we are entitled to interest as long as
15 this foreclosure sits on your docket, Your Honor. But you know the value of the property might
16 decline, the physical nature of the property, and any kind of repairs that might need to be done or
17 that kind of thing might also decline. So prejudice is not just whether or not we are going to have
18 any financial issues, obviously we will collect our interest for as long as it sits but you know we
19 are concerned too about the property. It is a very nice piece of property. It is worth a lot of
20 money or it was worth a lot of money at the time. And every day that it sits in foreclosure there is
21 a possibility that it declines in value. So obviously that is an argument against prejudice but of
22 course we would say that no *Wham* factor immunity should be discussed in this case because Mr.
23 Munsey has failed to provide an explanation for the default.
24 THE COURT: Counsel anything further?
25 MS. CULBERTSON: Your Honor, I submitted an Affidavit from my client and in connection

1 with my Motion, so the Court is aware of basically all of the factors that I know. Your Honor, I
2 did not represent him prior to December of this year so I can't exactly speak to his state of mind
3 other than to say that he was hopeful of reaching a settlement. Once Mr. Anthony, well I think it
4 sought of became apparent that our two (2) clients were not going to get along very nicely and
5 play well. And so Mr. Anthony obviously said you need to go get your own lawyer and stop
6 calling me. And that is when I came on board. That is as much as I know about that, Your
7 Honor.

8 THE COURT: All right. Mr. Anthony did not represent Mr. Munsey, is that right?

9 MS. CULBERTSON: Correct.

10 THE COURT: All right. As far as the Motion filed by Mr. Munsey to Set Aside Default and
11 Leave to File an Answer. I am going to deny that Motion. I don't feel like that there has been
12 enough showing of the requirements of why he did not timely file an Answer. There has been no
13 excuse offered. Mr. Anthony did not represent Mr. Munsey. And I don't see that there is any
14 good cause showing why he did not respond. If you will prepare that Order.

15 MS. LYBRAND: I actually have a proposed Order.

16 THE COURT: All right. Is there a need to take up the other matter?

17 MS. CULBERTSON: I believe that there is Judge.

18 THE COURT: If I have denied the Motion to Set Aside Default.

19 MS. CULBERTSON: I mean obviously it is your call.

20 THE COURT: Thank you.

21 MS. CULBERTSON: I didn't mean ---

22 THE COURT: All right.

23 MS. CULBERTSON: I do believe that it is worth taking a look at simply because it is the same
24 people, the same property and the same pot of money.

25 THE COURT: Well let me ask you this. What is the status of the other case?

1 MS. CULBERTSON: The other case is – has a default been filed in our case?
2 MR. ANTHONY: I do not remember.
3 MS. CULBERTSON: I have never received notice of the default.
4 MS. LYBRAND: I can answer that.
5 MS. CULBERTSON: Sure.
6 MS. LYBRAND: There has not been a default filed yet. I believe it has been referred, though.
7 MR. ANTHONY: It has been referred.
8 THE COURT: It has been referred, yes.
9 MR. ANTHONY: We have not requested a hearing because we were trying to see how this was
10 going to play out. And both should be consolidated. It does make sense to me to consolidate
11 the two, so if the property is going to be sold it only needs to be sold once.
12 MS. CULBERTSON: There is no resolution to our action without a resolution to this action, I
13 believe.
14 THE COURT: All right.
15 MRS. CULBERTSON: And I prepared simply my Motion just based on Rule 42. Just assuming
16 that this was sort of the most classic example of judicial economy. It has the same parties, the
17 same property, and the same pot of money. If this loan is going to get reinstated or paid off it
18 only can come from my client's funds not from Mrs. Otto's funds.
19 MS. LYBRAND: And Your Honor, I would disagree. Obviously I filed a Memorandum in
20 Opposition but Mrs. Otto's action against Mr. Munsey is initially a breach of contract. This is a
21 contract for deed. So it is a legal claim. The judicial efficiency issue comes barreling into the
22 courtroom here where we are talking about a legal claim versus an equitable foreclosure action.
23 If these two (2) cases were consolidated, we would likely be facing a motion or an order vacating
24 this reference, Order of Reference and send it back down to the circuit court we would then be put
25 on the circuit court roster and have to deal with any legal claims possibly through a jury trial.

1 THE COURT: How did the matter get referred? Was it referred by agreement of counsel or was
2 there a - - -

3 MS. CULBERTSON: That question is to Mr. Anthony, I believe.

4 MR. ANTHONY: We filed that like we do other foreclosures. It is an equitable matter.

5 THE COURT: Right.

6 MS. LYBRAND: So you are saying there is no jury trial demand even though there is a jury trial.

7 MR. ANTHONY: I don't think that we requested a jury trial.

8 MS. LYBRAND: No, it does say non-jury, I am sorry.

9 MR. ANTHONY: Right.

10 MS. LYBRAND: Beyond that issue, this issue between them is a private contract. The Plaintiff
11 was never a part of it and never made aware of it. In fact, those issues of whether or not
12 somebody was supposed to be making payments or returning payments and that sort of thing is
13 completely outside the scope of our straight forward mortgage foreclosure action. We obviously
14 have a prior lien. We would wholeheartedly disagree that there are similar facts. There are
15 different Complaints and the relief sought against different parties. Mrs. Otto is seeking relief
16 against Mr. Munsey and we are seeking relief against Mrs. Otto. I just feel that if we brought
17 these two cases together that would add additional confusion to the issues in the case. And there
18 is really no need, as far as I am concerned, in that case it appears that Mr. Munsey is in default as
19 you just ruled Mr. Munsey in default in this case. Therefore, he doesn't have any defenses in his
20 Motion to Consolidate the two (2) cases. You know it seems a little bit not warranted at this
21 point. You know it looks like Mrs. Otto can just proceed with her case and we can just proceed
22 with our case that we have for litigation with Mrs. Otto. But it just doesn't seem like it would be
23 warranted. It doesn't seem like it would have the effect that a consolidation is supposed to have.
24 Actually it would have the opposite. It would make this case longer and more confusing.
25 MS. CULBERTSON: In response Your Honor, I would respond that we contend that it was

1 Chase's negligence in refusing to accept payments that led to this situation, wherein we are forced
2 to defend the foreclosure by both Chase and Mrs. Otto. This one action led to two lawsuits,
3 basically.

4 MS. LYBRAND: Again Your Honor, Mr. Munsey is in default and doesn't have that opportunity
5 to raise the specifics of those issue and we have - - -

6 THE COURT: Well he is in default on the foreclosure part.

7 MS. CULBERTSON: Right..

8 THE COURT: But if nothing has been filed in the other case, it hasn't been ruled on whether he
9 is in default on that one or not.

10 MS. LYBRAND: Yes. I think there hasn't been a Certificate of Default but the time period with
11 which to answer has certainly expired.

12 THE COURT: There maybe different issues in that case, I don' know.

13 MS. LYBRAND: Right. I feel like that it would add to the confusion especially in light of the
14 fact that you ruled that he is now in default in this case. So if he sought relief from or if he is not
15 in default in that case we would have a situation of whether or not we are now being forced to
16 defend claims against or from Mr. Munsey that we probably shouldn't be if he is in default and he
17 has no defenses against the Plaintiff. Those issues could be a very few things and cause a delay.

18 MS. CULBERTSON: Are there not counterclaims pending on behalf of Mrs. Otto?

19 MS. LYBRAND: Mrs. Otto who you know, she is a party to the loan documents and we are
20 willing to move forward with litigating at trying to work out a resolution but you know she is a
21 party to the loan documents. She is not in default. She filed her Answer and counterclaims and
22 we are willing to move forward and we are going to work with Mr. Anthony on those. But you
23 know if the two cases were consolidated I would fear that Mr. Munsey would then attempt to raise
24 additional counterclaims or defenses or get involved in the litigation in a way that it would force
25 the Plaintiff to have to defend against claims from Mr. Munsey when he is now in default.

1 THE COURT: Well I am going to consolidate the cases. Because I figure if I get everybody in
2 one room together even I can understand what is happening.
3 MS. LYBRAND: I wasn't trying to say that - - -
4 THE COURT: No, I understand. But the status of that is he is in default on the foreclosure part
5 of it but Mrs. Otto in her part of it she has got counterclaims against the Plaintiff.
6 MS. LYBRAND: That is correct.
7 THE COURT: But I don't know where Mr. Munsey is as far as the other case. I haven't
8 looked at that case because it is not before me.
9 MS. LYBRAND: Right.
10 THE COURT: But I think that it would be better and if we get to a point where one part slows it
11 down we can carve out one part and cease with the other. So at least we have got all the issues
12 and got all of the facts. We don't have to, two months later revisit all of the facts. We have got
13 all of the facts going on the same tract and we can deal with it that way. So as far as the default
14 being set aside it is denied on that but the Motion to Consolidate is granted.
15 MS. LYBRAND: Thank you, Judge.
16 THE COURT: If you will prepare that?
17 MS. LYBRAND: I will.
18 THE COURT: All right. Send it to everyone.
19 MS. LYBRAND: Yes sir.
20 THE COURT: All right.
21 MS. LYBRAND: Thank you, Judge.
22 THE COURT: All right. Have a good day.
23 MR. ANTHONY: Thank you.
24 MS. CULBERTSON: Thank you.
25 -----END OF MOTIONS HEARING-----

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1 STATE OF SOUTH CAROLINA

2 COURT OF COMMON PLEAS

3 COUNTY OF SPARTANBURG

4
5 CERTIFICATE

6
7 I, the undersigned Sarah Hollis, Court Reporter for the Master-In-Equity for the County of
8 Spartanburg, State of South Carolina, do hereby certify that the foregoing is a true and accurate
9 Transcript of Motions of the proceedings had at the hearing of the captioned case, before the
10 Honorable Gordon G. Cooper, Master-In-Equity for Spartanburg County, South Carolina, on the
11 6th day of May, 2013.

12 I do further certify that I am neither of kin, counsel nor interest to any party hereto.

13
14 

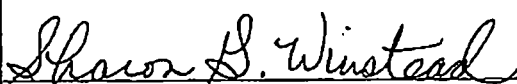
15 Sarah Hollis

16 Court Reporter

17
18 SWORN to before me this

19 5th day of February, 2016.

20 Spartanburg, South Carolina.

21
22 

23 Notary Public for South Carolina

24 My Commission Expires: September 7, 2016.

25

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) COURT OF COMMON PLEAS

3 U.S. BANK, NA, AS TRUSTEE RELATING
4 TO THE CHEVY CHASE FUNDING, LLC,
5 MORTGAGE BACKED CERTIFICATES,
6 SERIES 2004-B,

7 PLAINTIFF,

8 -VS-

9 ALYCE F. OTTO, INDIVIDUALLY; ALYCE F.
10 OTTO, TRUSTEE UNDER DECLARATION OF
11 TRUST OF ALYCE F. OTTO, DATED 11/17/09;
12 TD BANK, NA; THE UNITED STATES OF
13 AMERICA, ACTING BY AND THROUGH ITS
14 AGENCY, THE INTERNAL REVENUE
15 SERVICE; LAURA KERHULAS GIESE, AS
16 CO-TRUSTEE OF THE THEODORE ERNEST
17 KERHULAS TRUST UNDER DECLARATION
18 OF TRUST DATED 5/25/04; MARK WARNER
19 KERHULAS, AS CO-TRUSTEE OF THE
20 THEODORE ERNEST KERHULAS TRUST
21 UNDER DECLARATION OF TRUST DATED
22 5/25/04; JACKSON L. MUNSEY, JR., AND
23 CITIBANK, NA,

24 DEFENDANTS.

25 AND

JACKSON L. MUNSEY, JR.,

CROSS-CLAIM PLAINTIFF,

-VS-

ALYCE F. OTTO, INDIVIDUALLY; AND
ALYCE F. OTTO, TRUSTEE UNDER
DECLARATION OF TRUST OF ALYCE F.
OTTO, DATED 11/17/09,

CROSS-CLAIM DEFENDANTS.

TRANSCRIPT OF TESTIMONY

(2012CP42-3549)

(2012CP42-2874)

November 24, 2015

Spartanburg, South Carolina

1 REFERENCE HELD:

NOVEMBER 24, 2015.

2 BEFORE:

HONORABLE GORDON G. COOPER,
MASTER-IN-EQUITY FOR SPARTANBURG COUNTY.

3
4 APPEARANCES:

ROGERS, TOWNSEND & THOMAS, PC
BY: ERICA G. LYBRAND, ESQUIRE,
Attorneys for the Plaintiff.

6 BURR & FORMAN, LLP
BY: RICHARD C. KELLER, ESQUIRE,
Attorneys for the Plaintiff.

8 THE ANTHONY LAW FIRM, PA
BY: KENNETH C. ANTHONY, JR., ESQUIRE,
Attorneys for Alyce Otto, Individually and as Trustee
under Declaration of Trust of Alyce F. Otto.

10 KEHL, CULBERTSON, ANDRIGHETTI, KORNFELD
BY: ERIN CULBERTSON, ESQUIRE,
Attorneys for Jackson Munsey, Jr.

12 GAINES & WALSH,
BY: DAVID L. WALSH, ESQUIRE,
Attorneys for Laura Kerhulas Giese and Mark Warner
Kerhulas, co-Trustees of the Theodore Ernest Kerhulas
Trust Under Declaration of Trust.

18 Sarah Hollis, Court Reporter

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12	<u>EX.</u>	<u>DESCRIPTION</u>	<u>EXHIBITS</u>	<u>ID.</u>	<u>EV.</u>
13	<u>PLAINTIFFS:</u>				
14	PL. - 1	Copy of Note, dated August 18, 2004.			11
15	PL. - 2	Copy of Mortgage, Book 3290 at Page 70			11
16	PL. - 3	Copy of Assignment, Book 3290 Page 71.			13
17	PL. - 4	Copy of Title to Real Estate, Book 95-A, Page 439.			14
18	PL. - 5	Copy of Contract for Deed.			15
19	PL. - 6	Copy of Payment History.			16
20	PL. - 7	Copy of Two (2) Demand Letters.			17
21	PL. - 8	Affidavit of Statement of Account.			18
22	PL. - 9	Attorney's Fees Affidavit.			18
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1 EXHIBITS CONTINUED

2 DEFENDANT OTTO EXHIBITS

3	EX.	DESCRIPTION	EXHIBITS	ID.	EV.
4	DEF.- 1	Copy of Contract for Deed.			45
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13 DEFENDANT MUNSEY EXHIBITS

14	EX.	DESCRIPTION	EXHIBITS	ID.	EV.
15	DEF.- 1	Copies of Three (3) Checks.			56

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18 DEFENDANT KERHULAS EXHIBITS

19	EX.	DESCRIPTION	EXHIBITS	ID.	EV.
20	DEF.- 1	Copy of Warranty Deed, Book 80-T, Page 257.			82
21	DEF.- 2	Copy of Mortgage 3 pages, Book 3290, Page 70.			83
22	DEF.- 3	Copy of Note, dated May 1, 2007.			84
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24	DEF.- 5	Copy of Title to Real Estate, Book 95-A, Page 435.			86

1 DEFENDANT KERHULAS EXHIBITS CONTINUED:

2	EXHIBITS			
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4	DEF.- 6	Copy of Title to Real Estate, Book 95-A, Page 439.		86
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8	DEF.-10	Copy of Greenville County Public Index Sheet.		90
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1 THE COURT: We go on the record in the case of U.S. Bank, NA as Trustee relating to the
2 Chevy Chase Funding, LLC, versus Alyce F. Otto, Individually, and Alyce F. Otto. Trustee Under
3 Declaration of Trust of Alyce F. Otto, et al. This is Case Number 2012CP42-3549 and
4 2012CP42-2874. Are we ready to proceed?
5 MS. LYBRAND: I believe so, Your Honor.
6 MR. ANTHONY: Yes sir.
7 THE COURT: All right.
8 MS. LYBRAND: We have a number of attorneys representing the multiple parties in this
9 matter.
10 THE COURT: All right. So why don't we go on the record as far as who is who and for whom.
11 MS. LYBRAND: Thank you, Your Honor. Erica Lybrand of Rogers Townsend for the Plaintiff.
12 MR. KELLER: Richard Keller of Burr & Forman for the Plaintiff as well, Your Honor.
13 THE COURT: All right.
14 MR. ANTHONY: Your Honor, I am Ken Anthony and I represent well she is listed as Alyce
15 Otto, but she actually goes by Patty, in both as a Defendant in the U. S. Bank action and in the
16 action that we commenced versus Mr. Munsey which has been consolidated with the U. S. Bank
17 foreclosure.
18 THE COURT: All right.
19 MS. CULBERTSON: Your Honor, Erin Culbertson on behalf of Jack Munsey.
20 THE COURT: All right.
21 MR. WALSH: Your Honor, my name is David Walsh and I am representing Mark Kerhulas and
22 Laura Kerhulas Giese, Trustees.
23 THE COURT: And they are judgment holders, is that correct?
24 MR. WALSH: That is correct.
25 THE COURT: All right. Any matters that we need to take care of preliminarily?

1 MS. CULBERTSON: Yes, Your Honor. I have filed a Motion for Relief from Entry of Default.
2 And I would like to address that before we proceed with today's hearing.
3 THE COURT: All right. Now counsel this was filed - - go ahead. Mr. Anthony you rise to
4 speak?
5 MR. ANTHONY: Yes. I saw an email yesterday and I know the Plaintiff's position is that this
6 is not proper. It has already been ruled upon and it is certainly not timely and we would take the
7 same position.
8 THE COURT: All right counsel. And that is my question. This matter has been pending well
9 since 2012.
10 MS. CULBERTSON: Yes, Your Honor.
11 THE COURT: And the Order relating to the entry of the default was addressed back in May
12 2013.
13 MS. CULBERTSON: Yes, Your Honor.
14 THE COURT: And there was no appeal from that and there was no motion for rehearing from
15 that so as far as I see that ruling on the setting aside of the default is the rule of this case. Now
16 what basis do you have for bringing this up again when I have already ruled on it?
17 MS. CULBERTSON: Well if I may, Your Honor. In the Motion Denying Default Relief it was
18 not interlocutory and it was not appealable. Furthermore, this is simply a renewed Motion for
19 Relief from the Default given that just as Your Honor pointed out this case has been pending for
20 two and a half years after you ruled on that original Motion holding us in default. The point
21 behind Your Honor Order was that U.S. Bank strongly opposed that Motion for Relief of Default
22 saying that they needed to proceed with the case. They had to keep it running along and that did
23 not happen, in fact the case has been going on for two and a half years since that point. Mr.
24 Anthony was allowed to amend this case as of July of this year. And Your Honor's ruling on that
25 matter said that although that Motion had been filed September 2013, through oversight it was

1 never served so Mr. Anthony was allowed to amend his case whereas Your Honor did not think
2 that my clients presented good cause under a pretty lenient Rule 55 (c) standard back in May of
3 2013. So it looks like we are dealing with you know two different leniencies. So I wanted to put
4 the Motion back in front of the Court simply to protect my client's interest and to protect the
5 record on appeal on this issue.

6 THE COURT: All right.

7 MS. CULBERTSON: That is all I needed to put on in this issue.

8 THE COURT: All right. Counsel?

9 MS. LYBRAND: Thank you, Your Honor. It is our position that Ms. Culbertson and her clients
10 are estopped from renewing this Motion that was previously ruled on as you mentioned in May of
11 2013. No 59(e) motion was had from your Order that was entered in May of 2013. And
12 additionally, just for clarification of the record as I understand it the Order was entered as a result
13 of the failure to meet the good cause standard. Not necessarily because of and I don't know
14 exactly what Ms. Culbertson just argued but specifically with regards to a case called *Regions*
15 *Bank v. Owens* which is entirely on point in this case. And Your Honor ordered that she failed to
16 meet that initial burden of even showing a good reason for the default and so we didn't even move
17 onto the factors in the *Wham* case but like I said as an initial matter the Plaintiff objects to any
18 Motion for Relief being heard at this point as it has already been ruled upon two (2) years ago and
19 it was filed on the eve of trial. There has been more than enough time for Ms. Culbertson to have
20 re-raised this issue and with regard to her comments as to Mr. Anthony's amendment Ms. Otto did
21 timely file an Answer and her Amendment was the result of a procedural issue as opposed to what
22 I understood to be new claims. So in that regard we would request that you deny this Motion and
23 allow us to proceed at the present time on the merits of this hearing today.

24 THE COURT: All right. Mr. Anthony anything?

25 MR. ANTHONY: We concur.

1 THE COURT: All right. And that is my feeling counsel that the fact that there was additional
2 things going in the main case does not give rise to a basis for a renewal of the Motion to Set Aside
3 Default. Once you are in default the fact that there is other things being renewed or amended or
4 whatever in the main case does not give a rise in my opinion to a basis for your client renewing
5 the Motion for Setting Aside. And counsel is correct. That was not a ruling on anything other
6 than that case, I can't remember the case.

7 MS. LYBRAND: *Regions Bank v. Owens.*

8 THE COURT: That was the case that it was not a showing of good cause and it still is not. So
9 as far as the Motion again that is before me to set aside default I am going to deny that motion and
10 proceed with this final hearing.

11 MS. CULBERTSON: Thank you, Your Honor.

12 THE COURT: All right. Counsel? Is the Plaintiff ready?

13 MS. LYBRAND: We are Your Honor and as a preliminary matter I don't know whether or not
14 both or either party intends to cross examine our witness. From what we had understood all of
15 the individual Defendants in this matter had consented to testimony by Affidavit except for Mr.
16 Munsey's counsel but I just want to make sure that we are all on the same page about how we are
17 going to proceed going forward. We are ready to call our witness but as to cross examination in
18 that regard I just didn't know about procedurally, we want both, and Mr. Munsey's counsel
19 present for objections in that nature of cross examination.

20 THE COURT: All right. Well lets deal with that.

21 MR. ANTHONY: We consented to the presentation by Affidavit, Your Honor. And did not
22 anticipate any cross examination if a witness is called.

23 THE COURT: All right.

24 MS. CULBERTSON: We do intend to cross examine the Bank's witness.

25 THE COURT: All right.

1 MS. LYBRAND: Thank you, Your Honor. The Plaintiff calls Alan Baxter.

2 THE COURT: All right sir.

3 ALAN BAXTER, BEING DULY SWORN,

4 TESTIFIES AS FOLLOWS:

5 DIRECT EXAMINATION BY MS. LYBRAND.

6 Q. Good morning Mr. Baxter. What company do you work for?

7 A. Capital One Bank.

8 Q. And where is the physical location of your office?

9 A. In Plainville, Texas.

10 Q. All right. And what is your job title at Capital One?

11 A. I am a Litigation Specialist.

12 Q. And what are some of your job duties as a Litigation Specialist?

13 A. Working with our litigation department, outside attorneys and litigation matters against
14 Capitol One.

15 Q. Okay. And what is Capitol One's relationship to the Plaintiff in this action, U. S. Bank,
16 NA as Trustee relating to the Chevy Chase Funding, LLC, Mortgage Backed Certificates,
17 Series 2004-B?

18 A. We are the servicer of the loan.

19 Q. And are you authorized to testify on behalf of the Plaintiff here today?

20 A. I am.

21 Q. In the ordinary course of your business or this business does Capitol One maintain records
22 for their mortgage loan that is the subject of this lawsuit today?

23 A. We do.

24 Q. And as part of your job duties are you familiar with those records maintained by your
25 company?

1 A. I am.
2 Q. And has Capitol One adopted the records of previous servicers on this loan?
3 A. Yes.
4 Q. And do you have personal knowledge of this mortgage loan based upon your review of
5 these records?
6 A. I do.
7 Q. All right. I am going to hand you two documents. Have you seen these documents
8 before?
9 A. Yes.
10 Q. Based upon your review of the records is this a copy of the note and the mortgage in this
11 matter?
12 A. Yes.
13 MS. LYBRAND: Your Honor, I would like to move to enter the Note as Plaintiff's Exhibit 1 and
14 the mortgage as Plaintiff's Exhibit 2.
15 THE COURT: Any objections?
16 MR. ANTHONY: No objections, to that.
17 MS. CULBERTSON: No.
18 THE COURT: All right. The note will be 1 and the mortgage will be two.
19 MS. LYBRAND INTRODUCES INTO EVIDENCE A COPY OF A ADJUSTABLE RATE
20 NOTE DATED AUGUST 18, 2004, MARKED AS PLAINTIFF'S EXHIBIT NUMBER 1.
21 THE COURT: All right.
22 MS. LYBRAND INTRODUCES INTO EVIDENCE A COPY OF A MORTGAGE
23 RECORDED IN MORTGAGE BOOK 3290 AT PAGE 070, MARKED AS PLAINTIFF'S
24 EXHIBIT NUMBER 2.
25 THE COURT: All right.

- 1 Q. According to the note who is the borrowers on this mortgage loan?
- 2 A. Rudrick G. Otto and Alyce F. Otto.
- 3 Q. And when was the note signed?
- 4 A. August 18, 2004.
- 5 Q. And according to the note who was the original lender?
- 6 A. Chevy Chase Bank.
- 7 Q. And does this note cover the subject property address that we are here about today, 1841
- 8 Fairview Farms, Campobello, South Carolina?
- 9 A. It does.
- 10 Q. And at the time that the note was signed what was the principal amount borrowed under
- 11 the note?
- 12 A. Nine hundred ninety nine thousand five hundred (\$999,500.00) dollars.
- 13 Q. And is the note now endorsed to an entity or endorsed in blank?
- 14 A. Endorsed in blank.
- 15 Q. And is the Plaintiff in physical possession of the original note?
- 16 A. Yes.
- 17 Q. On the same date that the note was given did the borrowers also give a mortgage?
- 18 A. Yes.
- 19 Q. And is that mortgage also signed on the same date, August of 2004?
- 20 A. Yes.
- 21 Q. And what was that exact date. I am sorry?
- 22 A. August 18, 2004.
- 23 Q. August 18. And just for clarification of the record is that the same date on the note?
- 24 A. Yes.
- 25 Q. And does the mortgage cover the same property address?

1 A. It does.

2 Q. And does it constitute a first mortgage lien on the property address?

3 A. It does.

4 Q. And who signed the mortgage?

5 A. Also, Rudrick G. Otto and Alyce F. Otto.

6 Q. Has this mortgage been assigned?

7 A. Yes.

8 Q. Is this a copy of the assignment of the mortgage to the Plaintiff?

9 A. It is.

10 Q. And is the Plaintiff the current owner of the note and the mortgage?

11 A. They are.

12 MS. LYBRAND: I would like to move to admit the assignment of mortgage as Plaintiff's

13 Exhibit Number 3.

14 THE COURT: Any objections?

15 MR. ANTHONY: No objections.

16 THE COURT: All right. That will be Plaintiff's Exhibit 3.

17 **MS. LYBRAND INTRODUCES INTO EVIDENCE A COPY OF AN ASSIGNMENT**

18 **RECORDED IN BOOK 3290 AT PAGE 70, MARKED AS PLAINTIFF'S EXHIBIT**

19 **NUMBER 3.**

20 THE COURT: All right.

21 Q. I am going to hand you another document. Mr. Baxter have you ever seen this document?

22 Is this the document that was in the regular servicing file of Capital One?

23 A. It was not.

24 Q. Okay. Based upon your review of the records was Capital One ever notified that Mrs.

25 Otto transferred the property that we are here about today into a trust?

1 A. We were not.

2 Q. Was Capital One ever notified that Mrs. Otto conveyed the property at all into a trust or
3 any other entity?

4 A. No.

5 Q. Okay.

6 MS. LYBRAND: I would like to move to admit this as Plaintiff's Exhibit Number 4.

7 MR. ANTHONY: No objections to that either.

8 THE COURT: All right. That is Plaintiff's Exhibit 4.

9 MS. LYBRAND INTRODUCES INTO EVIDENCE A COPY OF A TITLE TO REAL
10 ESTATE RECORDED IN BOOK 95. PAGE 439, MARKED AS PLAINTIFF'S EXHIBIT
11 NUMBER 4.

12 THE COURT: All right.

13 Q. Would you please take a look at that for me again Mr. Baxter. Based upon your review
14 of the records was there any authorization or any other notes in the system with regards to
15 Mrs. Otto requesting authorization to convey the property into her trust?

16 A. No.

17 Q. And is transferring the property into a trust without authorization of the servicer or the
18 owner of the note a defaulting event pursuant to the terms of the note?

19 A. It is.

20 Q. Mr. Baxter have you ever seen this document?

21 A. No.

22 Q. Based upon your review of the records was this document obtained within the regular
23 servicing file of Capital One?

24 A. It was not.

25 Q. And based upon your review of the records was Capital One ever notified that Mrs. Otto

1 conveyed the property to Mr. Jackson Munsey or purported to convey an interest by
2 contract for deed?
3 A. No.
4 Q. And is there any record of Mrs. Otto requesting prior authorization to convey the property
5 to Mr. Munsey?
6 A. There is not.
7 MS. LYBRAND: We move to admit this as Plaintiff's Exhibit 5.
8 MR. ANTHONY: No objections.
9 THE COURT: This will be Plaintiff's Exhibit Number 5.
10 MS. LYBRAND INTRODUCES INTO EVIDENCE A COPY OF A CONTRACT FOR
11 DEED, DATED MARCH 4, 2011, MARKED AS PLAINTIFF'S EXHIBIT NUMBER 5.
12 THE COURT: All right.
13 Q. Mr. Baxter again for the record is a conveyance of the property to Mr. Munsey by contract
14 for deed a defaulting event under the terms of the mortgage?
15 A. It is.
16 Q. In the ordinary course of its business does Capital One maintain an electronic payment
17 history for this loan?
18 A. Yes.
19 Q. And does that payment history record credits and charges to the loan?
20 A. It does.
21 Q. And is the payment history updated at or near the time that those credits are termed as
22 occurring?
23 A. Yes.
24 Q. I hand you this document. Based upon your review of this is this the payment history for
25 this loan?

1 A. It is.
2 MS. LYBRAND: I would like to move to admit this payment history as Exhibit 6.
3 MR. ANTHONY: No objections.
4 THE COURT: The payment history will be Exhibit 6.
5 MS. LYBRAND INTRODUCES INTO EVIDENCE A COPY OF THE PAYMENT
6 HISTORY, MARKED AS PLAINTIFF'S EXHIBIT NUMBER 6.
7 THE COURT: All right.
8 Q. And at some point did the borrowers fall behind in their monthly mortgage payments and
9 default under the terms of the note?
10 A. They did.
11 Q. As a result of the borrower falling behind in their monthly mortgage payments was a
12 demand letter sent to them regarding the default for providing an opportunity to cure that
13 default?
14 A. It was.
15 Q. And is this two (2) separate letters that were sent?
16 A. Yes.
17 Q. And what are the dates on these letters?
18 A. November 2, 2011. Well both are November 2, 2011.
19 Q. And who were the letters addressed to?
20 A. Rudrick Otto and Alyce Otto.
21 Q. And again this letter was sent to multiple addresses is that correct?
22 A. Yes.
23 Q. And what is the mailing address on the addresses on the letters?
24 A. It is 101 East Rutherford Street, Landrum, South Carolina and 1841 Fairview Farms Road,
25 in Campobello, South Carolina.

1 Q. And the second letter 1841 is that the property address that we are here on today?
2 A. It is.
3 MS. LYBRAND: I move to admit the demand letters as Plaintiff's Exhibit 7.
4 MR. ANTHONY: No objections.
5 THE COURT: All right. Both letters then would be Plaintiff's Exhibit 7.
6 MS. LYBRAND INTRODUCES INTO EVIDENCE COPIES OF TWO (2) DEMAND
7 LETTERS FROM CAPITAL ONE BANK, MARKED AS PLAINTIFF'S EXHIBIT
8 NUMBER 7.
9 THE COURT: All right.
10 Q. Does the borrower owe certain sums of money to the Plaintiff?
11 A. Yes.
12 Q. And have you reviewed the records of the Plaintiff to determine what that amount is?
13 A. Yes.
14 Q. I hand you a copy of what is titled Affidavit of Verified Statement of Account. Can you
15 take a look at that for me, Mr. Baxter?
16 A. Yes.
17 Q. Have you ever seen that document?
18 A. Yes.
19 Q. Does it appear to be executed by an authorized representative of the Plaintiff?
20 A. It does.
21 Q. And is this an Affidavit regarding the amount of the debt owed in this case?
22 A. It is.
23 Q. And can you itemize for the record the amounts owed, for example indicate what the
24 principal amount due and accrued interest and any advances are individually?
25 A. The principal due is \$1,008,286.11. Interest due of \$129,017.00. Escrow advances for

1 hazard insurance of \$14,107.42. Taxes due of \$6,047.01. For a total of \$20,154.43. For
2 a total due of \$1,157,457.50.

3 Q. Okay. And is the Plaintiff asking for reasonable attorney's fees and costs as part of this
4 action?

5 A. Yes.

6 Q. All right.

7 MS. LYBRAND: Your Honor, I am moving to admit the Affidavit of Verified Statement of
8 Account, our Affidavit of Attorney's Fees and Affidavit of Costs.

9 THE COURT: Any objections?

10 MR. ANTHONY: No objections.

11 MS. LYBRAND INTRODUCES INTO EVIDENCE AN AFFIDAVIT OF VERIFIED
12 STATEMENT OF ACCOUNT, DATED NOVEMBER 4, 2015, MARKED AS
13 PLAINTIFF'S EXHIBIT NUMBER 8.

14 THE COURT: All right.

15 MS. LYBRAND INTRODUCES INTO EVIDENCE AN AFFIDAVIT OF ATTORNEY'S
16 FEES, MARKED AS PLAINTIFF'S EXHIBIT NUMBER 9.

17 THE COURT: All right.

18 MS. LYBRAND INTRODUCES INTO EVIDENCE AN AFFIDAVIT OF COSTS,
19 MARKED AS PLAINTIFF'S EXHIBIT NUMBER 10.

20 THE COURT: All right.

21 MS. LYBRAND: As a final matter the Plaintiff would like to move to amend the Notice of the
22 Final Foreclosure Hearing for the record, Your Honor.

23 THE COURT: Any objections?

24 MR. ANTHONY: No objections, Your Honor.

25 THE COURT: All right. Exhibit Number 11.

1 MS. LYBRAND INTRODUCES INTO EVIDENCE A COPY OF A NOTICE OF FINAL
2 FORECLOSURE HEARING DATED NOVEMBER 3, 2015, MARKED AS PLAINTIFF'S
3 EXHIBIT NUMBER 11.
4 THE COURT: All right.
5 MS. LYBRAND: I don't know if in terms of would you rather us rest as to our witness and
6 present the remainder of our case or allow the cross to proceed at this time.
7 THE COURT: What other matters do you have?
8 MS. LYBRAND: I just need to itemize the debt including the total with the attorney's fees and
9 costs.
10 THE COURT: Well why don't you go ahead and do that.
11 MS. LYBRAND: Yes sir. Your Honor, we are asking for a total judgment amount including
12 attorney's fees and costs in the amount of \$25,994.10 for a total debt of \$1,183,451.60. And I
13 have no further questions, Your Honor.
14 THE COURT: All right. Lets go back and itemize that on the record.
15 MS. LYBRAND: Sure.
16 THE COURT: Lets go back to the principal.
17 MS. LYBRAND: The principal amount owed is \$1,008,286.11. Interest through today's date in
18 the amount of \$129,017.00. Escrow advances in the amount of \$20,154.43. Attorney's fees and
19 costs in the amount of \$25,994.10. For a total debt of \$1,183,451.60.
20 THE COURT: All right. And the Plaintiff is requesting a sale on what date?
21 MS. LYBRAND: The January sale, Your Honor.
22 THE COURT: And is this a waiver of deficiency?
23 MS. LYBRAND: It is a waiver of deficiency.
24 THE COURT: All right. And does the Plaintiff rest at this point?
25 MS. LYBRAND: The Plaintiff rest at this point, Your Honor.

1 THE COURT: All right. Mr. Anthony.

2 MR. ANTHONY: Your Honor, I didn't anticipate any cross examination and I should probably
3 ask Ms. Lybrand but I noticed in the workstation sheet, I don't remember the number of it, that
4 there were attorney advances and costs. Are those duplicated in the Affidavit from you?

5 MS. LYBRAND: The payment history includes all of the credits and debits to the account. So
6 any time that the servicer had paid my office or another office those would be of record as part of
7 the payment history. But the total amount due has been itemized out so that the attorney's fees
8 and costs are a separate line item from the escrow advances, interest and principal owed.

9 MR. ANTHONY: All right. Thank you.

10 THE COURT: All right. Does that satisfy your question?

11 MR. ANTHONY: Yes sir.

12 THE COURT: All right. Counsel.

13 MS. CULBERTSON: Thank you Judge.

14 CROSS EXAMINATION BY MS. CULBERTSON.

15 Q. I would like if we could Mr. Baxter just to ask a couple of questions about the previous
16 history, the payment history of the loan. Sometimes those are difficult to read and you
17 have more experience with that than we do. He doesn't have the actual exhibit. This is
18 Exhibit 6.

19 THE COURT: All right. Exhibit 6?

20 MS. CULBERTSON: Yes, Your Honor.

21 THE COURT: All right.

22 Q. Mr. Baxter if we could, we don't have to go all the way back to the beginning of time
23 necessarily, but if we look for example at May 23, 2011 and May 26, 2011 which is on the
24 seventh page of this exhibit statement, to go all the way back. Specifically there is a line
25 item dated May 26, which says Arm Loan Adjustment. This appears several times in this

1 statement I see and there is another one on May 23, for example. What does this Arm
2 Loan Adjustment mean?
3 A. It is an interest rate adjustment.
4 Q. And why was that included?
5 A. Because this is an adjustable rate mortgage.
6 Q. And so it would adjust between three (3) days times?
7 A. There would be adjustments periodically.
8 Q. Do you know what the note calls for as far as adjustments and the identification of same?
9 Well first it might be helpful if we would just establish what the interest rate is and how it
10 is determined, if you don't mind going through that with me. So when the note was
11 executed in August of 2004, what was the initial interest rate on the loan?
12 A. It was one point nine five (1.95).
13 Q. And was this an adjustable rate mortgage?
14 A. Yes.
15 Q. When was the first adjustment made? I think that it is under Section 2(B) on the first
16 page? It looks like it calls for October of 2004.
17 A. Oh, I am sorry yes.
18 Q. Would you agree with that?
19 A. Yes.
20 Q. Okay. And how is the rate determined on each interest rate change date?
21 A. By the LIBOR.
22 Q. Okay. And what is the LIBOR rate?
23 A. The London based index.
24 Q. And how specially is this note rate calculated?
25 A. The London based rate issue plus the additional of one-eight (1/8) of one (1) percent, I am

1 sorry, that is the rounding. Plus the addition of two point nine five (2.95%) percent plus a
2 rounding of point one two five (.125).
3 Q. And how frequently after that first change date in October of 2004, how frequently could
4 the rate change throughout the life of the loan? Well would you agree in that same
5 section 2(B) it says the first day of October 2004, and on every day of that month?
6 A. Every day and every month thereafter.
7 Q. You see that day of every month?
8 A. Right.
9 Q. So theoretically it could change on the first of the month.
10 A. Correct.
11 Q. Any month after August of 2004?
12 A. Yes.
13 Q. So if we could go back to this account statement where we were on Page 7, I believe.
14 A. Right.
15 Q. You are showing an adjustment on May 23 and May 26?
16 A. Yes. I had not looked at this before and I don't know why it would show two (2).
17 Q. And similarly on the next page, 4 on Page 6. Don't you agree that there is shown an
18 adjustment on July 11 as well as July 5. Excuse me, on July 1, I am sorry July 1 and 11,
19 on July 1 and July 5?
20 A. Yes.
21 Q. And do you have any explanation as to why that would change twice in the month?
22 A. Well both of those two are exactly the same. Point zero three one two five, they would be
23 exactly the same.
24 Q. Why would it be two (2) different line items?
25 A. I have no answer to that.

1 Q. Okay. Under the ---
2 A. If I can say this ---
3 Q. Excuse me.
4 A. Those are not the screens. Those are tracked. Actual interest rate changes. There are
5 other screens other than that.
6 Q. Okay. So what would this document represent then?
7 A. So this is a payment history of transactions that happened on the account. You know
8 credits and debits are going on the account. Not necessarily the interest rate changes.
9 Those are tracked separately and I have looked at interest rate changes on this payment
10 history.
11 Q. Thank you for that. If we could go back to the promissory note just again to establish how
12 the interest rate changes over time. What is the Bank's obligation to notify the borrower
13 of what each month's interest rate is?
14 A. I don't see that indicated.
15 Q. I think that it is on Page 3, Section 4. I believe that is what addresses this issue.
16 A. I am sorry. The note holder will deliver or mail to me a notice of any changes in the
17 amount of my minimum payment at least 25 days before the effective date of any change.
18 Q. And that notice further will show what the next interest rate should be and what the
19 payment amounts are to, is that correct?
20 A. Correct.
21 Q. Okay. So the payment could theoretically change on the first day of every month that
22 would mean that the note holder was obliged to provide notice of that change 25 days
23 before that so a statement would have to be sent out by say the fifth of the previous month,
24 somewhere near there?
25 A. Correct.

1 Q. In order to notify of the amount?
2 A. Yes.
3 Q. Okay. And do you have a record of statements sent to the borrower?
4 MS. LYBRAND: Your Honor, I object to that.
5 THE COURT: I agree with that. Counsel you are crossing into matters that are not between
6 your client and the Bank.
7 MS. CULBERTSON: If I could explain?
8 THE COURT: I want to know why you are going in that direction.
9 MS. CULBERTSON: Okay. The issue is that my client was not given the bank statements - - -
10 THE COURT: I understand. But they had no obligation to give your client bank statement?
11 MS. CULBERTSON: Correct. The lender did not.
12 THE COURT: Exactly.
13 MS. CULBERTSON: What I am trying to establish is that the lender was providing bank
14 statements to the note holder.
15 THE COURT: Regardless. Regardless of that. You are in default at this point. The question is
16 the damage. The debt.
17 MS. CULBERTSON: Correct.
18 THE COURT: Not notification.
19 MS. CULBERTSON: Okay.
20 THE COURT: So I will sustain the objection.
21 MS. LYBRAND: Thank you; Your Honor.
22 MS. CULBERTSON: Okay.
23 Q. I do have a couple of additional questions for you Mr. Baxter relating to the insurance that
24 was placed on the property, the hazard insurance which is part of the itemized debt which I
25 believe was Exhibit 8. The hazard insurance amount that is placed on the property?

1 A. Yes.

2 Q. Can you tell me how that number was established and what their obligation is as far as
3 purchasing that hazard insurance?

4 MS. LYBRAND: I am going to object again, Your Honor.

5 THE COURT: All right.

6 MS. LYBRAND: As to the issue with regard to force placing the hazard insurance. That has not
7 been an issue in this case, that was not brought up as a defense or a counterclaim. And this is just
8 an itemization of the amounts that were paid for those insurance policies which we had not
9 previously been notified that anybody took issue with. And so I just object to any questioning by
10 the third party.

11 THE COURT: Your Honor, I am allowed to cross examine as to damages and this is an element
12 of damages.

13 THE COURT: I am going to sustain that objection.

14 MS. LYBRAND: Thank you, Your Honor.

15 THE COURT: Because I don't think that hazard insurance covered anyone other than the
16 borrower and the Bank.

17 MS. LYBRAND: That is correct. It would have been the ---

18 THE COURT: It had nothing to do with the contract for deed holder.

19 MS. LYBRAND: That is correct, Your Honor.

20 MS. CULBERTSON: Your Honor, I will renew my argument that this is an item of damages
21 about which I am allowed to cross examine.

22 THE COURT: I will sustain the objection.

23 MS. CULBERTSON: May I ask Mr. Baxter and according to your discretion what period of time
24 that hazard insurance covers?

25 MS. LYBRAND: I am going to renew my objection, Your Honor.

1 THE COURT: Counsel what I am trying to understand is that hazard insurance had nothing to do
2 with your client.
3 MS. CULBERTSON: Your Honor, it is a line item of damages.
4 THE COURT: Again it doesn't have anything to do with your client. The payment history does.
5 But your client has no interest in that insurance.
6 MS. CULBERTSON: Well Your Honor my client is an equitable property holder and has an
7 equitable right of redemption under this bond for title as to any lien against the property and so I
8 believe that we are fully entitled - - -
9 THE COURT: Excuse me. He has got an equitable right of redemption, is that what you are
10 saying?
11 MS. CULBERTSON: Yes, Your Honor.
12 THE COURT: When he is in default? Is that - - -
13 MS. CULBERTSON: Any title holder has an equitable right of redemption in a foreclosure
14 proceeding, Your Honor.
15 MS. LYBRAND: Your Honor, for the record we object to that.
16 THE COURT: And you are saying that your client is in default but he still has an equitable right
17 of redemption?
18 MS. CULBERTSON: Yes, Your Honor.
19 THE COURT: I am going to sustain the objection at this point. I am trying counsel to get you to
20 focus or to get me to focus on your damages that you are trying to track here.
21 MS. CULBERTSON: I understand.
22 THE COURT: I understand what your point is but I need to know where you are going as far as
23 an amount that affects your client.
24 MS. CULBERTSON: Your Honor simply this is going to be the debt that establishes the
25 foreclosure sale amounts that affect everything going forward with regards to the property to

1 which my client retains an equitable claim.

2 THE COURT: Okay. So it is your position that your client has an equitable claim even though
3 your client is in default in this action?

4 MS. CULBERTSON: The foreclosure filed by neither party has been adjudicated nor has the
5 property been sold to wipe out the client's equitable claim. And my position is I believe the case
6 law supports that a foreclosure is not complete until the sale. And so any point up until then, any
7 equitable rights in the property remain.

8 THE COURT: Notwithstanding the default of your client.

9 MS. CULBERTSON: Notwithstanding the default of my client. Yes, Your Honor.

10 THE COURT: All right. I am going to let you proceed but I am going to hold you on your track
11 with your client.

12 MS. CULBERTSON: That is fine, Your Honor. I understand that.

13 THE COURT: All right.

14 Q. The final question I have with regard to these damages was simply if Mr. Baxter would
15 establish for which years the property taxes were paid, which I believe will also be shown
16 on the payment history?

17 A. So all of the - - -

18 Q. Correct. If you can establish which year's property taxes were paid by the lender.

19 A. Based on this. Based on the payment history?

20 Q. I presume that we are showing your payment history for that?

21 A. The payment history would not show what year's taxes were being paid. It would say the
22 date that it was paid but it wouldn't necessarily say what year's taxes.

23 Q. Okay. That is fair. That is fair. And we would assume that the date that it was paid
24 would correlate with it - - -

25 A. Possibly.

1 Q. And the year's taxes and the amount?
2 A. Possibly.
3 Q. And could you just answer the question which dates were taxes paid on it?
4 MS. LYBRAND: Your Honor, we were not made aware that the taxes and insurance on this loan
5 were going to be in issue. And the witness actually has business records that would answer these
6 questions. However, we don't have them here in the courtroom today because we were not made
7 aware that this was going to be an issue. If this line of questioning continues, if we could be
8 granted leave to get those records for the witness.
9 THE COURT: Well lets see what he can do from these records.
10 A. County taxes were disbursed on December 3, 2014 at \$6,047.20.
11 Q. Mr. Baxter while we are on that what is the next line item underneath that same number?
12 THE COURT: Where are you on your document?
13 MS. CULBERTSON: It is Page 5 of Exhibit 6, I believe Your Honor.
14 THE COURT: All right.
15 Q. Mr. Baxter you said the line item was 6,047.01 and then underneath that there is a line
16 item of 17,483.48?
17 A. That would be the escrow payments.
18 Q. And what does that number represent?
19 A. At this point the escrow is actually negative so it went down to that. That is the amount in
20 escrow at that point. Do you want me to look for another one?
21 Q. Actually if you would flip a few further pages back to August 22, 2012. It is the tenth
22 page of this statement.
23 A. All right.
24 Q. There is shown an escrow refund of \$5,209.00?
25 A. Yes..

1 Q. Can you tell me what that was?
2 A. I am not sure what that represents.
3 Q. Similarly on August 21 it is \$5,208.00?
4 A. Again I am not sure what that represents.
5 Q. And then one more on the next page on July 16, \$5,306.00 as an escrow refund?
6 A. July what?
7 Q. July 16?
8 A. Yes, it is \$5,306.00. I don't know what that represents.
9 Q. And the next page there is one more on April 16, 2012. It is \$5300.02?
10 A. Again I don't know what that represents. We would have to be able to research that.
11 Q. And the final one that I see is March 16, 2012 on the next page back. An escrow refund
12 of \$10,601.00?
13 A. Correct.
14 Q. And a couple of pages back.
15 A. It is 4-16-2012.
16 Q. All right. Mr. Baxter I don't think that I have any further questions for you. And thank
17 you for your time today.
18 MS. LYBRAND: Your Honor, if I could redirect to clarify a couple of issues that Ms.
19 Culbertson asked about.
20 THE COURT: All right.
21 REDIRECT EXAMINATION BY MS. LYBRAND.
22 Q. Mr. Baxter, Ms. Culbertson asked you a couple of times about the arm rate changes.
23 Specifically, the ones from I think she said 2013?
24 A. Oh, yes.
25 Q. Where it happened twice in one month, May of 2013 and then again May 26?

1 A. Right.

2 Q. Did the payment amount based upon this record here, did the payment amount change?

3 A. What page was that on?

4 Q. I am looking for it again. May of 2011, May 23 and 26?

5 A. Yes.

6 Q. Based upon this payment history did the payment amount change?

7 A. No.

8 Q. Okay. And if we go back to the note where it indicates, you just discussed, and on Page 3

9 of the note, notices of changes?

10 A. Right.

11 Q. Can you read that first sentence please?

12 A. The note holder will deliver or mail to me a notice of any changes in the amount of my

13 minimum payment at least 25 days before the effective date of any change.

14 Q. And if the minimum payment amount is not going to change does this note require a notice

15 to the borrower?

16 A. No, it doesn't.

17 Q. Okay. In going back to the questions that Ms. Culbertson just asked you about the escrow

18 refunds.

19 A. Yes.

20 Q. Were any payments, any lump sum payments made in advance of those escrow refunds? I

21 think she was asking you about -- the last one she asked you about was March 16, 2012?

22 A. Yes.

23 Q. Yes there were lump sum payments made?

24 A. Yes, I just found that. Again as a matter of fact, there were.

25 Q. Okay. And would that have affected the escrow refunds?

1 A. Yes. As a matter of fact those appear and there is at least one bad check reversal. Yes
2 those possibly were the returned payments.
3 Q. Would you agree with me that on March 14 and March 15 of 2012 payments were made in
4 the amount of \$5300.00 and \$5301.00?
5 A. Yes, they were.
6 Q. Does that add up to \$10,601.00?
7 A. Yes, it does.
8 Q. Is that the amount of the escrow refund that was then put onto the account on March 16,
9 2012?
10 A. It was.
11 Q. And when a loan has a negative escrow balance and principal payments are made toward
12 the loan what is debited first, well what is credited first? What are those payments
13 credited to?
14 A. The negative escrow would be.
15 Q. So would that be the explanation for the negative escrow?
16 A. Yes.
17 Q. And if we go back to the escrow refund on 4-16-2012, was there a payment prior to that
18 escrow refund?
19 A. Yes. The exact same amount.
20 Q. Okay. And so is that the explanation for those escrow refunds?
21 A. It is. Yes.
22 Q. Okay.
23 MS. LYBRAND: That is all I have.
24 THE COURT: Any follow up questions?
25 MS. CULBERTSON: I do have one follow up question.

1 THE COURT: All right.

2 RECROSS EXAMINATION BY MS. CULBERTSON.

3 Q. I am sorry. I simply just don't understand what you all just went through. Obviously I
4 see the payments right before then ---

5 THE COURT: Counsel I can't understand. It is perfectly clear to me.

6 MS. CULBERTSON: Well I ---

7 THE COURT: That is a joke counsel. Lets go back over it.

8 MS. CULBERTSON: Yes sir.

9 Q. So Mr. Baxter lets go to the April 16 payment that you were just looking at. There is a
10 payment made on April 16 of \$5300.02?

11 A. Yes.

12 Q. When the next line item above that says escrow refund of that same amount. What does
13 that mean? Does that mean -- what is a refund? Whom is it refunded to?

14 A. This would have been refunded to the customer.

15 Q. So any time you see the number escrow refund that means it is bounced back to the note
16 holder?

17 A. Yes.

18 Q. Paid back to the borrower?

19 A. Yes.

20 Q. Why would a payment be returned to a borrower?

21 A. Because the account is in default and there are no arrangements to -- it is not either the
22 full amount due or there aren't any arrangements to bring the account current and the
23 account is in default.

24 Q. And can you tell me why that is shown as an escrow refund?

25 A. So my thought is that the payments were actually -- well they were posted to suspense.

1 They show as escrow and that is how they were refunded to the customer. In the event,
2 the account at this point also would have had an escrow advance balance. It was a
3 negative escrow.

4 Q. So why would the payments not be credited toward that negative escrow balance?

5 A. Actually I believe they were and then returned to the customer because it wasn't enough to
6 reinstate the account.

7 Q. Why would funds be returned to the borrower if there is a negative balance, a negative
8 escrow balance?

9 A. Because again we are not accepting payments that are less than the full amount due or we
10 have arrangements to pay the full amount due.

11 Q. And under the terms of your note you have the right to apply payments in a certain order,
12 isn't that correct?

13 A. Yes.

14 Q. And so typically how are those applied in a general sense? It is my understanding that
15 they generally pay late fees on negative balances?

16 A. Right.

17 Q. Interest spent as a whole?

18 A. These weren't applied as payments. None of these monies were ever applied as a
19 payment.

20 Q. And does this account statement that we are looking at here indicate why that is?

21 A. The intention - - I believe in this case the intention is they are taking money and then
22 because the account is past due they are going to the collection department to see if we are
23 going to authorize the money to be posted and in these cases if you look back through the
24 notes that are on the account the collection department's instructions were to return the
25 payments to the customer. That is because it is past due and in default.

1 Q. Is that, however, indicated any where in this statement if so?
2 A. Is what?
3 Q. Everything that you have just said about being in default and therefore not accepted?
4 A. Well yes. Because it didn't advance a due date. Okay. You look at two different things.
5 And so did you get on the account at that point it was December of 2011 and that is
6 indicated under the due date right there.
7 Q. The same date.
8 A. That transaction, that was applied with the 173 code which is a payment transaction. Did
9 not advance the due date from 2011 to January of 2012. So it was never posted as a
10 payment. And also you see there were no monies posted to principal. If you follow that
11 transaction along the principal paid zero, interest paid zero, escrow paid zero, okay. So it
12 went into suspense and that was pulled out and sent back to the customer.
13 Q. So you think when it says escrow deposit that essentially is the suspense account?
14 A. Yes.
15 Q. Okay. I think that I understand that now. Thank you very much.
16 THE COURT: Anything?
17 MS. LYBRAND: Nothing further, Your Honor.
18 MR. ANTHONY: Nothing, Your Honor.
19 THE COURT: You may step down sir. Thank you. All right counsel.
20 MS. LYBRAND: At this time we would just ask that judgment be entered in favor of the
21 Plaintiff in the amount itemized prior.
22 THE COURT: All right. Mr. Anthony?
23 MR. ANTHONY: We think they are entitled to that.
24 THE COURT: All right. Counsel?
25 MS. CULBERTSON: Your Honor, I would ask that in the event that the Court does order the

1 foreclosure and sale that you also establish a bond amount for an appeal.
2 THE COURT: All right. Mr. Walsh any matters on behalf of your client?
3 MR. WALSH: None, Your Honor, not at this time.
4 THE COURT: All right. Do you have a proposed Order?
5 MS. LYBRAND: I have not prepared a proposed Order because I was not sure about what we
6 might address today. I am not sure whether or not Mrs. Otto's consolidated matter with ours is
7 going to be addressed in the same Order or any issues with regard to Mrs. Otto and the Kerhulas
8 would be addresses in the same order. I am happy to prepare it and circulate it.
9 THE COURT: All right. Well I am going to find that you are entitled to the foreclosure and the
10 amount of the debt is as testified to by your witness.
11 MS. LYBRAND: Yes sir.
12 THE COURT: And if I want to have all of those matters - - Mr. Walsh's - - that is not an
13 additional matter that needs to be included.
14 MR. WALSH: Your Honor, my matter appears to be an issue of priority.
15 THE COURT: Right.
16 MR. WALSH: For the surplus and it doesn't appear to me that there is going to be a surplus but
17 if there is I think that we should raise that at that time at a surplus fund hearing.
18 THE COURT: Right. But is there a question of priority at this point?
19 MS. LYBRAND: I don't believe so.
20 MR. WALSH: Not with respect to them. They are number one (1).
21 THE COURT: Right. No, I mean as far as on down the line?
22 MR. ANTHONY: Well Your Honor, we were hoping to address Mr. Walsh's argument that for
23 the purpose that if our position is sustained that his judgments are not a lien against this property.
24 Then we would have an opportunity to try to reinstate this foreclosure action on our own between
25 now and the time of sale.

1 THE COURT: Okay.

2 MR. ANTHONY: If his judgment applies then it is probably futile for us to attempt to reinstate
3 the loan.

4 THE COURT: All right. I was not aware we were going in that direction possibly.

5 MR. ANTHONY: Of course, it is up to the Court.

6 THE COURT: Well I had rather get it all covered. We have got everybody here in this room.

7 MS. LYBRAND: Can I clarify for the record that the judgment that you have awarded is the total
8 judgment of the witness's testimony plus our attorney's fees and costs?

9 THE COURT: The total, right.

10 MS. LYBRAND: In the amount of One million one hundred eighty three thousand four hundred
11 fifty one & 60/100 (\$1,183,451.60)?

12 THE COURT: Correct.

13 MS. LYBRAND: Thank you, Your Honor.

14 THE COURT: All right. That is the amount of the judgment. And it is a waiver of the demand
15 for the deficiency?

16 MS. LYBRAND: That is correct. And I think that there was an issue about the equitable right
17 of redemption of Mr. Munsey that I would like the Court to address whether or not he would or
18 would not have that right. So that would be apart of the Order. Ms. Culbertson raised it. And if
19 the Court is ordering that he does in fact have that right I would like to make that part of the Order
20 and address it now and if not make that apart of the Order and address it now.

21 THE COURT: And what is your position on that?

22 MS. LYBRAND: My position is that there is no equitable right of redemption. One, particularly
23 because in the contract for deed that Mr. Munsey signed they made an explicit note that they are
24 violating the terms of the mortgage that we are here on, that we are foreclosing on today. And so
25 I don't believe equity requires that he get an equitable right of redemption in acknowledging and

1 purposely violating the terms of this mortgage that we are here about today but also because he is
2 in default and he has not previously raised any right to redemption prior to this morning. We
3 believe that if there is such a right that he has waived that right as part of being in default.
4 THE COURT: Counsel. Either one. Mr. Anthony?
5 MR. ANTHONY: I don't understand how there could be any right of redemption for Mr.
6 Munsey here. There is no credit between him and the first mortgage holder.
7 THE COURT: Counsel.
8 MS. CULBERTSON: Your Honor, just like a second mortgage holder can redeem the first
9 mortgage. Our equitable rights in the property have not been distinguished and will not be
10 distinguished until a foreclosure sale is ordered basically extinguishing our contract for deed
11 which operates similar to a junior lien to a first mortgage.
12 THE COURT: Well I don't know that you are a junior. I don't know how junior you are.
13 MS. CULBERTSON: Well we are pre-junior. There is a first mortgage and then there is a
14 second mortgage and then there is our contract for deed.
15 THE COURT: Well I don't know. I haven't looked at all of the dates but I am going to rule that
16 there is no equity of redemption.
17 MR. WALSH: Your Honor, if I may.
18 THE COURT: Yes sir.
19 MR. WALSH: I hesitate to wander into this but the fact that Mr. Munsey is in default and I agree
20 it would not affect whether or not he had a right of redemption. The right of redemption is
21 merely the right to pay the mortgage holder the amount due them.
22 THE COURT: Right.
23 MR. WALSH: Certainly I would think that a mortgage holder would want to be paid. And a
24 right of redemption is merely an equitable right that allows a junior lien holder or owner down the
25 line wherever to cough up the money but whether or not that would result in a clear title for Mr.

1 Munsey would be another thing.

2 THE COURT: Well that is the other issue.

3 MR. WALSH: And certainly it would be that but I don't think that a foreclosure would wipe out
4 their ability to cough up the money.

5 THE COURT: Are you joining on this side of the argument?

6 MR. WALSH: Your Honor, I don't think that it matters one way or the other to my client. It is
7 just that right of redemption is something that I have kind of gone into recently on some other
8 issues and I think Ms. Culbertson is right they should have that right of redemption. The right to
9 pay the mortgage holder but as to whether or not they get anything other than the first mortgage
10 paid off is another question that I gather to be wise for them to exercise the right of redemption
11 but I don't think they get cutoff.

12 THE COURT: And I appreciate your argument Mr. Walsh but I disagree with you.

13 MR. WALSH: Well you are a Judge.

14 THE COURT: And that is what I am ruling.

15 MS. LYBRAND: And all I was going to say is that our primary concern was any stated time for
16 the right of redemption or anything like that post foreclosure sale that would additionally delay
17 this matter for the Plaintiff as well. So while we don't believe that he has a right of redemption
18 in the event that there was such a right you know we just didn't want there to be some stated 120
19 day right of redemption.

20 THE COURT: No, I am founding that there is not one.

21 MS. LYBRAND: All right. Thank you, Your Honor.

22 THE COURT: And I think the Order as far as the Motion to Set Aside Default should be a
23 separate order because I don't want it included in the foreclosure order but I do want you to
24 prepare that order as well counsel.

25 MS. LYBRAND: I am happy to, Your Honor.

1 THE COURT: So if you will prepare that order and prepare the other order and circulate that to
2 all of the attorneys including Mr. Walsh for their review. The time line for the January sale, I am
3 going to make this for the February sale because there may be some issues that everyone here is
4 going to be dealing with. So the time line to get all of those documents done is January 8, 2016
5 for the February 1, 2016 sale date. And in your Notice of Sale go ahead and put that in there. It
6 is a waiver of the redemption. I don't think that we have to deal with the priorities unless we
7 have a surplus. But that would be nice. But I don't know but we will see. And the question of
8 the bond is an issue because the amount is normally determined in the event a borrower is
9 appealing. So I will have to look at that statutory requirement as far as the bond that would be
10 required and the appeal because there is not going to be a judgment but there is a return of the
11 property. So that same amount could flow down to the contract for deed holder but I will have to
12 look at that and if either of you wants to submit a brief letter memorandum of what the statutory
13 requirement would be in the event of an appeal by the contract for deed holder then I will take a
14 look at that and in the meanwhile I will take a look at it myself but I will wait - - do you want me
15 to set a date on which you - - -

16 MS. CULBERTSON: I will be glad to get it to you quickly Judge.

17 THE COURT: All right. What about December 14?

18 MS. CULBERTSON: That is fine, Your Honor.

19 THE COURT: That gets us pass the Holiday and well in the time window to get everything
20 done prior to the February 1, sale date.

21 MS. CULBERTSON: Thank you.

22 THE COURT: Any other matters that we need to take care of or address?

23 MS. CULBERTSON: Judge, I do wonder are we proceeding with the other foreclosure that has
24 been consolidated with this one today?

25 MS. LYBRAND: I am done, Your Honor.

1 MS. CULBERTSON: She is done.

2 THE COURT: Okay.

3 MS. LYBRAND: This is a case that Mrs. Otto filed an action against Mr. Munsey back in May
4 when the original default Order, the original Order where Ms. Culbertson's client was held in
5 default. A second Order was filed the same date consolidating our foreclosure matter with Mrs.
6 Otto's matter.

7 THE COURT: Right.

8 MS. LYBRAND: And so I think that is what Ms. Culbertson is asking about as whether or not
9 they are resolving that issue between the two of them today.

10 MR. ANTHONY: It was my understanding that we were proceeding with that simultaneously.

11 THE COURT: And I thought that we were because of the consolidation. Someone correct me if
12 I am wrong but it is my understanding that we consolidated this matter back in May of 2013.

13 MR. ANTHONY: I think that we had a pre-trial a month or so ago and this hearing was set. But
14 that was my understanding from the pre-trial hearing that we were proceeding on the two at the
15 same time.

16 THE COURT: Right.

17 MR. ANTHONY: Because ours was an action for a foreclosure and if this is foreclosed we don't
18 need to come back and foreclose again.

19 THE COURT: Well it takes care of the whole issue as far as the foreclosure of the mortgage and
20 the foreclosure of any rights under the contract for deed.

21 MS. LYBRAND: I am going to stand firm that we are done and we have presented our case to
22 the extent that we have anything to do with that one our position is that anything that happens in
23 that case would be subordinate or subsequent to our foreclosure. But I don't know if they have
24 got damages or anything like that which they need to discuss. I mean if so we would like to step
25 out.

1 THE COURT: But that default was as to the combined action.
2 MR. ANTHONY: Yes. There was a default in both actions.
3 THE COURT: So as far as I am concerned the matter of the foreclosure of the first takes care of
4 any interest of the contract for deed holder, the debtor, and the default also applies to the
5 consolidated cases. Counsel.
6 MS. CULBERTSON: The only issue I believe Your Honor would be the interest.
7 THE COURT: Well the question that I have though is the amount of the debt that you are
8 entitled to go into. But the question of damages falls under the issue of the Complaint for the, I
9 am sorry, the Third Party Complaint that you had which you were in default.
10 MS. CULBERTSON: I am sorry, Your Honor, if I may. The damages in the reference were any
11 damages claimed by Mr. Anthony's client pursuant to that foreclosure. So just as we get to cross
12 examine on damages with that mortgage I would assume that we would be allowed to cross
13 examine as to damages in this foreclosure as well.
14 MR. ANTHONY: That is fine, Your Honor. We knew that, of course, we had substantially
15 more damages than the Plaintiff in this case because we had a second mortgage that was supposed
16 to be paid and we had a third mortgage that was supposed to be paid and we have Association
17 dues that were supposed to be paid and we of course have attorney's fees and costs as well. So
18 our damages are much higher than what has been presented thus far. It would include that
19 amount.
20 MS. CULBERTSON: Right.
21 THE COURT: Okay. So the issue now is, we have got the foreclosure of the first mortgage.
22 MS. LYBRAND: I have no objections to them having a damages hearing as long as my client
23 witness can be excused to fly back to Texas.
24 MR. ANTHONY: No objection to that.
25 MS. CULBERTSON: None, Your Honor.

1 THE COURT: All right. Then that takes care of your client witness. You can be excused. Mr.
2 Walsh how about you and your clients?
3 MR. WALSH: Again I don't think we have a dog in this fight unless there is a surplus at the end
4 which I am not thinking is likely. I don't know what the amount of the second and third
5 mortgages are.
6 THE COURT: Well I have not seen those possible numbers as far as the action in the other case
7 as far as the damages and I did not know whether that was going to be an issue or it was just going
8 to be a wash at that point.
9 MR. ANTHONY: I am sorry if we didn't make that clear but the contract for deed itself sets
10 forth what is supposed to be paid by Mr. Munsey.
11 THE COURT: Okay.
12 MR. ANTHONY: The first thing was a first mortgage.
13 THE COURT: Right.
14 MR. ANTHONY: And the second mortgage which was actually supposed to be paid off before
15 now. The third mortgage was back to my client and it has not been paid.
16 THE COURT: Okay.
17 MR. ANTHONY: And then there is a substantial amount of -- this subdivision that it is apart of
18 has a substantial amount of home owner association fees which were also their responsibility.
19 THE COURT: All right. So then what we need to do is lets take a break and readjust
20 everybody's position as far as -- you folks, I don't know whether you even need to be here at this
21 point.
22 MS. LYBRAND: No, I don't think so.
23 THE COURT: I mean you can stay but at this point we will be proceeding on the damages
24 hearing on the contract for deed issue, correct?
25 MS. LYBRAND: That is my understanding.

1 MR. ANTHONY: Yes sir.
2 THE COURT: All right. So Plaintiff and the Plaintiff's witness you can stay or leave,
3 whichever.
4 MS. LYBRAND: Thank you.
5 THE COURT: All right.
6 MR. WALSH: And again I don't think that I get involved unless there is a surplus.
7 THE COURT: Correct.
8 MR. WALSH: And we can reserve that until after the sale.
9 THE COURT: Right. And if there is a surplus you and your clients would be notified as to the
10 time line and the claim to be filed. And this again will be the February sale so you will see what
11 happens at the sale and then you will know immediately if there is going to be a surplus hearing.
12 MR. ANTHONY: Just to renew our position Your Honor. We were hoping to have a ruling on
13 that today so that we would know whether it was worthwhile for us to try to reinstate the first
14 mortgage. Because if those substantial judgments do apply to the property then it is almost
15 certain that there is no equity in the property and no reason to try to redeem it.
16 MR. WALSH: You are going to try to redeem the property? Well I guess I can come back.
17 THE COURT: Well I think the issue is which matters as far as applying to or encumbering the
18 property ---
19 MR. ANTHONY: I am sorry. I didn't understand.
20 THE COURT: Are you talking about Mr. Walsh's judgment?
21 MR. ANTHONY: Yes, Mr. Walsh's judgment.
22 THE COURT: Okay.
23 MR. WALSH: There is a first mortgage and what is the second one?
24 THE COURT: That is TD Bank isn't it?
25 MR. WALSH: No doubt. And is there a mortgage after that?

1 MR. ANTHONY: Well it is back to the Ottos.
2 MR. WALSH: Okay.
3 MR. ANTHONY: It would be the first and second that we have to reinstate.
4 MR. WALSH: And do we know what the amount of the TD Bank mortgage is?
5 MR. ANTHONY: We do. I have got it here.
6 MR. WALSH: Two hundred thousand?
7 MR. ANTHONY: Roughly.
8 MR. WALSH: Okay.
9 THE COURT: Well do you want to - - -
10 MR. WALSH: I really - - and those two have to be paid off before we get into the - - okay, I
11 guess I can come back.
12 THE COURT: Well we are going to be five minutes. You know, take a break for five minutes.
13 MR. WALSH: Can we take 15 minutes? I need to forward a closing statement that I think may
14 be waiting for me at my office.
15 THE COURT: All right. Lets make it until eleven o'clock and we will start again. And if you
16 are not here we will start without you.
17 MR. WALSH: Thank you, Your Honor
18 THE COURT: All right. So we will readjust positions and start again at 11:00.
19 (RECESS)
20 BACK ON THE RECORD.
21 THE COURT: What we are going to proceed with at this point is that portion of this matter that
22 was consolidated in the present case that was the original case of 2012CP42-2874, Alyce F. Otto,
23 Trustee versus Jackson L. Munsey. Mr. Anthony are you ready to proceed?
24 MR. ANTHONY: Yes sir. We would like to proceed and we would like to call Alyce Otto to
25 the stand please.

1 THE COURT: All right.
2
3 ALYCE F. OTTO, BEING DULY SWORN,
4 TESTIFIES AS FOLLOWS:
5 DIRECT EXAMINATION BY MR. ANTHONY,
6 Q. You are Alyce F. Otto?
7 A. Yes.
8 Q. I believe you sometimes also go by or is known as Patty?
9 A. That is correct.
10 Q. Correct. Patty did you have an occasion to enter into a contract for deed for the sale of
11 your home at Fairview Farms to Jackson L. Munsey, Jr?
12 A. I did.
13 Q. And I hand you this document and I want to ask you some questions about it. But first is
14 that the contract for deed to which we just referred?
15 A. Yes sir.
16 Q. All right.
17 MR. ANTHONY: Your Honor, we would like to offer this as our first exhibit.
18 THE COURT: Any objections counsel?
19 MS. CULBERTSON: No objections.
20 THE COURT: All right.
21 MR. ANTHONY INTRODUCES INTO EVIDENCE A COPY OF A CONTRACT FOR
22 DEED, DATED MARCH 4, 2011, MARKED AS DEFENDANT OTTO'S EXHIBIT
23 NUMBER 1.
24 THE COURT: All right.
25 Q. Patty, I will hand you back what has now been marked as Defendant's Exhibit 1 and I
want to go through certain provisions of that document with you. As I just recited, this is

1 a contract for deed dated March 4, 2011 isn't it?

2 A. Yes sir.

3 Q. And it is for the sale of property at 1841 Fairview Farms Road in Campobello?

4 A. Yes sir.

5 Q. And it has a purchase price on the second page of \$1,400,000.00, correct?

6 A. Yes sir.

7 Q. Of which \$10,000.00 was to be paid down?

8 A. Correct.

9 Q. And then there were certain obligations that Mr. Munsey was to assume from you, correct?

10 A. Correct.

11 Q. And in fact if you flip toward the back of this document, several of the obligations that I

12 am about to recite were actually also memorialized as promissory notes that more or less

13 replicated the debt that he was supposed to pay on your behalf, correct?

14 A. Correct.

15 Q. The first thing that he was supposed to pay was the first mortgage on the property to

16 Chevy Chase Bank, correct?

17 A. Correct.

18 Q. And you have been here with me and heard testimony about what the amount of that debt

19 is to date?

20 A. Yes sir.

21 Q. And was Mr. Munsey supposed to make directly to the first mortgage holder the payments

22 that you had obligated yourself to make?

23 A. Yes sir.

24 Q. Did he do that?

25 A. For a short period of time.

1 Q. All right. Did he then default and failed to make those payments?
2 A. Yes sir.
3 Q. Is that why we are here this morning for the foreclosure of the first mortgage?
4 A. Correct.
5 Q. And again that debt to Chevy Chase was actually memorialized in a promissory note here
6 back to you on the same terms as your mortgage?
7 A. Correct.
8 Q. And then if we flip on over to Page 3, subparagraph C, which recites a second mortgage to
9 Carolina First Bank?
10 A. Correct.
11 Q. Was he supposed to pay that directly to Carolina First Bank?
12 A. Yes sir.
13 Q. Has he done that?
14 A. No sir.
15 Q. Was there actually a balloon payment as to that second mortgage?
16 A. There was.
17 Q. And when was it supposed to be paid in full by him?
18 A. In 2013.
19 Q. At the bottom of Page 3, does it recite a date of June 17, 2013, when that was supposed to
20 be paid?
21 A. Correct.
22 Q. And it has not been paid has it?
23 A. No sir.
24 MR. ANTHONY: And Your Honor, I don't think that I need to do it but as far as that first
25 mortgage debt goes I probably should refer on the record to the amount which was established by

1 the first mortgage as a total of \$1,183,451.60.

2 THE COURT: All right.

3 Q. Then as to the second mortgage Patty I am going to hand you this and I will ask you if that
4 is the latest statement you have from the second mortgage holder?

5 A. That is the latest statement that I have.

6 Q. And we will get that marked first.

7 THE COURT: All right.

8 MS. CULBERTSON: No objections.

9 MR. ANTHONY INTRODUCES INTO EVIDENCE A COPY OF A STATEMENT FROM
10 TD BANK, SHOWING A DUE DATE OF 06-17-13, MARKED AS DEFENDANT OTTO'S
11 EXHIBIT NUMBER 2.

12 THE COURT: All right.

13 Q. And I notice at the top of that it shows a letterhead of TD Bank where the mortgage was
14 originally Carolina First Bank. Can you explain that to us?

15 A. TD Bank acquired Carolina First.

16 Q. Okay. So this is the same debt?

17 A. Yes sir.

18 Q. And what is the latest statement amount shown?

19 A. It is \$177,564.74.

20 Q. And again was Mr. Munsey supposed to make that payment directly to the second
21 mortgage holder?

22 A. Yes sir.

23 Q. And did he do that?

24 A. No.

25 Q. This was a second mortgage on the Fairview Farms house right?

1 A. It was.
2 Q. Was it secured by anything else?
3 A. Yes sir.
4 Q. What was that?
5 A. The Hare and the Hound Restaurant, my business.
6 Q. Okay. As a result of the fact that it was secured by your assets as well as the home, did
7 you make some payments on this loan to try to keep it from going into default?
8 A. I did.
9 Q. All right. I am going to hand you this and I will ask you if this is your calculation of the
10 payments that you made that Mr. Munsey should have made?
11 A. And that is correct.
12 MR. ANTHONY: May we have that marked?
13 THE COURT: Any objections?
14 MS. CULBERTSON: No objections.
15 MR. ANTHONY INTRODUCES INTO EVIDENCE A COPY OF AN ACCOUNT QUICK
16 REPORT FOR THE HARE AND HOUND, DATED DECEMBER 31, 2012, MARKED AS
17 DEFENDANT OTTO'S EXHIBIT NUMBER 3.
18 THE COURT: All right.
19 Q. And I will hand you back what has now been marked as Defendant's Exhibit Number 3,
20 and I will ask you to tell us the amount of the payments that you made that he should have
21 made?
22 A. That was Eleven thousand fifty two & no/100 (\$11,052.00) dollars.
23 Q. While we are at that point let me digress for just a second. There was testimony that you
24 heard this morning from the first mortgage holder about some payments on the first
25 mortgage possibly being returned to the borrower which I presume would be you?

1 A. Correct.

2 Q. Did you in fact receive these payments back from the first mortgage holder when they
3 refused to accept them?

4 A. I did.

5 Q. What did you do with that money?

6 A. After conferring with my attorney I paid the second mortgage, made second mortgage
7 payments and then the rest was left in escrow.

8 Q. Okay. We will come back to that. Now going back to the contract for deed, which we
9 marked as our Exhibit 1. On Page 4, subparagraph D, required that certain tax liens were
10 going to be paid out of the closing with Mr. Munsey, am I correct about that?

11 A. That is correct.

12 Q. Okay. I want to hand you this document and ask you to identify it for us?

13 A. This is the settlement statement from the closing on the contract for deed.

14 Q. All right. Let me get that marked and then I will ask you a few more things about it.

15 A. Yes sir.

16 THE COURT: Exhibit 4.

17 MS. CULBERTSON: No objections.

18 MR. ANTHONY INTRODUCES INTO EVIDENCE A COPY OF A SETTLEMENT
19 STATEMENT, MARKED AS DEFENDANT OTTO'S EXHIBIT NUMBER 4.

20 THE COURT: All right.

21 Q. All right. Let me hand you back what has now been marked as Defendant's Exhibit 4,
22 which you identified as the settlement statement and I will ask you to turn to the fourth
23 page, which is entitled additional disbursement sheet, and I will ask you if there is a line
24 item there showing the payment to the Internal Revenue Service to clear up those taxes?

25 A. There is.

1 Q. How much is it?
2 A. It is Fourteen thousand six hundred one & 71/100 (\$14,601.71) dollars.
3 Q. All right. I am going to refer you back to the contract for deed, Exhibit 1. And at the
4 bottom of Page 4, subparagraph J, which carries over onto the next page, it does a set-up,
5 essentially a third mortgage from Mr. Munsey back to you?
6 A. Correct.
7 Q. And again was there a promissory note signed that memorialized that in addition to the
8 contract for deed?
9 A. Yes sir.
10 Q. And that note was originally in the amount of \$13,000.00?
11 A. That is correct.
12 Q. And it was supposed to be paid on a monthly basis?
13 A. That is correct.
14 Q. Has that been paid?
15 A. No sir.
16 Q. Is Mr. Munsey in default on that payment as well?
17 A. Yes sir.
18 Q. I hand you this document and ask you if this is a calculation of the amount due on that
19 third mortgage at this point with interest and late fees included?
20 A. Yes, that is correct.
21 Q. Of \$21,859.39?
22 A. Correct.
23 MR. ANTHONY: We would offer this, Your Honor.
24 THE COURT: Exhibit 5.
25 MR. ANTHONY INTRODUCES INTO EVIDENCE A SHEET DATED NOVEMBER 24,

1 2015 AND ENTITLED AS PAYOFF CALCULATION, MARKED AS DEFENDANT
2 OTTO'S EXHIBIT NUMBER 5.
3 THE COURT: All right.
4 Q. I will hand you back for a second what is marked now as Exhibit 5 and I will ask you if
5 you see a credit on that on the next to the last line where there is an amount credited to Mr.
6 Munsey. Do you see that? It says \$6,044.10?
7 A. Yes sir.
8 Q. We talked earlier about a few payments that were returned to you by the first mortgage
9 holder and you applied some of those to the second mortgage, correct?
10 A. Yes sir.
11 Q. But is my law firm still holding this amount that is credited here, that was left over from
12 those payments that were sent back to you?
13 A. Yes sir.
14 Q. Okay. The next item that Mr. Munsey was supposed to pay under this contract for deed, I
15 believe was the Homeowners Association dues, am I correct?
16 A. Yes sir.
17 Q. And who does that get paid to?
18 A. Greenspace of Fairview.
19 Q. All right. Has he made those Homeowner Association payments?
20 A. No sir.
21 Q. All right. I hand you this document and ask you if that is the latest statement that you
22 have received from the Homeowners Association?
23 A. Yes, it is.
24 MR. ANTHONY: We offer this, Your Honor.
25 THE COURT: All right.

1 MR. ANTHONY INTRODUCES INTO EVIDENCE A INVOICE FROM GREENSPACE
2 OF FAIRVIEW, LLC, DATED JULY 1, 2015, MARKED AS DEFENDANT OTTO'S
3 EXHIBIT NUMBER 6.

4 THE COURT: All right.

5 Q. And Exhibit 6 shows a total due as of the last statement of \$19,200.00, correct?

6 A. That is correct.

7 Q. Has there been an additional capital call from the Homeowners Association?

8 A. Yes. There has been an additional capital call of \$20,000.00 on 5/24/2015.

9 Q. Would that also be the responsibility of Mr. Munsey?

10 A. Yes sir.

11 Q. I hand you this and ask you if this is a statement as to that capital call?

12 A. Yes sir.

13 Q. And that is not included in the statement that we just marked as Exhibit 6 is it?

14 A. No sir.

15 MR. ANTHONY: We offer that as Exhibit 7.

16 THE COURT: All right.

17 MR. ANTHONY INTRODUCES INTO EVIDENCE A COPY OF A CAPITAL CALL,
18 MARKED AS DEFENDANT OTTO'S EXHIBIT NUMBER 7.

19 THE COURT: All right.

20 Q. Finally Patty this litigation obviously has been going on for about three (3) years now,
21 correct?

22 A. Yes sir.

23 Q. There have been a lot of activity and your deposition taken and various items produced.
24 Have you incurred a substantial amount of attorney's fees as a result?

25 A. I have.

1 Q. And does the contract for deed provide for Mr. Munsey to be responsible for that in the
2 event we wind up in this situation?
3 A. Yes sir, it does.
4 Q. And I will hand you this Affidavit which shows that we have incurred \$12,600.00 in
5 attorney's fees. And I just wondered does that sound about right to you?
6 A. Yes sir, it does.
7 Q. So you are asking that amount be added to the amounts that we have already stated, the
8 first mortgage balance, the second mortgage balance, the third mortgage to you, the fees
9 due to Greenspace and then our fees and costs that are itemized there?
10 A. Yes sir.
11 MR. ANTHONY: We offer this Affidavit.
12 THE COURT: Exhibit 8.
13 MR. ANTHONY INTRODUCES INTO EVIDENCE AN AFFIDAVIT OF KENNETH C.
14 ANTHONY JR., AS TO ATTORNEY FEES, DATED NOVEMBER 24, 2015, MARKED
15 AS DEFENDANT OTTO'S EXHIBIT NUMBER 8.
16 Q. Do you want the property to be foreclosed and sold if necessary to extinguish any interest
17 Mr. Munsey might claim in this property?
18 A. Yes sir.
19 Q. Thank you.
20 MR. ANTHONY: Your Honor that is all I have of this witness.
21 THE COURT: All right. Let me go over those figures one more time.
22 MR. ANTHONY: I am sorry. I didn't prepare you a total sheet but I didn't have the numbers
23 for the first mortgage.
24 THE COURT: All right. Lets just go over it for the record a breakdown of the numbers.
25 MR. ANTHONY: Those numbers are again according to the testimony from the first mortgage

1 holder this morning I wrote down a total of \$1, 83,451.60. The second mortgage which is now
2 the TD Bank, as of the last statement it was \$177,564.74. The payments that Mrs. Otto made on
3 the second mortgage which should have been paid by Mr. Munsey are \$11,052.00. The
4 \$13,000.00 note has now come to, I think \$21,859.39. That would be the third mortgage. The
5 Greenspace charges were \$19,200.00 for the regular dues and then the \$20,000.00 capital call for
6 a total of \$39,200.00 to Greenspace of Fairview, LLC. And then finally Your Honor our fees
7 were \$12,600.00 with cost of \$295.00.

8 THE COURT: All right. Counsel.

9 CROSS EXAMINATION BY MS. CULBERTSON.

10 Q. All right. I would like to go back over some of those numbers. You claim or you have
11 presented a statement from TD Bank that shows a balance due of \$177,564.74?

12 A. Yes ma'am.

13 Q. And you are also claiming \$11,052.00 that you paid to Carolina First as part of that spread
14 sheet that you paid to Carolina First as part of that spread sheet you gave us for The Hound
15 and The Hare?

16 A. The Hare and The Hound, yes ma'am.

17 Q. Explain to me how that is not double dipping, I mean that \$11,052.00 that you paid to
18 Carolina First in addition to the payoff to Carolina First?

19 A. The payoff to Carolina First I believe the statement is in 2013. Those payments I made in
20 2012. I believe that is the way that works.

21 Q. So the payoff to Carolina First would have already included any payments that you had
22 made?

23 A. That is correct. But I made those payments so it would be in addition to what the second
24 mortgage would be owed because I made the payments that Jack would have made.

25 Q. And the contract deed, he talked about this earlier in the earlier foreclosure but the

1 mortgage companies were not parties to that contract for deed, is that correct?

2 A. That is correct.

3 Q. So your obligations to the mortgage companies, both Capital One and TD Bank were not
4 extinguished by this contract for deed, is that correct?

5 A. That is correct.

6 Q. In other words you were still obligated to them to make those payments regardless of that
7 contract for deed?

8 A. I was.

9 Q. Mrs. Otto, I am going to hand you up three (3) checks here and I just ask you to take a look
10 at those and we will mark those once you have looked at them.

11 A. All right.

12 Q. And would you tell the Court what those documents are?

13 A. Those are the three payments that I received back from Capital One that we discussed
14 previously.

15 Q. And we agree that they total about \$15,000.00, approximately?

16 A. Yes ma'am.

17 Q. And you said that you paid \$11,000.00 to Carolina First out of the returned checks, is that
18 correct?

19 A. I paid that from The Hare and The Hound.

20 **MS. CULBERTSON INTRODUCES INTO EVIDENCE A COPY OF THREE CHECKS,**
21 **ABOVE IDENTIFIED, FROM CAPITAL ONE, MARKED AS DEFENDANT MUNSEY'S**
22 **EXHIBIT NUMBER 1.**

23 **THE COURT:** All right.

24 Q. All right. I will put this back in front of you in case you need to look at this. And then
25 you claim that additional \$6,044.00, you gave to Mr. Anthony to hold in trust?

1 A. The rest of the money was given to him, yes, the six thousand, whatever the number was.
2 Q. But that is not true is it. Mr. Anthony is actually holding my client's money in the amount
3 of \$6,044.00?
4 MR. ANTHONY: Your Honor, I think after looking at it that we probably should stipulate that
5 Mr. Munsey is entitled to a credit for the three (3) checks that have been presented assuming we
6 get to keep the funds that I have in escrow. I think that I probably got that confused.
7 THE COURT: All right.
8 Q. And Mrs. Otto at some point Mr. Munsey notified you that there were some liens against
9 the property that were in violation of that bond for title?
10 A. Yes.
11 Q. Specifically the loan that Mr. Walsh is here about today, the Kerhulas's judgment?
12 A. He did send me some letters concerning that.
13 Q. And would you take a look back at your bond for title, that document is still in front of
14 you. Paragraph 5 and I am just going to read it to confirm that I am reading accurately.
15 A. Neither party shall as a result of an act or omission, cause the property in any way to be
16 further encumbered, either voluntarily or involuntarily, without the written consent of the
17 other party and to immediately, after notice thereof, removed, or cause to be removed any
18 encumbrances placed against the property. Is that accurately read?
19 A. Yes.
20 Q. And further in that paragraph on the next page starting at the bottom of this page. Should
21 a judgment be filed against the Seller affecting the property, or should an encumbrance be
22 placed against the property as a result of Seller's acts or omissions, purchaser after actual
23 notice thereof, may in addition, cease to make payments to seller under the note payable to
24 seller. Is that correct? Am I reading that correctly?
25 A. That is correct.

1 Q. And further shall have the right of setoff against any amounts due for such liens or
2 encumbrances including costs arising therefrom.
3 A. Correct.
4 Q. Correct. Including reasonable attorney fees?
5 A. Correct.
6 Q. So do you allege that when Mr. Munsey put you on notice that there were encumbrances
7 and liens against the property in violation of this provision that he was not entitled to stop
8 making those mortgage payments to you?
9 A. He was not entitled. When he made notice of it that lien was not even well that judgment
10 was not applicable. We had already gone into foreclosure at the time that happened. He
11 had already been not making the payments.
12 Q. I am sorry. That is not the question that I asked you. Once you were on notice that
13 there were liens and encumbrances does that not immediately entitle the purchaser to stop
14 making payments under the note?
15 A. He had already stop making those payments.
16 MR. ANTHONY: Your Honor, I would note for the Court that Mr. Munsey is already in default
17 as we have indicated this is just a hearing on the damages.
18 MS. CULBERTSON: Your Honor, she is not entitled to that payment. She is not entitled to
19 those damages.
20 THE COURT: Well we are proceeding based on the default already. So the question is damages
21 and that is what we are doing at this point. Correct counsel?
22 MR. ANTHONY: Yes sir.
23 THE COURT: Counsel so the question at this point is the amount of damages, if any, correct?
24 MS. CULBERTSON: Yes, Your Honor.
25 THE COURT: All right. And this action for the termination or foreclosure of the contract for

1 deed was filed on July 6, 2012, is that correct?
2 MS. CULBERTSON: Yes, Your Honor.
3 THE COURT: All right.
4 MS. CULBERTSON: Your Honor, I think that we are probably a little bit hamstrung on any
5 other questions regarding damages given Your Honor's ruling on the default but if I may have just
6 two seconds to confer with my client.
7 THE COURT: All right.
8 MS. CULBERTSON: Your Honor, I don't think that I have any other followup questions, thank
9 you.
10 THE COURT: All right.
11 MR. ANTHONY: I have nothing further on this issue. If the Court's wants to hear the issue of
12 Mr. Walsh's client then I can proceed with that.
13 THE COURT: Well getting back to the question of the damages. I am not quite through with
14 that I don't think counsel as far as the issue on damages, money damages. Lets go back to this
15 question. In the event of the foreclosure of this contract for deed is there a seeking of deficiency?
16 MR. ANTHONY: Yes, Your Honor.
17 THE COURT: So there would be a question of a deficiency amount?
18 MR. ANTHONY: Yes, Your Honor.
19 THE COURT: So I want to get back to the damages.
20 MS. CULBERTSON: Yes sir.
21 THE COURT: And those that counsel partially hit as far as the damages that were -- what I am
22 trying to do is set that date of the filing of the original action. What amount was paid and when
23 or up to that date, to the default, because there is a significant difference between those dates and
24 when the payments were made and if they have been made and what constitutes a deficiency and
25 how much. So I need to clarify those numbers at least for me to understand the total amount that

1 you are seeking. Is that the total amount that is applicable based on the time frame? I don't
2 know if I am making any sense or not but that is where I am.

3 MS. CULBERTSON: Yes. Your Honor, I would argue that my client is entitled to credit for
4 any payments that he made from the date of the contract for deed going forward. If her damages
5 encompass basically the full amount of the debt then we should get a credit for the payments that
6 we made against that debt. And similarly we should get a credit for those refunded payments that
7 came back from Capital One, those three (3) checks that I put into the record.

8 THE COURT: Well that is what I am trying to clarify.

9 MS. CULBERTSON: Right.

10 THE COURT: As far as the -- the payments were to be made directly to the first mortgage.

11 MR. ANTHONY: The first and second.

12 THE COURT: First and second.

13 MR. ANTHONY: And the Homeowners Association.

14 THE COURT: Right. So there were payments made in there but they are already given credit in
15 that debt determination and first mortgage.

16 MS. CULBERTSON: Well Your Honor I think in the way that I am looking at it is a little bit of
17 a windfall for Mrs. Otto to establish as part of her debt all of our bond for title or contract for deed
18 payments as well as the full amount of the judgment claims since those payments stop being
19 accepted. See in other words, Your Honor, basically then the windfall is our equity built up in the
20 property and our contract for deed payments.

21 THE COURT: Well you are going off in a different direction here as far as equity in the
22 property. That is a question of an amount of value. Do you have someone here to testify to the
23 value of this property?

24 MS. CULBERTSON: No sir, not yet. But we will certainly bring an appraiser in.

25 THE COURT: I mean, today?

1 MS. CULBERTSON: No sir, we don't.
2 THE COURT: Okay.
3 MS. CULBERTSON: We will certainly raise an appraisal issue if that comes into it. By equity,
4 I am sorry, I meant our payments toward the contract.
5 THE COURT: Yes. But there may well be no equity in this property as far as that.
6 MS. CULBERTSON: Correct.
7 THE COURT: But lets see if I can refocus on the damages, the number. And the claim is for all
8 of these numbers. In other words, the first mortgage of \$1,183,451.60. The second mortgage
9 which is already in default and there was a balloon payment due already that has not been paid.
10 Giving credit for the payments that Mrs. Otto made of \$11,052.00. So the balance that is due on
11 the balloon is \$177,564.74, correct?
12 MR. ANTHONY: Yes, Your Honor.
13 THE COURT: And then there is the third mortgage that is going back to Mrs. Otto that is now
14 \$21,859.39. And then the Greenspace debt or lien of \$19,200.00. I don't know if that has been
15 paid or not.
16 MR. ANTHONY: It has not been paid, Your Honor.
17 THE COURT: And then there is the \$20,000.00 capital call. I don't know if it is due now or is
18 past due. It says May 24 and due by July 15, 2015. So it was due in July. And then the
19 attorney's fees. So whatever that number is that is what their claim for damage is.
20 MS. CULBERTSON: Your Honor, the attorney's fees are included in that third mortgage payoff
21 as well. So there is no need to be doubled up.
22 THE COURT: The attorney's fees for the - - -
23 MS. CULBERTSON: Yes, Your Honor. They are showing it on the third mortgage calculation.
24 MR. ANTHONY: Oh, she is correct Your Honor. I am sorry.
25 THE COURT: All right.

1. MR. ANTHONY: That is correct.
2 THE COURT: All right. Then that is not there. So the third mortgage then is a total of
3 Twenty one, is that the total amount?
4 MR. ANTHONY: That would include the attorney's fees.
5 THE COURT: All right.
6 MR. ANTHONY: I am sorry.
7 THE COURT: So whatever that total there is, that is the damages that are being sought, right
8 MR. ANTHONY: Right.
9 MS. CULBERTSON: With the addition of another credit.
10 THE COURT: Which was Six thousand whatever that number?
11 MS. CULBERTSON: No, Your Honor, which is the amount of those three (3) checks which I
12 presented in evidence which is about Fifteen thousand.
13 MR. ANTHONY: It is about Fifteen.
14 THE COURT: All right. I don't know why the Six thousand number - - -
15 MS. CULBERTSON: That is the credit that is a credit from that.
16 MR. ANTHONY: That is what we are still holding from that.
17 THE COURT: All eight.
18 MR. ANTHONY: If we keep the six thousand that we are holding he is entitled to a credit for
19 those three checks in full.
20 THE COURT: Okay. So you have got a balance of six thousand and some odd cents in your
21 trust account?
22 MR. ANTHONY: Yes sir.
23 MS. CULBERTSON: Six thousand forty four & 10/100 (\$6,044.10), I believe.
24 THE COURT: Okay.
25 MR. ANTHONY: But we have already knocked that off - - We have already reduced the, this is

1 the sheet and it is marked up here, one of the exhibits. What we have done here on this sheet is
2 took the third mortgage amount and added interest and late fees and apparently added attorney
3 fees and costs but then we have also given a credit for the amount that we are holding.
4 THE COURT: Okay.
5 MR. ANTHONY: So that amount is netted out.
6 THE COURT: You have already credited that amount?
7 MS. CULBERTSON: Yes, Your Honor. That has already been accounted for. What has not
8 been accounted for as far as your records go are the three (3) checks?
9 THE COURT: Are those three (3) checks?
10 MS. CULBERTSON: Yes, Your Honor.
11 THE COURT: But to do it accurately I should have taken the three checks total and then
12 subtracted the six thousand that we are holding and that would be the credit. I can do that real
13 quick.
14 THE COURT: So you would take off the three (3) checks plus the credit for the six?
15 MR. ANTHONY: No. The six is included in the three checks. Giving credit for the ---
16 MS. CULBERTSON: The six thousand is not included in the three checks. The six thousand
17 was paid by my client to you.
18 MR. ANTHONY: Right. It was a result of the current check.
19 MS. CULBERTSON: No. Those were payments made directly by them to you and I will be
20 glad to put someone on the stand as to that.
21 MR. ANTHONY: Okay. I trust you. If Erin says so then that is fine.
22 THE COURT: All right.
23 MR. ANTHONY: We will credit the three (3) checks and the six thousand.
24 THE COURT: So those three checks total?
25 MS. CULBERTSON: We have those.

1 THE COURT: I don't have it but whatever the total is that is what it is.
2 MS. CULBERTSON: Yes sir.
3 THE COURT: Approximately five thousand per check?
4 MS. CULBERTSON: The amounts are. I will establish these for the record. One is Five
5 thousand two hundred nine, Five thousand two hundred eight and Five thousand three hundred
6 six.
7 THE COURT: So about Fifteen thousand seven twenty-three.
8 MR. WALSH: Yes, Your Honor.
9 THE COURT: So a credit of about Twenty one thousand, is that number right?
10 MR. ANTHONY: With the six, I think that is right.
11 THE COURT: With the six added to the fifteen.
12 MR. ANTHONY: But as I say we credited the six thousand against our calculations - - -
13 THE COURT: So you have already gotten that.
14 MS. CULBERTSON: Right. Correct.
15 MR. ANTHONY: Yes sir.
16 MS. CULBERTSON: So the only thing that we need to deal with is that Fifteen thousand.
17 THE COURT: All right. So it looks like that number is right around Sixteen thousand one
18 hundred thirty six something, at least to the third.
19 MS. CULBERTSON: That is the balance. I am sorry, Your Honor. That is the balance. You
20 are netting that Fifteen thousand out of the - - -
21 THE COURT: Right. Working off of that same sheet that I think that you are working off of.
22 MS. CULBERTSON: Okay.
23 THE COURT: It gives a credit for the - - so whatever?
24 MR. ANTHONY: I got Fifteen thousand seven hundred thirteen (\$15,713.00) dollars.
25 THE COURT: Okay. I was just doing it - - well whatever that number is between fifteen and

1 sixteen thousand.
2 MR. ANTHONY: Yes, Your Honor.
3 MS. CULBERTSON: Right. So that is the credit that we are entitled to that is not what the net
4 payoff is? I think that we are saying two (2) different numbers.
5 THE COURT: Yes, we are.
6 MS. CULBERTSON: Your Honor said -- you were trying to establish I believe a bottom line
7 number on this?
8 THE COURT: On that sheet that has the credit for the six thousand.
9 MS. CULBERTSON: Correct.
10 THE COURT: What is that? What that sheet is, would be what is due on the third mortgage,
11 right?
12 MS. CULBERTSON: Yes, Your Honor.
13 THE COURT: So what I am doing is taking that additional fifteen seventy three off of that.
14 MS. CULBERTSON: Okay.
15 THE COURT: So that number should be around ---
16 MS. CULBERTSON: I don't know. I was an English major.
17 MR. WALSH: It is Six thousand one hundred thirty six & 09/100 (\$6,136.09) dollars, Your
18 Honor.
19 THE COURT: All right. So that is the amount that is due on that third mortgage? Is that now
20 the number? Counsel do you agree with that number, is that the number?
21 MS. CULBERTSON: That is fine if you want to count it like that. Yes sir, that is fine sir.
22 THE COURT: I mean if there is another way of doing it. I see head shaking throughout the
23 room.
24 MS. CULBERTSON: Well I was going to suggest that fifteen thousand credit that we are talking
25 about.

1 THE COURT: Those three checks.

2 MS. CULBERTSON: The three checks. Those are related to the first mortgage. So if we want
3 to put them in a different column we can. I don't care where we put them because I think the
4 numbers at the end of the day will add up the same.

5 THE COURT: Well they can't go back to the first mortgage because that amount has been
6 established in the prior hearing and it won't be applied to that. Because that amount is what it is.

7 MS. CULBERTSON: And that is fine. We can establish this credit.

8 THE COURT: Just as long as it is somewhere.

9 MS. CULBERTSON: Right, right.

10 THE COURT: Okay, fine. All right. So the question is now what are the damages? I am
11 looking at you counsel?

12 MS. CULBERTSON: I know that you are.

13 THE COURT: What is your position as far as the damages?

14 MS. CULBERTSON: I mean I think Your Honor that these damages are you know the judgment
15 amount, the debt amount from the first mortgage does not count as straight up damages because
16 there is not a deficiency sought against Mrs. Otto. So I don't think that can be established as
17 damages against my client unless and until that property is sold. I don't know how we establish
18 the damages on that amount because again there is no deficiency sought. How do we establish
19 damages? And you know similar to the Carolina First, I don't know if they have filed an action
20 to reduce this to a judgment against her or this is just the amount due.

21 THE COURT: Well that amount was agreed to be paid, correct?

22 MS. CULBERTSON: Yes, Your Honor.

23 THE COURT: On the second. And that amount was due and is due.

24 MS. CULBERTSON: But she has not paid it. So why is she entitled to damages for that
25 amount?

1 THE COURT: Well the question is, had it not been for the nonpayment we would not be here.
2 So moving from that point what we have got to determine are the damages, the amounts that were
3 unpaid that caused her to be in this position which would include whatever those unpaid payments
4 are on the first. That is what I am trying to determine, what the actual damages are.
5 MS. CULBERTSON: My position Your Honor is we are not privy to the contract with the first
6 mortgage or the second mortgage holder. Her damages should be limited to what we would have
7 paid under our bond for title obligations.
8 THE COURT: So the ---
9 MS. CULBERTSON: And not what flows further from that.
10 THE COURT: Then moving in that direction what is the amount that should have been paid
11 under the bond for title, your contract for deed?
12 MS. CULBERTSON: Well Your Honor the first mortgage payments, I believe that it would be
13 Mrs. Otto's obligation to establish these damages.
14 THE COURT: Well she has already established what she is claiming and now you have got to
15 come along and say no that is not right, this is what it would be and that is your limit under the
16 default..
17 MS. CULBERTSON: I understand, Your Honor.
18 THE COURT: That is where you have to go to say no that is not the damage. These are the
19 damages.
20 MS. CULBERTSON: Right. I understand.
21 THE COURT: Because what it goes directly to is the amount, if any, of a deficiency judgment
22 against your client based on the default under the bond for title.
23 MS. CULBERTSON: Okay.
24 THE COURT: So this is what they are claiming their damages are.
25 MS. CULBERTSON: All right. I understand.

1 THE COURT: All right.

2 Q. So I think Mrs. Otto what I will need you to do is go back over the payment history of the
3 loan with Mr. Munsey and establish for me what payments you claim were not made?

4 A. The contract for deed was for 1.4 million dollars. That included the first mortgage, the
5 second mortgage, the mortgage to me and the tax lien was paid. All I know is that I feel
6 that I am due what my contract said. I am not asking for anything other than that. My
7 damages are what and if you think that I am not going to be held accountable for that
8 second mortgage you as an attorney knows that is not so. So that is all I can say. You
9 know the payments reflected what he made in the first mortgage. They presented how
10 much was owed. So I assume that reflects the payments that were made. That reflects
11 the payments he made against the amount, the one point four (1.4) million that he bought
12 the property for and had the contract for deed for plus interest, attorney fees, and
13 everything. The second mortgage was originally one ninety four and it is now one seventy
14 seven. I think that it was one hundred and seventy before they added interest and
15 penalties. So I think he was given credit between the one ninety four and the one seventy
16 for payments made. My attorney fees are my attorney fees. Those are there. The
17 Greenspace items those are - - -

18 Q. All I am asking you right now is the first mortgage. And the note to you for
19 \$1,061,968.32. Can you establish what payments were made and what payments were
20 not made beginning on April 1, 2011?

21 A. The Bank established that with the payoff of the loan with the one million six whatever
22 that number was that you just quoted. The Bank established that. That reflects
23 everything that was made on that loan from the time that he executed it.

24 Q. I am going to ask you to go through month by month with me and explain it. And you
25 received monthly payments on this mortgage, is that correct?

1 A. I did.

2 Q. So every month you have received a statement that showed what payment had been made
3 and what amount was paid is that correct?

4 A. That is correct.

5 Q. So you were the only one in possession of those statements, is that correct?

6 A. Yes, other than the copies that I would have given to Jack.

7 Q. And so you need to establish for me what payments were made and what payments were
8 not made?

9 MR. ANTHONY: Your Honor, if I could object to that approach. I don't think that is
10 necessarily the proper way to establish that. I would point out to the Court that not only do we
11 have a contract for deed document that cited Mr. Munsey's obligations but as I pointed out in the
12 questioning of Mrs. Otto for each of those obligations an independent promissory note was signed
13 by Mr. Munsey saying I agree to pay not to the Bank but the contract for deeds says that you have
14 got to pay the Bank but the notes say that you have got to pay it to Mrs. Otto on each one of them.
15 So if he defaults the entire debt is due just like any promissory note. I didn't handle the closing
16 but I think that it was done that way for a reason.

17 THE COURT: Well a lot of times in the contract for deeds what you will have is an amortization
18 schedule, a set price, an amortization schedule where Mrs. Otto could track the payments and then
19 she would make the payments to whoever but in this case it was not set up that way. In this case,
20 the payment under this 1.4 million dollar contract for deed with a credit for the \$10,000.00 deposit
21 was pay the first mortgage payment, pay the second mortgage payment and pay the Greenspace,
22 pay the taxes, insurance and whatever. So that is the way that this one was set up.

23 MR. ANTHONY: Well it was in the contract for deed itself but attached as part of our Exhibit 1,
24 are these three (3) promissory notes that memorialize the debt that is established in the contract
25 for deed.

1 THE COURT: Okay.
2 MR. ANTHONY: And they provide for when you default, to be accelerated, just like always.
3 THE COURT: Well the one promissory note, the 193.
4 MR. ANTHONY: Which reflects the second mortgage.
5 THE COURT: Which was the second mortgage.
6 MR. ANTHONY: Yes sir.
7 THE COURT: So that was a note to her but it was based on the debt due on the second
8 mortgage.
9 MR. ANTHONY: Right. And both in the contract for deed and the promissory note it
10 ballooned.
11 THE COURT: Right.
12 MR. ANTHONY: So that one is already, I think, clearly due.
13 THE COURT: All right. The other is the payment to her on the third.
14 MR. ANTHONY: Correct.
15 THE COURT: Well what I will say is the third but there is not an obligation except for the
16 contract for deed that would reflect or encumber or encompass -- there it is right there. The
17 promissory note for one point one (1.1). Now is that the ---
18 MR. ANTHONY: That is the first.
19 THE COURT: That would represent the first. Right?
20 MR. ANTHONY: Yes, Your Honor.
21 THE COURT: Okay. But the underlying basis for that figure is the first mortgage.
22 MR. ANTHONY: Correct.
23 THE COURT: The balance on the first mortgage. But she did not receive these payments. The
24 deal was to make the payments directly to the first mortgage, second mortgage holders?
25 MR. ANTHONY: That is correct.

1 THE COURT: Okay.

2 MR. ANTHONY: I will just note that the promissory note refers to well it creates reference to
3 the note to the bank for its term which includes the acceleration costs, etc. If I don't pay then the
4 whole debt is due.

5 THE COURT: All right. So there is not an amortization schedule for these notes separate and
6 apart from the obligations due on one and two.

7 MR. ANTHONY: There is actually an amortization schedule in here for the third.

8 THE COURT: The third, correct. Okay.

9 MR. ANTHONY: The others just rely on the payment.

10 THE COURT: All right. So the obligation starts at one point four million minus ten thousand.

11 MS. CULBERTSON: Well - - -

12 THE COURT: The original obligation.

13 MS. CULBERTSON: There was an additional cash portion of that payment.

14 THE COURT: Okay. Where is that?

15 MS. CULBERTSON: Item I.

16 THE COURT: Let me look at that.

17 MS. CULBERTSON: Yes sir. There is a \$43,000.00 cash payment.

18 THE COURT: All right. So lets get to the original debt.

19 MS. CULBERTSON: Yes. Your Honor.

20 THE COURT: It is what?

21 MS. CULBERTSON: The original debt is one point four (1.4) million but that is comprised of - - .

22 THE COURT: Right. But I mean after-credits. So you have got one million four minus ten
23 minus something else.

24 MS. CULBERTSON: Okay. If we go down these line by line or it would be minus payments
25 made under the note to Capital One minus payments made under the note to Carolina First minus

1 the payment of the tax lien shown in Item D on the contract for deed and minus payment of the
2 property taxes shown in Item E. So a lot of these items were paid on the closing statement.
3 They were paid immediately on the day of closing. The only notes, the only loan obligations
4 were shown in this contract for deed as B, C, and J.
5 THE COURT: Well that is what I am trying to get to because the contract for deed holder, the
6 obligation is only, not only, but what is that number that we started out with in the contract for
7 deed. That is the one million four minus the ten minus the whatever.
8 MS. CULBERTSON: Yes, Your Honor.
9 THE COURT: Then minus whatever has been paid by the contract for deed holder. So it can't
10 be -- the damages can not be one point eight million dollars for the contract for deed holder
11 because their obligation is not that high. Do you see what I am saying?
12 MR. ANTHONY: Well yes Your Honor but I don't think that is taking into account the fact that
13 there is interest accruing.
14 THE COURT: It may well be but it is not at the 1.8 million. It is based on that debt. And that is
15 what I am trying to figure is what is the debt. What is their debt? The original debt then is
16 whatever the contract for deed is even though in other words you have got to figure your debt
17 figure on this one based on their debt, not on the Bank's debt. And that is where I am having a
18 problem with the damages here.
19 MR. ANTHONY: Well when he specifically took on the Bank's debt.
20 MS. CULBERTSON: But we didn't assume the Bank debt.
21 THE COURT: I understand that. I understand that.
22 MR. ANTHONY: But in effect you did because he signed the contract for deed that said I am
23 going to pay the Bank according to this note which is attached and shows the obligation. When
24 he doesn't do that and interest accrues and late charges accrue and attorney's fees accrue I think --
25 well it is inescapable that he is responsible for everything that he has created. That his default

1 has created. That is what he obligated himself to do was to pay the Bank according to the terms
2 of that note. The same way with the second mortgage. He obligated himself to pay under the
3 terms of that second mortgage. If there are additional late charges, interest or whatever accrues
4 on that note as a result of the default is what he signed on to be responsible for. And the third
5 just speaks for itself.

6 MS. CULBERTSON: And, Your Honor, I disagree because I believe Mrs. Otto and her husband
7 went and got this loan a long time ago and they enjoyed the benefit of the loan and lived in the
8 property a lot of years. We came long and agreed to make these payments. We did not assume
9 the loan. They did not enter into an assumption agreement with us. We agreed to make the
10 payments, absolutely. So we are on the book for payments for the period of our bond for title. I
11 will happily admit that.

12 THE COURT: Well the note says with interest from the date at the rate to and according to the
13 terms of that note given by the Ottos to Chase in 2004. I am trying to work my way through this
14 because this has been arranged in such a different way and obviously the way - - I mean it was
15 made basically, you assume my payments and you can have my property.

16 MS. CULBERTSON: Correct. Yes, Your Honor. I believe that was it.

17 THE COURT: I mean that looks like it. If you go to the bottom line. You give me this much
18 money and this much money and take over my payments or assume my payments you can have
19 the property.

20 MS. CULBERTSON: Yes sir.

21 THE COURT: And if you pay pursuant to the terms of those notes then when you are finished
22 then the property is yours. I mean isn't that the bottom line of this?

23 MS. CULBERTSON: Yes, Your Honor.

24 THE COURT: So he didn't make the payments, right?

25 MS. CULBERTSON: Correct.

1 THE COURT: So the question now is as a result of the failure to make the payments what are
2 the damages? In other words, it made the circle again after we are dealing with the issue.
3 MS. CULBERTSON: Correct.
4 THE COURT: What are the damages? The damages are - - but I think the issue is counsel if
5 there were not a demand for deficiency then we wouldn't be going through this exercise.
6 MS. CULBERTSON: Correct.
7 THE COURT: Is that correct?
8 MS. CULBERTSON: Yes sir, absolutely.
9 THE COURT: So at the end of the day that is what we are talking about.
10 MS. CULBERTSON: Yes sir.
11 THE COURT: So it becomes important to determine that amount.
12 MS. CULBERTSON: Yes sir.
13 THE COURT: If there is a deficiency.
14 MS. CULBERTSON: Correct, Your Honor. And I think given that there is not a deficiency in
15 the first mortgage foreclosure and I don't know what is happening in the second mortgage action
16 but that is not a damage that can flow when it doesn't exist uphill - - - .
17 THE COURT: Well it may well if they come after the obligation on the note when they have
18 been wiped out of the property. Mr. Anthony I am waiting for an answer to the damage issue.
19 MR. ANTHONY: To me if there is any validity to the arguments it is that last point that we
20 don't know what Mrs. Otio's ultimate obligation to the Bank is going to be. If in deed, since they
21 have waived the deficiency judgment. And if the Court wanted to reserve that issue I mean we
22 are going to know at the February sale. We are going to know what the property sells for and if
23 the Court wanted to substitute at that point that number whatever it turns out to be. There was a
24 judgment entered against Patty presumably that is the value of the land she is losing for the
25 amount of the first mortgage indebtedness equation. I could understand that approach. I don't

1 know if I enunciated that correctly.

2 THE COURT: No, I understand what you are saying but I am trying to - - -

3 MS. CULBERTSON: And that doesn't adjust the second mortgage.

4 MR. ANTHONY: The second to me, it is done. It has matured. He owes that. He owed that a

5 couple of years ago.

6 THE COURT: The second and the third I am not concerned with because those are obligations

7 that matured and he agreed to pay those obligations pursuant to the terms and that included the

8 balloon, correct?

9 MS. CULBERTSON: Yes, Your Honor.

10 MR. ANTHONY: That is right.

11 THE COURT: Let me look at that.

12 MS. CULBERTSON: What we are arguing is - - well I would argue that she is not entitled to

13 the third mortgage payments but I am not allowed to make that argument since we are in default.

14 THE COURT: Right.

15 MS. CULBERTSON: So when you are looking at his obligations under the contract for deed I

16 am hamstrung by not being able to argue contrary positions.

17 THE COURT: I understand that counsel but I didn't do that to you. That was done by the

18 virtue of your client's activity and that was my ruling based on case law. So lets move on from

19 hamstrung.

20 MR. ANTHONY: That is the bottom of page 3, Your Honor.

21 THE COURT: Three?

22 MR. ANTHONY: Yes sir.

23 THE COURT: All right. A note, a copy of which is attached and incorporated herein . . under

24 the payments are made current or modified by the terms and conditions of the said note and

25 mortgage . . . and a like amount until June 17, 2013, when on that date the balance shall be due

1 and payable. The purchaser acknowledges and agrees that the original terms and conditions of
2 this note . . . all right, so we are done with that one. He did not pay the balance due on the
3 balloon. .

4 MS. CULBERTSON: I think my argument is that doesn't translate to damages that Mrs. Otto has
5 yet suffered.

6 THE COURT: I understand.

7 MS. CULBERTSON: Okay. And if for example you were to go to Carolina First and buy the
8 note for pennies on the dollar then that would no longer be an item of damages that she would be
9 entitled to.

10 THE COURT: Well I didn't hear anybody offer that throughout this.

11 MS. CULBERTSON: But I mean - - -

12 THE COURT: You know that is an option.

13 MS. CULBERTSON: All I am doing is saying that I am not sure how we calculate these
14 damages until everything has been reduced.

15 MR. ANTHONY: Well Your Honor if the Court proceeds as we requested which is having the
16 property foreclosed and the sale left open for the possibility of a deficiency then we are going to
17 know in February what it sells for. You wouldn't ever enter a deficiency until the redemption date
18 is passed and by that time we will of course know what the sale amount was and could put that,
19 we would have that number, once you knew the - - if there was an upset bid you would know
20 what the deficiency against Mr. Munsey was.

21 THE COURT: And that may be the only way to handle this in this case based on the way that
22 this contract for deed was set up because it doesn't make it easy for us to sit here and try to
23 determine what the actual damages are but we do know one thing and that is the first mortgage is
24 foreclosing and the bond for title will be foreclosed. So that interest will be taken care of in that
25 foreclosure. Now is it your intention also to foreclose this bond for title or are you just going to

1 seek whatever the damages are in the form of a deficiency or what is your intention at the end of
2 this?

3 MR. ANTHONY: Well Your Honor the reason we wanted to follow a parallel track here with
4 the other foreclosure is you know my client thinks that this is a realistic possibility. Well we have
5 had in mind all along trying to reinstate this first mortgage and second mortgage.

6 THE COURT: Okay.

7 MR. ANTHONY: And take the property back over. Our primary goal was to get rid of this
8 contract for deed.

9 THE COURT: Okay.

10 MR. ANTHONY: So that we can do that. And again that hinges somewhat on Mr. Walsh's
11 issue because if those judgments apply we probably are not interested in trying to do that. But
12 our goal was that we could foreclose the contract for deed and get his claim against the property
13 out of the way then we would be free to go back to the Bank and try to keep the property and that
14 is still our goal.

15 THE COURT: So it may well be counsel that the only way to handle this is there is no question
16 that there is a default under the contract for deed.

17 MS. CULBERTSON: There is no question that there is a default under the ---

18 THE COURT: I understand that. I am saying it. You don't have to say it. But the other issue
19 is that if there is an amount to be paid by the contract for deed holder to Mrs. Otto we don't know
20 that amount and it is almost impossible to determine that today. So I would entertain the way to
21 do it is to go ahead and set this for sale. You can't determine the amount of the debt but if you
22 can word it that the debt will be determined at a subsequent hearing but it would be subject to a
23 second sale any way and that would be the March sale and then we would have more realistic
24 figures or at least we could determine what the numbers are. Do you see any particular --

25 MS. CULBERTSON: My issue with that is ---

1 THE COURT: I mean there are no payments being made on the property at this point to
2 anybody.
3 MS. CULBERTSON: Correct.
4 THE COURT: And your client is occupying the property.
5 MS. CULBERTSON: Correct.
6 THE COURT: So ---
7 MS. CULBERTSON: And ancillary another issue is going to come into place with regards to
8 your previous ruling about our right of equitable redemption and do you stand by that with regards
9 to this contract for deed as well.
10 THE COURT: Well does that contract for deed have it in it? The problem with that is how are
11 we going to determine if we don't have a number to determine the amount that the contract for
12 deed holder could bid in or a third party could bid in or even Mrs. Otto would bid in at the sale.
13 Do you see what I am saying?
14 MS. CULBERTSON: Because you are saying that there is a redemption.
15 THE COURT: Well no, that is not what I said.
16 MS. CULBERTSON: Well no Your Honor but what you are getting at is if the deficiency is held
17 open ---
18 THE COURT: Well they are seeking a deficiency. That is why I mentioned the March sale.
19 MS. CULBERTSON: All right.
20 THE COURT: Because that would be the second sale. So for the contract for deed holder to bid
21 in there has got to be a number. She has got to bid in her debt or be able to bid her debt at the
22 first sale. So unless we determine that number she can't bid or there is no basis for her bid. And
23 we don't have an appraisal to determine if there is any equity in the property that requires a
24 foreclosure.
25 MS. CULBERTSON: Would Your Honor entertain an option of allowing both parties to submit

1 appraisals and proposals for how the debt should be established or proposals of numbers of what
2 the debt amount should be with an explanation for how it was established. I think today we are
3 not ---
4 THE COURT: No, we are beating the same -- and I keep opening doors and they don't get
5 closed.
6 MS. CULBERTSON: I feel like I have answered multiple questions.
7 THE COURT: Yes. And I don't know -- who is he?
8 MS. CULBERTSON: I am wondering that, too.
9 MR. ANTHONY: He actually is an attorney but not licensed to practice here. He is a friend of
10 Mrs. Otto.
11 THE COURT: Well okay. I know it is hard for you to be silent sir but you are not authorized to
12 appear in this Court as an attorney. Why don't we do that. Submit proposed Orders and a basis
13 for those. All right. Mr. Walsh, I see your hand back there.
14 MR. ANTHONY: Well Your Honor what I was going to request is I was wondering if the Court
15 would consider a recess giving me the right if Ms. Culbertson doesn't object to talk with my client
16 even though she still is seated on the stand.
17 THE COURT: Right.
18 MR. ANTHONY: And see if we can come to some proposal.
19 THE COURT: Do you have any objections to that?
20 MS. CULBERTSON: I have no objections. I don't.
21 THE COURT: All right. Well why don't we take a lunch break and we will come back and
22 maybe start up again. We have got the whole day. We scheduled the whole day and it looks like
23 it may well take it.
24 MS. CULBERTSON: Would you let me go ahead and hear Mr. Walsh's side of the thing before
25 we leave for lunch.

1 THE COURT: Well that is up to him. Are you ---
2 MR. WALSH: Your Honor, it seems to me that the problem with the amount of the debt for Mrs.
3 Otto is the TD Bank amount. I don't know what TD Bank has done in this. I imagine that they
4 have said yes we are owed money and if there is any let us know. So I think TD Bank needs to
5 establish its debt for her to be able to establish what her damages are because if they pay that
6 money to her and she doesn't pay it to TD Bank I think that is maybe a double recovery or
7 something. So I think TD Bank needs to step up or determine what TD Bank is going to do and I
8 don't know what the pleadings are but that is kind of where your problem is in setting your
9 damages are.
10 THE COURT: Well Mr. Walsh you are jumping on everybody's side here today, aren't you?
11 MR. WALSH: No, Your Honor. I am just trying to keep this thing on a regular course.
12 THE COURT: Well that is what I am trying to do. It seems we are trying to do the same thing.
13 All right, Mr. Anthony are you prepared to address Mr. Walsh's issues at this point if we do that
14 or can we do that? And then what we will do is we will start up again about two o'clock, if that
15 suits everybody's schedule and we can hopefully during that time and Mr. Anthony counsel has
16 indicated that she has no objections to your talking to your client during that break. So we will
17 do that. Mr. Walsh if you are ready on your issue or whoever -- I think the issue is whether your
18 judgment or whatever it is encumbers this property.
19 MR. WALSH: I really hadn't prepared to present that but I guess I can try to wing it now.
20 THE COURT: Well do you want to wait until we come back at 2:00?
21 MR. WALSH: Well, no. I will present it right now.
22 THE COURT: All right.
23 MR. WALSH: I think maybe I can. Yes, Your Honor.
24 THE COURT: All right. And Mr. Walsh is here on behalf of ---
25 MR. WALSH: Giese and Kerhulas. Laura Giese and Mark Kerhulas.

1 THE COURT: All right. Co-trustees of the Trust. All right. When you are ready counsel.
2 MR. WALSH: Your Honor, I am afraid that I didn't know to prepare exhibits for everybody. I
3 think most of them were previously attached to my Reply to Motion to Amend and Motion to
4 Disallow the Liens.
5 CROSS EXAMINATION BY MR. WALSH.
6 Q. Mrs. Otto it has been a while since I have seen you. How are you doing these days?
7 A. I am doing fine.
8 Q. Your name is Alyce F. Otto?
9 A. Correct.
10 Q. Are you also known as Patty Otto?
11 A. Yes sir.
12 Q. Mrs. Otto we are here on a piece of property folks have described as 1841 Fairview Farms
13 Road. Has that property also been known as 1842 Fairview Farms Road?
14 A. I believe so.
15 Q. And I am going to show you what I will represent is a warranty deed recorded on July 12,
16 2004 in Deed Book 80-T, Page 257 from Fairview Associates, LLC, to Rudrick G. Otto
17 and Alyce F. Otto for 25.08 acres distribution Tract G, is that the property that U. S. Bank
18 is foreclosing here today?
19 A. It is. Yes sir.
20 Q. And was Mr. Newton your attorney at that closing?
21 A. I don't remember.
22 Q. All right. So you and your husband acquired this property on July 12, 2004 or
23 thereabouts, I think the date on there is also July 12?
24 A. Yes.
25 Q. And I will also show you a mortgage recorded on August 24, 2004 recorded in Real Estate

1 Mortgage Book 3290 at Page 70, and this is a portion of a mortgage from Rudrick G. Otto
2 and Alyce F. Otto also covering Tract G, Greenspace 25.08 acres. Is that the mortgage
3 you gave to Chevy Chase Bank?
4 A. Yes.
5 Q. Do you know what you paid to purchase that property?
6 A. I don't.
7 MR. WALSH: May I introduce this as Kerhulas Exhibit Number 1.
8 THE COURT: All right. Any objections?
9 MR. ANTHONY: No objections, Your Honor.
10 MS. CULBERTSON: No.
11 MR. WALSH INTRODUCES INTO EVIDENCE A COPY OF A WARRANTY DEED,
12 RECORDED IN DEED BOOK 80-T AT PAGE 257, MARKED AS DEFENDANT
13 KERHULAS'S EXHIBIT NUMBER 1.
14 THE COURT: All right.
15 MR. WALSH: And this mortgage, this is not the full mortgage, I think that is probably of
16 record in here. This is just mine to show the date that this document was recorded.
17 THE COURT: Do you want this writing up here put in?
18 MR. WALSH: Well it doesn't really matter.
19 THE COURT: Well it does if you are going to put it in, if it is going to be scanned in I think we
20 should mark it out.
21 MR. WALSH: Okay.
22 THE COURT: I don't think that makes any difference as far as the validity of the document
23 itself.
24 MR. WALSH: And this is Kerhulas's Exhibit Number 2.
25 THE COURT: And this is just a portion of the mortgage?

1 MR. WALSH: Yes. It is just the first page and the description.
2 THE COURT: All right.
3 MR. WALSH INTRODUCES INTO EVIDENCE A COPY OF THREE PAGES OF THE
4 MORTGAGE RECORDED IN BOOK 3290 AT PAGE 70, MARKED AS DEFENDANT
5 KERHULAS'S EXHIBIT NUMBER 2.
6 THE COURT: All right.
7 Q. If you will note on here the third page. The Affidavit of Consideration doesn't state that
8 there was any money paid for that acquisition of the property, is that correct?
9 A. That is correct.
10 Q. And on the front page there the doc stamps that are paid for recording three seventy per
11 thousand the figure on the doc stamps is zero?
12 A. Yes.
13 Q. All right. Can you tell me what this is?
14 A. This is the note from me to the Kerhulas Trust for the teahouse.
15 Q. For the teahouse?
16 A. Yes.
17 Q. And is it one point four seven (1.47) million?
18 A. It is.
19 Q. And that is dated May 1, 2007?
20 A. It is.
21 Q. So you incurred that debt after you acquired this property that is the subject of the
22 foreclosure today?
23 A. Yes. We acquired that property in 2001.
24 Q. Okay. This deed states 2004?
25 A. All right. My husband was Fairview Associates.

1 Q. He was Fairview Associates, okay. So that was acquired in 2001.
2 A. Yes.
3 Q. And it was put in your name?
4 A. Yes.
5 Q. So at the time that you signed this note on May 1, 2007, you still owned this property,
6 Tract G, the 25.08 acres?
7 A. We did.
8 Q. Have you ever paid off that debt to the Kerhulases?
9 A. I have not.
10 Q. All right.
11 **MR. WALSH INTRODUCES INTO EVIDENCE A COPY OF A NOTE DATED MAY 1.**
12 **2007, MARKED AS DEFENDANT KERHULAS'S EXHIBIT NUMBER 3.**
13 **THE COURT:** All right.
14 Q. And can you tell me what this is?
15 A. This is the foreclosure from the Kerhulases.
16 Q. And that was entered over in Greenville County?
17 A. Yes.
18 Q. And it appears to have been entered on September 20, 2011?
19 A. Yes.
20 Q. Maybe September 21. I am looking at that back page there. And the amount of the debt
21 on which the foreclosure was based was One million eight-hundred nine dollars and some
22 change?
23 A. I guess that was it.
24 Q. The decree amount before the sale of the property?
25 A. Yes.

1 MR. WALSH: We offer this as Kerhulas's Exhibit Number 4.
2 THE COURT: Exhibit 4.
3 MR. WALSH INTRODUCES INTO EVIDENCE A COPY OF A DECREE OF
4 FORECLOSURE AND SALE, CASE NUMBER, 2009-CP-23-10866, MARKED AS
5 DEFENDANT KERHULAS'S EXHIBIT NUMBER 4.
6 THE COURT: All right.
7 Q. And I will show you two documents recorded in Deed Books 95-A, Page 435 and 439.
8 Can you tell me what these two (2) documents are?
9 A. These are documents establishing I guess the property going into a trust for my husband
10 and then one going in for myself.
11 Q. Okay. Can you tell us what the dates on those deeds are?
12 A. Yes. The 17th day of November 2009.
13 Q. The 17th day of November 2009, which is after you entered into the debt with the Kerhulas
14 Trustees on May 1, 2007?
15 A. Yes.
16 Q. Okay. So at the time that you transferred the property into the trust you still owed the
17 money to the Kerhulas?
18 A. I guess.
19 Q. Has that money been paid to this date?
20 A. No.
21 Q. What did you receive in consideration for the conveyance to the Trust?
22 A. I didn't receive anything.
23 Q. You didn't receive anything? No consideration?
24 A. No.
25 Q. All right.

1 MR. WALSH: We offer these.

2 THE COURT: Exhibit 5 and 6.

3 MR. WALSH INTRODUCES INTO EVIDENCE A COPY OF A TITLE TO REAL
4 ESTATE, RECORDED IN BOOK 95-A, PAGE 435, BY RUDRICK G. OTTO, MARKED
5 AS DEFENDANT KERHULAS'S EXHIBIT NUMBER 5.

6 MR. WALSH INTRODUCES INTO EVIDENCE A COPY OF A TITLE TO REAL
7 ESTATE, RECORDED IN BOOK 95-A, PAGE 437, BY ALYCE F. OTTO, MARKED AS
8 DEFENDANT KERHULAS'S EXHIBIT NUMBER 6.

9 THE COURT: All right.

10 Q. I will show you a document dated or at least recorded on February 10. It is dated
11 February 9 and recorded on February 10 and recorded in Deed Book 97-V, Page 181. Can
12 you tell me what that is?

13 A. It is the trust, putting I guess it is the property going into my trust.

14 Q. When did Rudrick, when did your husband die?

15 A. He died December 2, 2009.

16 Q. On December 2, 2009?

17 A. Yes.

18 Q. And so on this document you are acting as the successor Trustee under his Trust to convey
19 the property to yourself as Trustee under your Trust, is that correct?

20 A. To my trust.

21 Q. Okay. And the properties conveyed are the twenty five (25) acres, Tract G, which is the
22 property that we are here on today?

23 A. That is correct.

24 Q. The Lot A, Arthur B. Coggins and James E. Ashmore, what property is that?

25 A. I believe that is probably a piece of property that is attached to the Fairview, the

1 Greenspace.

2 Q. Okay. It is a good ways away. Is this maybe the Hare and Hound property in downtown

3 Landrum?

4 A. I don't think so.

5 Q. Okay. It is Block Map 1 08-05 and your Greenspace is 1 03-00?

6 A. No, it wouldn't be there. No.

7 Q. Okay. Whatever it is it is conveyed to you right?

8 A. Conveyed to the Trust.

9 Q. Conveyed to you as Trustee for the Trust, is that correct?

10 A. Yes.

11 Q. And what consideration did you receive for that conveyance?

12 A. None.

13 Q. No consideration?

14 A. No.

15 Q. And the Declaration of Trust of Alyce F. Otto, were you told that was a family trust?

16 A. Sir, I really don't remember what it was called. My husband was dying. An attorney for

17 estate planning said this was what needed to be done.

18 Q. Okay. Was this to avoid having any creditors come after your assets?

19 A. Absolutely not.

20 Q. Okay. So this is all subject to claims of your creditors, is that correct?

21 MR. ANTHONY: That question would call for a legal conclusion.

22 THE COURT: I will sustain that.

23 Q. What was your understanding of the reason for the creation of the Trust?

24 A. Probate.

25 Q. To avoid Probate?

1 A. It was said that - - well I don't know. Our estate lawyers said this is what was supposed
2 to be done. My husband was dying. I did what they said. You are asking me questions
3 that I can only tell you that I did what I was told to do.

4 MR. WALSH: I offer this as Exhibit 7.

5 THE COURT: All right.

6 MR. WALSH INTRODUCES INTO EVIDENCE A COPY OF TITLE TO REAL ESTATE,
7 RECORDED IN DEED BOOK 97-V, PAGE 181, MARKED AS DEFENDANT
8 KERHULAS'S EXHIBIT NUMBER 7.

9 THE COURT: All right.

10 Q. And I will show you two documents, recorded on February 10, 2011 in Deed Books 97-V,
11 Page 173 and Book 97-V, Page 186, Certifications of Trust for Alyce F. Otto and Rudrick
12 G. Otto. Are those documents relating to the Trust?

13 A. Yes sir.

14 Q. And it just puts on the record what the authority of the Trustee is. Is that your
15 understanding of it?

16 A. Yes.

17 Q. Does it state that it is a revocable? That each of them is revocable trust?

18 A. I really don't know.

19 Q. Okay. Lets look at Paragraph 3.

20 A. It says it is revocable.

21 Q. Okay. Do you know what that means?

22 A. I guess that it could be revoked.

23 Q. Okay. That means at any time you can just take the assets out of the Trust and put it back
24 in your name if you wanted to?

25 A. I don't know if that is what it means or not.

1 MR. WALSH: I offer this.
2 THE COURT: This will be Exhibit 8. And this will be 9.
3 MR. WALSH INTRODUCES INTO EVIDENCE A COPY OF A CERTIFICATION OF
4 TRUST, RECORDED IN BOOK 97-V, PAGE 186, MARKED AS DEFENDANT
5 KERHULAS'S EXHIBIT NUMBER 8.
6 MR. WALSH INTRODUCES INTO EVIDENCE A COPY OF A CERTIFICATION OF
7 TRUST, RECORDED IN BOOK 97-V, PAGE 173, MARKED AS DEFENDANT
8 KERHULAS'S EXHIBIT NUMBER 9.
9 THE COURT: All right.
10 Q. Mrs. Otto, I am going to show you what I will represent is an index from the Greenville
11 County Judicial Circuit showing the actions and the parties in the case of Laura Kerhulas
12 Giese, et al., versus Shamrock Realty, et al., including Alyce Otto. If you would, can you
13 tell me what the file date is?
14 A. It is 12-22-2009.
15 Q. And the disposition date on here?
16 A. It is September 21, 2011.
17 Q. And I will show you the last page which I will represent is the Spartanburg County public
18 index. Can you tell me what the file date for this is?
19 A. It is 1-3-2012.
20 Q. And does that indicate the deficiency judgment of the Kerhulas which was brought over to
21 Spartanburg County and filed on that date?
22 A. I guess. The amount is wrong.
23 Q. With regards to the amount that is wrong you went through the appraisal process and that
24 amount was reduced according to your appraisal?
25 A. Yes.

1 Q. All right.

2 MR. WALSH: I don't know if I should make this one exhibit or two.

3 THE COURT: We will make the Greenville County one of them and the Spartanburg another
4 one.

5 MR. WALSH: Yes sir.

6 THE COURT: Exhibits 10 and 11.

7 MR. WALSH INTRODUCES INTO EVIDENCE A COPY OF A GREENVILLE COUNTY
8 PUBLIC INDEX SHEET FOR LAURA KERHULAS GIESE, ET AL., VERSUS
9 SHAMROCK REALTY INVESTMENTS, LLC, ET AL., (2009CP2310866), MARKED AS
10 DEFENDANT KERHULAS'S EXHIBIT NUMBER 10.

11 THE COURT: All right.

12 MR. WALSH INTRODUCES INTO EVIDENCE A COPY OF A SPARTANBURG
13 COUNTY PUBLIC INDEX SHEET FOR LAURA KERHULAS GIESE, ET AL., VERSUS
14 SHAMROCK REALTY INVESTMENTS, LLC, ET AL., (2012CP4200014), MARKED AS
15 DEFENDANT KERHULAS'S EXHIBIT NUMBER 11.

16 THE COURT: All right.

17 Q. Mrs. Otto do you have the present ability to pay this - - and just for the record and I don't
18 have a copy of the document for some reason but that judgment that we just introduced
19 was reduced to, does this sound about right, \$228,329.90 plus interest from December 10
20 at 8%, it was pretty much cut in half. Do you currently have the ability to pay this
21 judgment?

22 A. No sir.

23 Q. All right.

24 MR. WALSH: Your Honor, that is all I have. I will be glad to present some legal arguments for
25 the benefit of the Court, but that is all I have from this witness.

1 THE COURT: All right. Mr. Anthony.

2 REDIRECT EXAMINATION BY MR. ANTHONY.

3 Q. Mrs. Otto, I am going to ask you some questions particularly pertaining to this Kerhulas
4 judgment. You entered into this transaction with them about May of 2007?

5 A. Right.

6 Q. Is that right?

7 A. Right.

8 Q. And the Court may be aware but you have operated the Hare and the Hound Restaurant in
9 Landrum for a number of years?

10 A. I have sir.

11 Q. And this Kerhulas property is what was called the teahouse on Lake Lanier?

12 A. Correct.

13 Q. And you bought this from them to operate as a second restaurant didn't you?

14 A. Correct.

15 Q. And you did in fact operate it as a restaurant there and made payments to the Kerhulas
16 according to your agreement?

17 A. Yes sir.

18 Q. And what happened in 2009 that caused you and your husband to deed your home into this
19 trust?

20 A. My husband became ill and his death was perceived so we knew he was dying and we
21 sought legal advice as far as estate planning and it was recommended that we put the
22 property in a trust.

23 Q. Whom did you go to?

24 A. Mr. Brennan in Spartanburg.

25 Q. Brennan, Jim Brennan?

1 A. Jim Brennan, yes sir.
2 Q. Who is an estate planning attorney?
3 A. Yes sir.
4 Q. And the two of you went to him for purposes of looking at your estate and recommending
5 what to do?
6 A. Correct.
7 Q. And his recommendation was that these properties be placed into the trust?
8 A. That is correct.
9 Q. Was there any discussion about doing this in an effort to avoid the Kerhulases or any other
10 creditors?
11 A. Absolutely not.
12 Q. In fact, at the time of his death and afterwards you were still operating the teahouse
13 restaurant weren't you?
14 A. I was.
15 Q. And you were still making payments to the Kerhulases?
16 A. I was.
17 Q. All right. You certainly wasn't in default in payments when the deeds went into the trust?
18 A. Correct.
19 Q. And you continued to make payments to the Kerhulases for how long after?
20 A. On through 2010. I left the teahouse in November of 2011.
21 Q. All right. So up until November of 2011 you were still trying to make a go of it?
22 A. I was.
23 Q. And you were still making payments to the Kerhulases?
24 A. Yes, in some form or another. Selling properties or whatever, yes.
25 Q. So with titling the properties into the trust, was that at any time intended to defeat the

1 Kerhulases or any other person or bank that you owed money to?

2 A. No sir.

3 Q. All right.

4 MR. ANTHONY: That is all I have, Your Honor.

5 THE COURT: Mr. Walsh?

6 **RECROSS EXAMINATION BY MR. WALSH.**

7 Q. Mrs. Otto the first payment you missed was the November 1, 2008 payment before you

8 started these trusts? That is what was alleged in the Complaint to the trial?

9 A. In 2008.

10 Q. November 1, 2008 was the first payment that you missed and you did make sporadic

11 payments occasionally but by 2009 you never made any payments after that except when

12 you sold property, is that correct?

13 A. We sold property and I also gave credits to Mark to let him keep the payments---

14 Q. There was a payment to Mark Kerhulas?

15 A. Quiet a large one. And a three hundred thousand dollar lot, yes sir.

16 Q. All right.

17 MR. WALSH: That is all I have.

18 THE COURT: Mr. Anthony.

19 **REDIRECT EXAMINATION BY MR. ANTHONY.**

20 Q. Tell us a little bit more about that lot that you transferred?

21 A. The property I had divided into three (3) lots. It was next to the teahouse property. The

22 entire plan of the project was to sell off those lots to reduce the debt and the teahouse. So

23 I would be into the teahouse for something that was reasonable. I sold one (1) lot and I

24 gave all of the money from that lot to reduce the debt of the teahouse. I also started a spec

25 house which I put \$289,000.00 in building and to try to sell this spec house to reduce the

1 debt. So that continued up until well I mean all through 2010. And at that point I had
2 \$289,000.00 in the house and I sold the one (1) lot for Three hundred thousand. So I
3 continued to try to get support from you know trying to get investors. I did everything I
4 could to keep the teahouse going. I didn't try to avoid anything. I tried to keep it going
5 until the day that I walked out.

6 Q. And the three hundred thousand payment was about when?

7 A. That was in 2010.

8 Q. All right. Thank you.

9 MR. ANTHONY: That is all I have.

10 **RECROSS EXAMINATION BY MR. WALSH.**

11 Q. And none of those payments ever brought the loan back current? You were always
12 continually in default after November 1, 2008?

13 A. I never made the regular payment, no sir. But yes after 2008, I made a payment before
14 2009 but no I never was, I was always trying to keep ahead of it, yes.

15 THE COURT: All right. Mr. Walsh any argument?

16 MR. WALSH: Yes, Your Honor. The Statute of Elizabeth provides that a fraudulent transfer,
17 any transfers made for the purpose to delay, hinder, or defraud creditors and others of their just
18 lawful debts may be deemed and taken to be clearly and utterly void, frustrated and of no effect,
19 any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the
20 contrary notwithstanding. That is the *Albertson v. Robinson* case, 638 S.E.2d 81 at Page 83. That
21 is the Court of Appeals in 2006. There are certain rules in establishing a fraudulent transfer. The
22 first rule is a creditor needs to establish the grantor was indebted to the creditor at the time of the
23 transfer. Okay. And I have established that the debt arose on May 1, 2007 and the transfer to the
24 Trust was on November 18, 2008. That was the first fraudulent conveyance. The conveyance
25 was voluntary. You know there wasn't any requirement that she make this conveyance. She told

1 us because they found out her husband was sick but she also stated that it was without
2 consideration. And the grantor failed to retain sufficient property to pay his indebtedness to the
3 creditor in full. Not merely at the time of the transfer but in the final analysis when the creditors
4 seek to collect the debt. That is *Mathis v. Burton*, 460 S.E.2d 406, at Page 408, Court of Appeals
5 1995. Quoting *Albertson v. Robinson*. And they at one point said well the judgment wasn't
6 obtained until after the debt. The case of *Matthews v. Montgomery*, addresses that issue, at 7
7 S.E.2d 841, a 1940 case from the Court of Appeals. It does not matter whether a creditor
8 obtained the judgment against a property owner before the conveyance: It is only necessary that
9 the debt should have been in existence or the right of action have accrued at or before the time of
10 the transfer. And of course, we have proven that the debt existed prior to the transfer. It may be
11 reduced to a judgment at a later date. We have shown that it has been reduced to judgment. To
12 determine whether a person is such an existing creditor as can invoke the protection of the Statute
13 of Elizabeth the inception of the debt or obligation is the time which controls and not the date of
14 the subsequent entry of judgment. And again *Albertson v. Robinson* quotes *Matthews v.*
15 *Montgomery*. And in *Durham v. Blackard*, which is a 1993 Court of Appeals case, also cited in
16 *Mathis v. Burton*. Conveyances can be set aside for existing creditors as well as for subsequent
17 creditors. For existing creditors, conveyances can be set aside in two instances. First, when the
18 challenged transfer was made for a valuable consideration. That is not the case here. She has
19 testified that there was no consideration. It will be set aside if the Plaintiff establishes that (1) the
20 transfer was made by the grantor with the actual intent of defrauding his creditors and (2) the
21 grantor was indebted at the time of the transfer, and the grantor's intent is imputable to the
22 grantee. Second, where the transfer was not made on a valuable consideration, as is the case
23 here, no actual intent to hinder or delay creditors must be proven. Instead, as a matter of equity,
24 the transfer will be set aside if the Plaintiff shows that the grantor was indebted to him at the time
25 of the transfer. Again we have shown the May 1, 2007 debt and the November 1, 2008 transfer.

1 The conveyance was voluntary, which it was. And the grantor failed to retain sufficient property
2 to pay the indebtedness to the Plaintiff in full, not merely at the time of the transfer, but in the
3 final analysis when the creditor seeks to collect his debt. That is *Durham v. Blackard* as cited in
4 *Mathis v. Burton*. And one other case is probably applicable here, *Windsor Properties,*
5 *Incorporated v. Dolphin Head Construction*, 331 S.C. 466 at Page 471 and 498 S.E.2d 858 at
6 Page 860, a 1998 case. With a voluntary inter-family transfer, which is here, a transfer
7 voluntarily from a person to that person's trust for their benefit. The burden shifts to the
8 transferee, that is the trustee of the trust, to establish the transfer was valid. Where transfers to
9 members of the family are attacked either upon the ground of actual fraud or on account of their
10 voluntary character, the law imposes the burden on the transferee to establish both a valuable
11 consideration, which she has already testified that there was none and the bona fides of the
12 transaction by clear and convincing testimony. So I would move that you find that the Kerhulas
13 Trust does apply to the standards of a junior lien. I don't know that it will do us much good but it
14 will also apply to her other property which she has transferred into this Trust. Thank you, Your
15 Honor.

16 THE COURT: Mr. Anthony.

17 MR. ANTHONY: Well Your Honor, you have heard the testimony and it is uncontradicted that
18 the reason for putting this into the Trust was the illness and expected death of her husband. And I
19 think that is borne out by the fact of the attorney they went to, Jim Brennan, who is known to be a
20 very fine estate planning attorney and that was the reason that they went there not to try to avoid
21 creditors. There is not a showing that this lender, Mrs. Otto is any less able to pay this judgment
22 than she would have been otherwise. I would point out that she and it ties into what we have
23 been here about all day. The only other asset that she has got of any significant is this home there
24 and she is selling that to Mr. Munsey for an amount essentially to take the debt off of me and you
25 can have it. So there was no equity there in that property that was being sold. She is in no

1 different financial position by virtue of selling that. There is not any evidence to show that she
2 became any less able to pay the Kerhulas debt once this property was transferred because this
3 property appears to not have any equity any way. So there is no evidence of intent. I mean it is
4 called a fraudulent transaction and fraud requires an intent. And there is no testimony been
5 presented whatsoever by the Kerhulases to show that this was done in an intention to defeat their
6 judgment and as the Court has heard there were payments made long after the property was
7 transferred. Sizable payments made long after the property was transferred. We ask the Court to
8 find that there was no fraudulent intent and that the judgments are not valid against this property.
9 People are free to title property however they desire and on the advice of their attorney and this
10 was what was recommended and what was done.

11 THE COURT: All right.

12 MR. WALSH: Well I think that he overlooked that when there is a voluntary transfer between
13 family members the burden is on her and it doesn't matter whether fraud is shown or not it is just
14 a matter of whether or not she can pay the debt. Also, I would refer the Court to South Carolina
15 Code Section 62-7-505, the South Carolina Trust Code. It states, creditors' claims against settlor.
16 Whether or not the terms of a trust contain a spendthrift provision, the following rules apply.
17 During the lifetime of the settlor, the property of a revocable trust is subject to claims of the
18 settlor's creditors. And the Kerhulas Trust is one of her creditors. Thank you.

19 THE COURT: Mr. Anthony any response to that?

20 MR. ANTHONY: No. Nothing further.

21 THE COURT: What is that Code section again?

22 MR. WALSH: It is 62-7-505.

23 THE COURT: All right. I am going to find that this judgment does encumber this property.

24 MR. WALSH: Thank you, Your Honor.

25 MR. ANTHONY: Your Honor, is that ruling based on the Code Section?

1 THE COURT: That is the Code Section based on the fact that the -- and when Mr. Walsh was
2 going through that the buzz word that caught my ear was the revocable portion. If it is revocable
3 that interest is subject to the creditors during the life time of the settlor. So the Code Section is
4 what I am finding it on, well the transfer itself was done without consideration during the term so
5 it does apply based on really both of those issues. One, the Code Section as far as the Trust and
6 then again a revocable trust and the other is the transfer was made during the existence of the debt
7 without consideration into this Trust. All right.

8 MR. ANTHONY: What I am trying to clarify Your Honor is not that the transaction has to be
9 reversed but simply a ruling based on the Code Section that the judgments apply regardless of the
10 Trust.

11 THE COURT: Well the transfer is not set aside.

12 MR. ANTHONY: That is all I am asking.

13 THE COURT: But the encumbrance or this judgment encumbers the property. We are not
14 setting aside the transfer.

15 MR. ANTHONY: That was what I was asking.

16 THE COURT: It is just a finding that whatever is left of this ---

17 MR. WALSH: The assets are subject to the judgment.

18 THE COURT: Right.

19 MR. ANTHONY: Thank you, Your Honor. That is all I wanted to clarify.

20 THE COURT: So we will re-adourn at 2:15.

21 MR. WALSH: Do I need to draft an Order to that effect or will it be ---

22 THE COURT: It won't be any where else. So you need to draft an Order.

23 MR. WALSH: Yes sir.

24 (RECESS)

25 THE COURT: We are back on the Record in Case Number 2012-CP42-3549. Mr. Anthony.

1 MR. ANTHONY: May it please the Court, I appreciate opposing counsel allowing me to talk
2 with my client over the break and I hope that - - well I feel like that I have got a solution to the
3 question or the answer for the Court. In part of the Court's ruling on the Kerhulas judgment to
4 resolve that because it looks like there is no possibility of reinstatement of the first mortgage at
5 this point. The first thing that I did Your Honor was I cleaned up this sheet that I prepared on the
6 third mortgage to make it cleaner, if that is all right.

7 THE COURT: All right.

8 MR. ANTHONY: And it just pertains to the third mortgage. Now the balance, the interest and
9 then tell us what that amount would be due today and without that confusing credit that was on
10 there before and the attorney's fees are not logged in so they are separately stated in the Affidavit
11 that has been handed up. So my proposal at this point, Your Honor, is that we essentially waive
12 our foreclosure action. Since that is being taken care of by the first mortgage foreclosure action.
13 Since there is no sense in our trying to foreclose the contract for deed when the first mortgage
14 action is taking it away, well taking care of that aspect of it having the property sold and therefore
15 no reason to hold the sale open and no reason to seek a deficiency judgment at this point. So then
16 the only, in the same way a bank sometimes will choose not to foreclose their mortgage but rather
17 simply collect on the note. And so we would then ask the Court just to award a judgment in the
18 amount that the Court finds appropriate based on the Contract for Deed and the notes that were
19 attached to the Contract for Deed. And the way that we would calculate this is I prepared this
20 summary sheet to see if I can keep my numbers and myself straight here. And the way that we
21 would calculate that, the amount that was due under the Contract for Deed is just as I have set
22 forth here. The first mortgage as established by the Bank. The second mortgage as established
23 by the TD Bank statement. The third mortgage is established by the sheet that I have just handed
24 up to the Court. The Greenspace debt, the attorney's fees and costs which is set forth in the
25 Affidavit and the credit for the three (3) checks that have been put into evidence that were

1 returned by the first mortgage holder. That would give a total of One million four hundred
2 twelve three hundred ninety five & 49/100 (\$1,412,395.49) dollars. What we would prefer to do
3 less somehow we get a windfall on the first mortgage if it is bid in for less and there is no
4 deficiency we would be content for the Court to not enter this judgment until after the sale price of
5 the property is determined at the February sale and then just substitute for this top number that we
6 have got whatever the sale price is because that will have established the value of the property
7 which we have lost as a result of the failure to make the payments under the Contract for Deed. If
8 it sells for Seven hundred thousand then this total will be reduced by the difference and that would
9 be substituted for the first line. If it sells for Nine hundred fifty thousand dollars that would
10 become the first line of that total. I hope that this -- all of that makes sense to me, over the last
11 hour that I have sat and thought about it. I hope that is an eligible solution to the problem we are
12 trying to determine what is due under the Contract for Deed without the necessity of some how
13 having --- Your Honor after I thought about it, there is no way that I can see to have a deficiency
14 judgment anyway because once the property has been sold by the Bank at the February sale
15 nobody can come in and bid it in this action because the property has already been sold with a
16 private sale.

17 THE COURT: All right. Counsel.

18 MS. CULBERTSON: Judge first of all I point out that there is still the money left in trust with
19 Mr. Anthony's office that he had agreed previously to discount which was Six thousand forty four
20 & 10/100 (\$6,044.10) dollars.

21 THE COURT: Lets stop at that point. Is that in these figures?

22 MR. ANTHONY: It is not. I forgot it.

23 THE COURT: Okay. All right.

24 MR. ANTHONY: I was still thinking that it was included in the fifteen. But I stipulated earlier
25 when Erin said so that it was a credit.

1 THE COURT: So this figure ---
2 MR. ANTHONY: And I will be glad to have my office run this again and bring it back.
3 THE COURT: That number would be, the fifteen thousand ---
4 MS. CULBERTSON: No, Your Honor. I think it would make more sense just to add another
5 line item under returned checks just for trust account purposes.
6 MR. ANTHONY: Right. Trust account funds.
7 MS. CULBERTSON: A credit of ---
8 MR. ANTHONY: A credit of \$6,044.10.
9 THE COURT: So that would be minus six, what is that amount?
10 MS. CULBERTSON: Six zero four four point one zero.
11 THE COURT: Okay.
12 MS. CULBERTSON: But on a larger scale Judge, I still think that conceptually this is not an
13 accurate representation of damages under the contract for deed. Mr. Anthony made reference to a
14 deficiency under the first mortgage. They are not seeking a deficiency so whether the property
15 sells for Seven hundred thousand dollars or Two million dollars that does not matter under the
16 contract for deed. And over lunch I was sort of thinking about it in my mind that the analysis
17 should be how would Mrs. Otto be made whole under the contract for deed. In my opinion that is
18 the analysis we are looking at to determine her damages. And on its face which means we have
19 to look back to the contract for how it handles default and in Paragraph 13 on Page 12, which in
20 this case Notice of Default, Right to Cure, and then stipulates that seller's interest shall be treated
21 as interest of the holder of a third mortgage and the remedy of seller shall be to foreclose the
22 interest of the purchaser in the same manner as the seller would foreclose the interest of the
23 purchaser. So it does not allow for the proposal that Mr. Anthony has just made to the Court.
24 THE COURT: Well it does say the remedies set forth are not exclusive. On the next page, Page
25 13.

1 MS. CULBERTSON: Your Honor I would assume that if the contract which was negotiated
2 between the parties stipulated how a default would be handled the Court should refer to the terms
3 of that contract as to how to establish damages but even without regard for that, I still think
4 conceptually there is a gap here. Mrs. Otto was going to be made whole under the contract for
5 deed if my client had performed. He would have ultimately paid off the first mortgage, paid off
6 the second mortgage and paid off the third mortgage and she would deed the property to him.

7 THE COURT: Correct.

8 MS. CULBERTSON: Correct. Now if the property under the first mortgage, if the first
9 mortgage forecloses the property they are going to satisfy their mortgage under the foreclosure
10 proceedings and they are not seeking a deficiency against Mrs. Otto and Mrs. Otto will no longer
11 own the property. So the result would be - - -

12 THE COURT: But here the property is lost as a result of the inaction or nonpayment of your
13 client.

14 MS. CULBERTSON: Understood. But I am trying to get conceptually at the damages on it. If
15 we had performed she wouldn't own the property anymore and the Bank would be paid off. We
16 didn't perform and the Bank is going to be paid off and she is not going to own the property any
17 more but that doesn't necessarily cause her any damages because the Bank is not seeking a
18 deficiency against her for any gap there in the middle.

19 THE COURT: So the fact that the Bank is not seeking a deficiency then excuses a default or any
20 judgment by your client?

21 MS. CULBERTSON: No sir. I don't think that it excuses any default but I think that it
22 establishes a zero damage number, well maybe not a zero damage number. I think she would
23 have incurred attorney fees in defending that foreclosure action. But if the theory is to be made
24 whole under the contract for deed and the first mortgage company is going to foreclose and their
25 mortgage will be paid off at the foreclosure sale and they are not seeking deficiency then at the

1 end of the day Mrs. Otto has not suffered any money damage and we should not be accountable
2 for One point one million dollars worth of damages on that. It is sort of analysis to you know if
3 we had paid off, if Mr. Munsey got a loan and paid off the Bank, paid off Capital One, the payoff
4 to Capital One and this example would not translate as well, but the payoff to Capital One would
5 be whatever their payoff amount was and not one penny would go to Mrs. Otto.

6 THE COURT: All right.

7 MS. CULBERTSON: Correct. Again if we had performed under the contract for deed it did not
8 anticipate Mrs. Otto making any more money than what she had made, than what she had been
9 paid in cash at the closing and her second mortgage.

10 THE COURT: Okay.

11 MS. CULBERTSON: So I see anything above and beyond as a windfall. Particularly if the
12 Court rules that she is entitled to any surplus funds.

13 THE COURT: Okay. Mr. Anthony.

14 MR. ANTHONY: Well, Your Honor, to say that if my client loses a property that is worth seven
15 fifty or nine fifty or a million two that she has suffered no damage that is just ludicrous. We are
16 agreeing and suggesting that the number, the amount of her loss when she loses the property is
17 whatever the sale price turns out to be. I think that there is no more accurate way to ascertain
18 what her damage on that line item is. To say oh well, you have lost the property but you don't
19 have to pay the Bank any money so you don't have any damages. Well she just lost a very
20 valuable asset that was supposed to make her some money. I can see that number being reduced.
21 I can't see it going to zero.

22 MS. CULBERTSON: I think Your Honor if we had performed under the mortgage she would
23 have been entitled to more money for the property upon a payoff of the first mortgage.

24 THE COURT: Well the only thing that I am concerned with well not the only thing but is the
25 loss that she will be subject to at some point the possibility of an action by the second mortgage.

1 MS. CULBERTSON: I agree, Your Honor.
2 THE COURT: And also she has lost the third mortgage. Now I don't know whether she has
3 incurred the Greenspace debt but that will be foreclosed with the property.
4 MR. ANTHONY: Greenspace has already sued her and obtained a judgment in the amount of
5 Forty five hundred, I believe.
6 THE COURT: Against her personally?
7 MR. ANTHONY: Against her personally. It is forty five hundred ninety dollars. So there is no
8 reason to think that they won't pursue the larger amount at some point. Particularly that Twenty
9 thousand dollar capital call.
10 THE COURT: Well I was not aware of that judgment.
11 MR. ANTHONY: No. But that is included in the amount that we submitted.
12 THE COURT: The Thirty nine thousand two hundred?
13 MR. ANTHONY: Yes sir.
14 MS. CULBERTSON: Judge while you are ruminating there is a couple of - - -
15 THE COURT: While I am doing what?
16 MS. CULBERTSON: While you are ruminating.
17 THE COURT: Ruminating.
18 MS. CULBERTSON: There are a couple of more new options I would like to throw at you.
19 THE COURT: Okay.
20 MS. CULBERTSON: One is when the Munseys, when Jack Munsey entered into this contract
21 for deed part of the purchase price was a reinstatement fee to Capital One of fifty three thousand
22 and some odd dollars which is reference to the contract for deed as one of the line items it
23 comprises, that One point four million dollar purchase price. It is close to fifty one thousand
24 dollars. So that indicates that Mrs. Otto was already in default with Capital One before we were
25 even on the scene.

1 THE COURT: But that just enabled you to start at zero at the time the contract for deed went
2 into effect.

3 MS. CULBERTSON: Correct Your Honor. That was necessary to be paid in order to reinstate
4 that first mortgage so they didn't foreclose.

5 THE COURT: Right. That is what I am saying. It brought them to zero and everybody
6 basically started the clock running again with that reinstatement figure.

7 MS. CULBERTSON: Correct, correct. But you know Mr. Anthony's argument that my client's
8 default is the only reason that we are here isn't exactly true. And then one other item that I was
9 looking at over lunch on this account statement we got from the first mortgage holder, Mrs. Otto
10 only claims that she got those three (3) checks back totaling that Fifteen thousand dollar number
11 that we have been given credit for but there is another refund shown on here of Ten thousand
12 dollars, ten thousand six zero one. So I think that amount needs to be accounted for.

13 THE COURT: I don't know that there is a check or anything else evidencing that.

14 MS. CULBERTSON: Well the lender indicates they made that refund to her.

15 THE COURT: Let me see if I can -- is that figure right, first mortgage, is that the right figure?

16 MR. ANTHONY: The first mortgage.

17 THE COURT: All right. Okay. One eight three four six one six.

18 MR. ANTHONY: Actually I left the sixty cents off.

19 THE COURT: No, I was thinking that it was higher than that. Okay. The obligation on the
20 Greenspace part of that has been reduced to a judgment.

21 MR. ANTHONY: Yes, Your Honor.

22 THE COURT: And what is the result of the rest of it? Is it going to be foreclosed or is there any
23 outstanding obligation that will follow?

24 MR. ANTHONY: I don't know what will become of the rest of that debt. I think that we have
25 got a couple of representatives of Greenspace in the courtroom. They have proven before that

1 they don't mind suing over the dues.
2 THE COURT: But that is a restriction. It is not a personal liability. It is a restrictive covenant
3 so to speak.
4 MR. ANTHONY: Well it is a personal obligation of the owner of the property.
5 THE COURT: But I mean if the person ---
6 MR. ANTHONY: Once they are not an owner anymore.
7 THE COURT: Right. It is not a personal it is a land flow or a land obligation as long as you are
8 an owner of the property or you can be sued as the property owner it is entering a judgment
9 against the property.
10 MR. ANTHONY: Well I don't want to say anything to the detriment of my client.
11 THE COURT: I understand.
12 MR. ANTHONY: I would think that it is her obligation up until the foreclosure sale.
13 THE COURT: Foreclosure sale. Right.
14 MR. ANTHONY: And it would continue to accrue and could be collected. Now once the
15 person takes title then that purchaser at the foreclosure sale becomes subject to the dues and
16 assessments. I would think.
17 THE COURT: Right.
18 MR. ANTHONY: I would think that even though they are named - - well are they named in the
19 foreclosure action?
20 THE COURT: I think that I saw that name in there.
21 MR. ANTHONY: I don't think that forecloses the debt. Forecloses any lien against the
22 property.
23 THE COURT: No maybe they weren't.
24 MR. ANTHONY: I don't think so.
25 MS. CULBERTSON: Your Honor, I think that the Four thousand five hundred ninety judgment

1 that Mr. Anthony referenced has been paid off but not satisfied. That was a line item on the
2 closing statement. That is my understanding of it. There has been a subsequent judgment lien
3 taken for Six thousand dollars but it was filed after the Lis Pendens in this matter. So I think it is
4 going to be wiped out by virtue of its later filing.
5 THE COURT: There is a Four thousand five hundred ninety & 34/100 (\$4,590.34) dollars line
6 item in the HUD-1.
7 MR. ANTHONY: I must have picked up the wrong judgment.
8 MS. CULBERTSON: I think that it is still of record, actually.
9 MR. ANTHONY: There is another judgment.
10 MS. CULBERTSON: Since that matches up with that line item perfectly and it corresponds to an
11 earlier date I think that it has been paid off but not satisfied. And then there is a subsequent Six
12 thousand dollar judgment.
13 MR. ANTHONY: That is correct. That is right.
14 THE COURT: Okay.
15 MS. CULBERTSON: Which was entered after the Lis Pendens in the foreclosure was filed.
16 THE COURT: All right. So that is no longer a consideration.
17 MR. ANTHONY: Well the Six thousand is a judgment and it is included in the numbers that we
18 gave the Court as having accrued since Mr. Munsey took on the obligation of making payments.
19 THE COURT: But the foreclosure will extinguish that encumbrance.
20 MS. CULBERTSON: The Six thousand.
21 THE COURT: It will not follow her.
22 MR. ANTHONY: Well no, Your Honor, because I think it is as Ms. Culbertson said, it was
23 taken after the Lis Pendens was filed.
24 THE COURT: Okay.
25 MR. ANTHONY: And it is my understanding that would be since they were not named as a

1 party in this action they can still pursue her.
2 THE COURT: All right.
3 MR. ANTHONY: They couldn't pursue the property.
4 THE COURT: All right. Anything further counsel?
5 MR. ANTHONY: No, Your Honor.
6 MS. CULBERTSON: No sir.
7 MR. ANTHONY: I can't think of any better solution so if the Court adopts our proposal we are
8 prepared to waive our right to actually have the contract for deed foreclosed and simply to proceed
9 under the language that you pointed out at the top of page 13, the availability of other remedies,
10 one of which would be just entering a judgment for the amount due under the contract for deed
11 and the accompanying notice.
12 THE COURT: And also this is a - - I am going to start at the end of the bus first. This is a
13 termination of this contract for deed.
14 MR. ANTHONY: Yes sir.
15 MS. CULBERTSON: If that is the Court ruling.
16 THE COURT: No, I mean that is what and basically a finding that there was a breach and that
17 this terminates the contract for deed. Now the question is as a result of the breach the contract is
18 terminated and a judgment is entered for this amount which represents the damages.
19 MR. ANTHONY: Correct.
20 THE COURT: And at this point the only amount that is ascertainable is the second mortgage.
21 The third mortgage whatever amount is due there, whatever judgments as far as the Greenspace,
22 the attorneys' fees and costs with those other credits is the final number I can not determine until
23 the sale of the foreclosure even though it is a deficiency waived whatever that sells for at the sale I
24 will take that into consideration and the difference will be the top number. So I will not
25 determine the debt, in my way that I am going to calculate it, until the result of the sale on

1 February 1, 2016.

2 MR. ANTHONY: Yes, Your Honor. And at least in my analysis, I thought that I heard the
3 Court say the difference would be the top number. In my analysis the bid price would be the top
4 number.

5 THE COURT: That is what I am saying. Right. So whatever the property sells for at the sale
6 the difference between that number and this top number would be the amount. Do you see what I
7 am saying?

8 MR. ANTHONY: Your Honor, I think that is backwards.

9 THE COURT: No, if the property sells for Eight hundred thousand and the debt is one point one,
10 I am saying that difference of five hundred thousand would be the top number. Are we going
11 through the same - - - ?

12 MR. ANTHONY: Yes sir.

13 THE COURT: So that is what I am saying.

14 MR. ANTHONY: Yes sir.

15 THE COURT: And if you want to so that you will have a complete order at this point, well the
16 only order at this point would be the termination of the contract based on the breach.

17 MR. ANTHONY: Right.

18 THE COURT: And the final order will not be entered until after the sale on February 1, 2016,
19 and that will also - - I am thinking of what counsel had requested as far as an amount in the event
20 of an appeal bond. I am trying to determine that but I will have to determine that when those
21 memos are sent in. So that would be my ruling. That there is a breach. And I am trying to work
22 out in my mind the delivery of possession date but I think that is going to have to coincide with
23 the results of the sale. So whoever is the successful bidder at the sale, well because the worse
24 thing you don't want this quality of a residence vacant. It is my understanding that the property is
25 occupied at this point and to have it vacant for any period of time is not a good idea. I think the

1 delivery would coincide with the sale. So whoever is the successful bidder that would be the
2 delivery of possession unless there is an appeal. All right. I don't think that there is another way
3 to handle it because you are not going to deliver it and then un-deliver it because that is just not a
4 good way to handle it.
5 MR. ANTHONY: I will be glad to prepare that Order.
6 THE COURT: Counsel?
7 MS. CULBERTSON: I just wanted to clarify Your Honor that the only memo that you are really
8 looking for is the amount of the bond?
9 THE COURT: The appeal bond.
10 MS. CULBERTSON: Okay.
11 THE COURT: Right. And that is why I was going through that to try to figure it.
12 MS. CULBERTSON: Right.
13 THE COURT: We are kind of taking this thing as to different parcels here. And going back to
14 the issue of Mr. Walsh's judgment and I had thought about that and you had asked a question.
15 There was no fraud in the conveyance but what is still outstanding is the judgment is still
16 enforceable against the property that is in the trust because it is in a revocable trust.
17 MR. ANTHONY: Yes, Your Honor.
18 THE COURT: So I didn't want it - - if the order comes through any other way I don't want it to
19 be stated that way. There was no fraud and I don't find fraud. But I do find that it is
20 enforceable. So there is no setting aside of the transfers or anything else. So I want to make sure
21 that - - Mr. Walsh is not here but I want to clarify that portion of that order in the event it is any
22 other way.
23 MR. ANTHONY: I presume that he will present it to me and I will inform him of that.
24 THE COURT: All right. And then if you can make an order between the two of you, an order
25 that goes along with where we are.

1 MS. CULBERTSON: Since we have consolidated these cases it might just be best according to
2 Ms. Lybrand to prepare the order the same order as to the Capital One deficiency and her
3 foreclosure and ours as to the contract for deed. We will figure out the caption that makes some
4 sense.

5 THE COURT: All right.

6 MR. ANTHONY: Yes sir. I will send it to you.

7 THE COURT: All right. Then I will wait on you to do that. All right. Any other matters that
8 we need to handle?

9 MR. ANTHONY: No sir.

10 THE COURT: All right.

11 -----END OF HEARING-----
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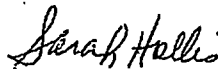
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COUNTY OF SPARTANBURG

COURT OF COMMON PLEAS

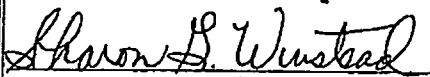
CERTIFICATE

I, the undersigned Sarah Hollis, Court Reporter for the Master-In-Equity for the County of Spartanburg, State of South Carolina, do hereby certify that the foregoing is a true and accurate Transcript of Testimony of the proceedings had at the hearing of the captioned case, before the Honorable Gordon G. Cooper, Master-In-Equity for Spartanburg County, South Carolina, on the 24th day of November, 2015.

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


Sarah Hollis
Court Reporter

SWORN to before me this
2nd day of February, 2016.
Spartanburg, South Carolina.


Notary Public for South Carolina
My Commission Expires: September 7, 2016.